

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

**WT/DS382**

**SECOND WRITTEN SUBMISSION OF  
THE UNITED STATES OF AMERICA**

**August 31, 2010**

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<i>Argentina – Poultry</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>EC – Asbestos (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Bed Linen (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001
<i>EC – Cotton Yarn</i>	GATT Panel Report, <i>EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995
<i>Egypt – Steel Rebar (Panel)</i>	Panel Report, <i>Egypt – Definitive Anti Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002
<i>India – Patents (AB)</i>	Appellate Body Report, <i>India – Patent Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods (Panel)</i>	Panel Report, <i>United States – Anti Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)</i>	Appellate Body Report, <i>United States – Anti Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/AB/R, adopted 28 November 2005,
<i>US – Corrosion-Resistant Steel Sunset Review (AB)</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti Dumping Measures on Certain Hot Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697

<i>US – OCTG from Argentina (AB)</i>	Appellate Body report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Softwood Lumber Dumping (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R
<i>US – Softwood Lumber Dumping (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber Dumping (Article 21.5) (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264/AB/RW
<i>US – Softwood Lumber Dumping (Article 21.5) (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006
<i>US – Stainless Steel (Mexico) (Panel)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, adopted 20 May 2008, as modified by the Appellate Body Report, WT/DS344/AB/R
<i>US – Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/AB/R, adopted 9 May 2006
<i>US – Zeroing II (EC) (Panel)</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R, adopted 19 February 2009, as modified by the Appellate Body Report, WT/DS350/AB/R
<i>US – Continued Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009

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

## **I. Introduction**

1. In this submission, the United States responds to the arguments made by Brazil at the first meeting of the Panel, including the argument under Article 2.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”) that was not raised in Brazil’s First Written Submission.

2. The United States will also address additional points made by Brazil at the meeting with respect to the alleged obligation to provide offsets in Article 9 assessment proceedings. In particular, as explained further below, the text of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and the AD Agreement do not impose the obligations that Brazil suggests, and the contextual arguments offered by Brazil are misplaced. In addition, the obligations and interpretations proposed by Brazil are irreconcilable with prospective normal value systems, which are expressly provided for by the AD Agreement.

3. Finally, the United States will discuss how the “impact” of “zeroing” is relevant to the issues in this dispute. It is difficult to see how there could be an inconsistency with the covered agreements where “zeroing” has no impact on the duties assessed, or where there are no non-dumped sales that even could be “zeroed.” Such instances cannot, in turn, be the basis for finding that an inconsistency will be repeated in measures that do not even exist.

## **II. Article 2.4 of the AD Agreement Does Not Impose Obligations with Respect to Zeroing**

4. Brazil argues that Article 2.4 of the AD Agreement requires an administering authority to offset positive and negative margins in any calculation of dumping margins in administrative reviews, while improperly equating any denial of the offsets with a failure to “conduct a ‘fair comparison,’ irrespective of the outcome of the calculation.”<sup>1</sup> On the contrary, 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.” Brazil has failed to provide any textual analysis of Article 2.4 for its position. For these reasons, Brazil’s claims under Article 2.4 should be rejected.

### **A. Brazil’s Claims Are Contrary to the Text of Article 2.4**

5. An analysis of Brazil’s claims of inconsistency with Article 2.4 necessarily begins with the text of Article 2.4. Article 2.4 of the AD Agreement provides as follows:

A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same

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<sup>1</sup> Brazil’s First Opening Statement, para. 68.

time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

6. From the text, 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. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities.

7. 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.<sup>2</sup>

8. The panel's discussion in *Egypt – Steel Rebar* of the scope of the fair comparison language was expressly quoted and supported by the panel in *Argentina – Poultry*.<sup>3</sup> Numerous Appellate Body and panel reports support the U.S. interpretation of the scope of the fair comparison language in Article 2.4.<sup>4</sup> In particular, 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.<sup>5</sup> For example, the panel in *US – Softwood Lumber Dumping* summarized the scope of Article 2.4 when it found:

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<sup>2</sup> *Egypt – Steel Rebar*, para. 7.335.

<sup>3</sup> *Argentina – Poultry*, para. 7.265.

<sup>4</sup> See, e.g., *US – Softwood Lumber Dumping (Panel)*, para. 7.356; *US – Hot-Rolled Steel (AB)*, para. 179.

<sup>5</sup> See, e.g., *Argentina – Poultry (Panel)*, para. 7.265; *Egypt – Steel Rebar (Panel)*, para. 7.269.

An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a *difference* between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. *Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, an adjustment would not be required to be made by that provision.*<sup>6</sup>

9. Accordingly, 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.”<sup>7</sup> Thus, Brazil’s proposed interpretation of Article 2.4 to encompass the *results* of comparisons between export price and normal value is erroneous. Article 2.4 does not apply to the *results* of comparisons.

10. Brazil has not offered any argument as to how an offset to the dumping found on one export transaction as a result of a distinct export transaction having been sold at above normal value would be considered an adjustment or other comparison criterion that falls under Article 2.4. Because the “fair comparison” obligation in Article 2.4 refers to the required price adjustments, it does not create an obligation with respect to how the results of those comparisons are treated. Assessment of antidumping duties in the amount by which the normal value exceeded the export price on a transaction-specific basis does reflect a “fair comparison” made for each export transaction.

11. Brazil appears to be arguing that in addition to making a fair comparison for each transaction, Article 2.4 also requires an aggregation of comparison results and that Article 2.4 imposes an obligation on the manner of such aggregation. The text of Article 2.4, however, is limited to the selection of comparable transactions and the making of appropriate adjustments to those transactions so as to render them comparable. The principles of interpretation “neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”<sup>8</sup> As discussed above, a proper reading of the actual language of the AD Agreement yields the conclusion that the phrase “fair comparison” in Article 2.4 simply has nothing to do with the aggregation of comparison results. The text of

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<sup>6</sup> *US – Softwood Lumber Dumping (Panel)*, para. 7.356 (emphasis added).

<sup>7</sup> *US – Hot-Rolled Steel (AB)*, para. 179.

<sup>8</sup> *India – Patents (AB)*, para. 45.

Article 2.4 is silent on the issue of aggregation and silent on the issue of offsets for non-dumped transactions.

12. In short, there is no obligation in Article 2.4 to offset any negative differences between normal value and export price. The United States cannot be found to have violated an obligation that does not exist.<sup>9</sup>

**B. Negotiating History and Past Practice Confirms the Interpretation That Article 2.4 Involves Price Comparability**

13. 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 noted above, previous panels have applied the “fair comparison” language according to the specific requirements of Article 2.4 relating to adjustments, level of trade, currency conversions, price comparisons, etc. 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.’”<sup>10</sup>

14. The term “fair comparison” originated in the 1967 Kennedy Round Antidumping Code,<sup>11</sup> where the negotiators sought to clarify the use of certain adjustments in making price comparisons.<sup>12</sup> Because prices in the home market and export market can reflect fundamental differences in levels of distribution, terms of sale, sales volume, physical characteristics of the product, taxes, etc., the agreement was designed to clarify the role of adjustments in order to avoid artificial findings of dumping, when no dumping in fact exists. Accordingly, Article 2(f) of the Kennedy Round Antidumping Code 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

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<sup>9</sup> As noted in our first written submission, in *US – Softwood Lumber Dumping* the Appellate Body found an obligation to provide offsets 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.” But if, as Brazil suggests, Article 2.4 requires offsets, there would be no need for such a requirement in Article 2.4.2.

<sup>10</sup> *EC – Cotton Yarn*, para. 492 (emphasis in original).

<sup>11</sup> Article 2(f), Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Anti-Dumping Code, BISD 15S/4-35.

<sup>12</sup> These issues had been discussed by a Group of Experts, who submitted a report to the Contracting Parties. Report of the Group of Experts on Anti-Dumping and Countervailing Duties, L/978, adopted on May 19, 1959, para. 5. The experts did not use the term “fair comparison”, but instead referred to an “effective comparison.”

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: the reference to “fair comparison” was broken out as a stand-alone sentence; the list of potential adjustments was expanded; and two sentences were added regarding levels of trade and burdens of proof.

15. In other words, the term “fair comparison” has been understood to refer to the various adjustments listed in Article 2.4, and not as a freestanding obligation that dictates how any and all antidumping calculations must be made. As noted above, in *EC – Cotton Yarn*, a Tokyo Round Antidumping Code 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.”<sup>13</sup> The same interpretation should be adopted here.

### **C. Brazil’s Interpretation of Article 2.4 Is Overly Broad and Should Be Rejected**

16. Not surprisingly, 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)*. Brazil cites these reports in support of its broad claim that denial of offsets constitutes a failure to “conduct a ‘fair comparison,’ irrespective of the outcome of the calculation.”<sup>14</sup> Such an unprincipled approach to the “fair comparison” requirement should be rejected.

17. Brazil relies on the reasoning set forth in the Appellate Body report in *US – Zeroing (Japan)*. While in that dispute the Appellate Body found that the use of “zeroing” in assessment proceedings was inconsistent with Article 2.4,<sup>15</sup> 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

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<sup>13</sup> *EC – Cotton Yarn*, para. 500.

<sup>14</sup> Brazil’s First Opening Statement, para. 68.

<sup>15</sup> *US – Zeroing (Japan) (AB)*, para. 168.

Article 2.4.”<sup>16</sup> 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 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.

18. 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.”<sup>17</sup> Use of the transaction-to-transaction comparison methodology in investigations is not at issue in this dispute. It is worth noting, however, that 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.<sup>18</sup> 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 inflat[e]” or “inherently unfair” even under the Appellate Body’s rationale.<sup>19</sup>

19. The final report cited by Brazil, the Appellate Body’s report in *US – Corrosion Resistant Steel Sunset Review*, concerned a sunset review, which is not at issue in this dispute. Moreover, in that 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.<sup>20</sup> The Appellate Body statement that

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<sup>16</sup> *US – Zeroing (Japan) (AB)*, para. 168 (emphasis added).

<sup>17</sup> *US – Softwood Lumber (Article 21.5)(AB)*, para. 142.

<sup>18</sup> *US – Softwood Lumber (Article 21.5)(AB)*, paras. 143-44. Indeed, the United States considers that the imposition of an obligation to reduce the amount of dumping found based on a fair comparison of export price and normal value to account for a separate non-dumped transaction improperly decreases the margin of dumping found on the dumped transaction.

<sup>19</sup> Brazil states that an above *de minimis* importer-specific assessment rate was determined for Cutrale’s importer. See Brazil’s First Opening Statement, para. 72. In this instance, the importer-specific assessment rate differed from the estimated duty (or cash deposit) rate (which was *de minimis*) because the denominator of the calculation is different. The importer-specific assessment rate calculation uses the entered value that the importer reported to the customs authorities, rather than the reported sales value. The difference in the two values has nothing to do with zeroing.

<sup>20</sup> *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 138 (“For these reasons, we find that we are unable to rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying on the dumping margins from the administrative reviews in making its likelihood determination in the CRS sunset review.”).

there “is an inherent bias in a zeroing methodology”<sup>21</sup> cited by Brazil was a reference to the EC methodology in investigations challenged in *EC – Bed Linen*.<sup>22</sup> The Appellate Body declined to equate the methodology used by the United States with the methodology at issue in *EC – Bed Linen*.<sup>23</sup> Thus, the Appellate Body’s characterization of “inherent bias” was not a characterization of the methodology challenged in this dispute.

20. Moreover, any allegation of bias is based upon the assumption that a methodology “artificially” inflates the magnitude of dumping – otherwise, the methodology would produce the correct magnitude of the margin 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.

21. The text of Article 2.4 requires that a “fair comparison shall be made between the export price and the normal value.” However, the text of Article 2.4 does not resolve whether any particular assessment of antidumping duties exceeds the margin of dumping because the text of Article 2.4 does not resolve whether “dumping” and “margins of dumping” are concepts that apply to individual transactions. Indeed, the text of Article 2.4 does not resolve the question of whether zeroing is “fair” or “unfair.” 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.”<sup>24</sup> 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.”<sup>25</sup> Other panels have reached the same conclusion. In *US – Softwood Lumber Dumping (Article 21.5)*, for example, the panel cautioned against the overly liberal use of the “fair comparison” language of Article 2.4:

[W]e believe that a claim based on a highly general and subjective test such as ‘fair comparison’ should be approached with caution by treaty interpreters. For this reason, any concept of ‘fairness’ should be solidly rooted in the context provided by the *AD Agreement*, and perhaps the *WTO Agreement* more generally. As such there must be a discernible standard within the *AD Agreement*, and

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<sup>21</sup> *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 135.

<sup>22</sup> *US – Corrosion Resistant Steel Sunset Review (AB)*, paras. 135-38.

<sup>23</sup> *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 137.

<sup>24</sup> *US – Zeroing (Japan) (Panel)*, para. 7.155.

<sup>25</sup> *US – Zeroing (Japan) (Panel)*, para. 7.158 (citing *US – Zeroing (EC) (Panel)*, para. 7.261).

perhaps the *WTO Agreement*, by which to assess whether or not a comparison has been ‘fair’ or ‘unfair.’ Thus, 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.”<sup>26</sup>

In *US – Zeroing (EC)*, the panel similarly stated: “[C]autious . . . 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*. The meaning of ‘fair’ in a legal rule must necessarily be determined having regard to the particular context within which the rule operates.”<sup>27</sup>

22. Brazil would apparently have the Panel use Article 2.4 to examine any and all antidumping calculations to determine whether they are “impartial, even-handed, or unbiased.”<sup>28</sup> Such an open-ended approach would result in disputes that are virtually impossible to resolve in any principled, text-based way. The term “fair” is highly subjective, and its meaning varies widely depending on one’s interests and perspective. The *New Shorter Oxford English Dictionary* provides little help. It defines “fair” as “just, unbiased, equitable, impartial, legitimate, in accordance with the rules or standards.”<sup>29</sup> 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. We respectfully submit that 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.

### **III. 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**

23. Brazil argues that the text of Article VI:1 and Article VI:2 of the GATT and Article 2 of the AD Agreement define the terms “dumping” and “margin of dumping” in relation to a “product as a whole”. However, it bears repeating that the term “product as a whole” is not found anywhere in the AD Agreement and the GATT 1994, and Brazil’s so-called “textual”

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<sup>26</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.74.

<sup>27</sup> *US – Zeroing (EC) (Panel)*, para. 7.260.

<sup>28</sup> Brazil’s First Opening Statement, para. 68.

<sup>29</sup> Exhibit US-7, *New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 907, meaning 11.

argument is devoid of any textual analysis of the relevant provisions. Brazil has instead made several contextual interpretations, which at times contradict each other.

**A. The Terms “Dumping” and “Margin of Dumping” May Be Informed By the Context in Which the Term Is Used**

24. Brazil argues that the terms “margin of dumping” and “dumping” must always relate to the “product as a whole” regardless of the context in which the term is used. Inexplicably, Brazil contradicts its own argument by contending that “a single word used in two provisions may have different meanings in each provision, depending upon the context” and “[t]he 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.”<sup>30</sup> The United States agrees that context matters.

25. 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.<sup>31</sup> 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. As detailed in our First Written Submission and below in Section III.C, Article 5 investigations, Article 9 assessment proceedings, and Article 11 reviews are different types of proceedings, with distinctly different functions within the AD Agreement, calling upon administering authorities to engage in distinct inquiries subject to distinct obligations.

26. Dumping is defined as occurring in the course of ordinary commercial transactions, where products are “introduced into the commerce”<sup>32</sup> of the importing country transaction by transaction, not “as a whole.”<sup>33</sup> 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. Dumping is defined using terms and phrases that have an ordinary

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<sup>30</sup> Brazil’s First Opening Statement, para. 40.

<sup>31</sup> *EC – Asbestos (AB)*, para. 88; *see also* Brazil’s First Opening Statement, para. 40 (making a substantially identical argument with respect to interpreting the term “product.”).

<sup>32</sup> Article 2.1 of the AD Agreement.

<sup>33</sup> Brazil also asserts that it is not evident that exporters assess pricing by reference to individual transactions. Brazil’s First Opening Statement, para. 17. Brazil overlooks the fact that prices generally vary from transaction to transaction and that an exporter negotiates these prices.

meaning, such as a “product,” “price,” and “introduced into the commerce.” These terms and phrases are nowhere in the agreements defined as having a meaning that is more limited than or otherwise different from their ordinary meaning. 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.

27. 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. Normal value may be established on a weighted-average basis (to be used in weighted-average-to-weighted-average comparisons and weighted-average-to-transaction comparisons)<sup>34</sup> or on a transaction basis (to be used in transaction-to-transaction comparisons). In the context of transaction-to-transaction comparisons the normal value is most certainly defined in relation to a transaction, not a “product as a whole.” The term “export price” is similarly defined in relation to a single transaction (when transaction-to-transaction or weighted-average-to-transaction comparisons are used) or multiple transactions (in weighted-average-to-weighted-average comparisons). 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.<sup>35</sup>

## **B. The “Multilateral Character” of the AD Agreement Undermines Brazil’s Arguments**

28. 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 Agreement defines “dumping” in a sufficiently broad way as to apply in a variety of distinct contexts and accommodate varying assessment systems of WTO Members. 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. The recognition that “dumping” and “margin of dumping” can apply at the level of individual transactions – a conclusion reached by a number of prior panels – does

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<sup>34</sup> As explained in the U.S. First Written Submission, in addition, the AD Agreement’s express recognition of asymmetrical comparisons – where weighted-average-normal value is compared to a price of an individual transaction – creates a problem of mathematical equivalency, if offsets were required. See U.S. First Written Submission at paras. 93-98.

<sup>35</sup> By characterizing “dumping” as a “derivative term,” we do not suggest that the term “dumping” is unimportant. We simply emphasize that this term derives its meaning from other terms that may refer to an individual transaction.

not, contrary to Brazil’s suggestion,<sup>36</sup> strip either those terms or the AD Agreement of any meaning.

29. 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.<sup>37</sup> Under this interpretation, the antidumping systems of WTO Members could only be superficially different. Again, 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. As demonstrated in our First Written Submission, results could differ even with identical transactions depending upon which comparison methodology is used;<sup>38</sup> for example, transaction-to-transaction comparisons could result in a different amount of dumping than average-to-average or average-to-transaction comparisons. 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.

### **C. Article 9 Assessment Proceedings and Article 5 Investigations Are Different Contexts**

30. Brazil asserts that a contradiction arises when the same types of transactions are treated as dumped for purposes of injury determination in the investigation and as non-dumped in assessment proceedings.<sup>39</sup> Brazil also argues that the remedies under the AD Agreement and GATT 1994 are imposed by reference to a single margin of dumping for the product, not multiple margins for individual export transactions.<sup>40</sup> In doing so, Brazil conflates distinct proceedings – investigations and assessment proceedings – which are subject to different requirements and serve different functions.

31. As Brazil itself acknowledges, Article 9.3 does not require an injury determination.<sup>41</sup> Nonetheless, Brazil insists that all transactions must be invariably treated in one particular manner, as if an additional injury determination is made repeatedly in the context of Article 9.3

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<sup>36</sup> Brazil’s First Opening Statement, para. 30.

<sup>37</sup> See Brazil’s First Opening Statement at paras. 31, 33, 34; Brazil’s First Written Submission at paras. 66-67.

<sup>38</sup> U.S. First Written Submission, paras. 117-118.

<sup>39</sup> Brazil’s First Opening Statement para. 24.

<sup>40</sup> Brazil’s First Opening Statement para. 25.

<sup>41</sup> Brazil’s First Opening Statement para. 24.

assessment proceedings. This is not what the AD Agreement requires. To the contrary, a finding of injury in the investigative phase is not reviewed in an Article 9.3 assessment proceeding. Reviews that re-examine whether there is a basis in injury for maintaining an antidumping measure are provided for in Article 11 of the AD Agreement. Further, Article 11 reviews are distinct from Article 9.3 reviews in that they are intended to examine the entire measure, not the sales practices of a single exporter.

32. Brazil fails to recognize that Article 9.3 assessment proceedings are distinct from Article 5 investigations, and, thus, provide a different context. 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. . . . [I]n an Article 9.3 context the extent of dumping found with respect to a particular exporter must be translated into an amount of liability for payment of anti-dumping duties by importers in respect of specific import transactions.<sup>42</sup>

33. Accordingly, Brazil’s reliance on Article 5 investigations as a context for justifying the imposition of additional obligations on Article 9.3 assessment proceedings is misplaced.

#### **IV. Brazil’s Contextual Arguments under Articles 3, 5.8, 6.10, 8.1, 9.1, 9.3 and 9.5 Are Misplaced**

##### **A. Article 5.8 of the AD Agreement**

34. Brazil argues that in the context of Article 5.8 the margin of dumping must refer to an aggregation of multiple transactions. We agree that in the context of an Article 5 investigation that term may refer to multiple transactions. But the fundamental flaw of Brazil’s contextual argument is that Brazil seeks to apply that understanding entirely removed from the context of Article 5.

35. As explained above, 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 its application to the “investigation phase” and provides three

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<sup>42</sup> *US – Zeroing (EC) (Panel)*, para. 7.201.

methodologies that an investigating authority may use. A single margin of dumping, expressed as a percentage, is only necessary in the context of an Article 5 investigation to determine whether dumping exists at a level that exceeds the *de minimis* level set forth in Article 5.8, such that the imposition of a measure is warranted.

36. 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.

37. 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, and that the “requirements of Article 9 do not have a bearing on Article 2.4.2, because the rules on the *determination* of the margin of dumping are distinct and separate from the rules on the *imposition and collection* of anti-dumping duties.”<sup>43</sup> 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.”<sup>44</sup>

38. Unlike Article 5 investigations, assessment proceedings under Article 9 are not concerned with determining whether dumping exists at a level that meets the 2 percent *de minimis* dumping margin under Article 5.8 so as to justify the imposition of an antidumping duty measure. Article 5.8 does not support Brazil’s interpretation with respect to Article 9.3 assessment proceedings.

## **B. Article 6.10 of the AD Agreement**

39. Article 6.10 requires that an authority determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. Brazil interprets this to mean that a Member must calculate a single margin for each known exporter or producer for the “product as a whole.”<sup>45</sup> However, 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 AD Agreement) or individual transactions.

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<sup>43</sup> *EC – Bed Linen (Article 21.5) (AB)*, paras. 123-124 (emphasis in original).

<sup>44</sup> *Argentina – Poultry*, para. 7.358. See also *US – Zeroing (EC)*, para. 7.220.

<sup>45</sup> See Brazil’s First Opening Statement, paras. 21-22.

40. Article 6.10 provides in part that: “The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation.” The Appellate Body has relied on this language in finding “zeroing” in reviews to be WTO-inconsistent.<sup>46</sup> However, such reliance on Article 6.10 is erroneous. Article 6.10 merely provides that a separate margin must be calculated for each exporter, based on its own pricing behavior, rather than one margin for all exporters. A margin calculated on a transaction-specific basis is individual to the exporter of the transaction and, therefore, is consistent with Article 6.10.

41. Brazil attempts to salvage its analysis by asserting that if every transaction-specific comparison constituted a margin of dumping, there would be multiple margins of dumping rather than an “individual” margin of dumping.<sup>47</sup> Brazil appears to be arguing that the term “individual” means “single” margin. However, that is not what Article 6.10 provides. Article 6.10 requires that any calculated margin *correspond* to the individual exporter, not that each exporter has only one overall margin. The interpretation of “individual” as meaning “corresponding to” is confirmed by the Spanish text, which provides that the investigating authority determine a margin of dumping “que corresponda a cada exportador” or “that corresponds to each exporter.” A margin may correspond to an exporter while being based on one transaction – as long as that transaction is the exporter’s. Brazil’s interpretation ignores the broader context of Article 6.10, which specifies that each exporter is entitled to a margin. It has nothing to do with how many transactions form the basis for any such margin.

42. 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:

Neither the phrase “product under investigation” nor the reference to an individual margin of dumping for an exporter or producer in our view provides any guidance with respect to the precise methodology to be used for the purpose of calculating that margin of dumping. As in Article 2.1 of the *AD Agreement* and Articles VI:1 and VI:2 of the GATT 1994, the use of the word “product” in Article 6.10 does not exclude the possibility of applying the concept of dumping to individual transactions. Even assuming *arguendo* that the notion of an ‘individual margin of dumping for each known exporter or producer’ implies an obligation to determine a single margin of dumping for each known exporter or producer based on an analysis of the totality of the export transactions under consideration, it does not necessarily follow that in deriving such a single margin an authority must accord

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<sup>46</sup> *US – Stainless Steel (Mexico) (AB)* at paras. 88, 99; *US – Zeroing (Japan) (AB)* at para. 112; and *US – Zeroing (EC) (AB)* at para. 128.

<sup>47</sup> Brazil’s First Opening Statement, paras. 21-22.

the same weight to transactions in which the export price is above the normal value as to transaction in which the export price is below the normal value. Nothing in the text of Article 6.10 indicates that such a margin may not be calculated as an overall weighted average margin of dumping in which the numerator consists of the sum of the amounts by which export prices are less than normal value and the denominator reflects the total value of all export transactions. Nor do we see on what basis it could be argued that such an approach to the calculation of margins of dumping is inconsistent with the fact that Article 9.2 of the *AD Agreement* provides for the imposition of an anti-dumping duty on a ‘product’ or with ‘the need for consistent treatment of a product during an anti-dumping investigation and throughout the life of an anti-dumping action.’<sup>48</sup>

43. 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. Prospective normal value systems are premised on the understanding that each transaction can be compared with its respective normal value to determine both the margin of dumping and the antidumping duty owed. As explained in Section V.A below and in our response to question 13, refund reviews pursuant to Article 9.3.2 often are limited to addressing issues such as correction of ministerial errors at the time of importation. Moreover, Members that operate prospective normal value systems usually conduct refund reviews with respect to a particular transaction, not all transactions made during a particular period of time. 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.

### **C. Brazil Overstates the Significance of the Use of the Singular in the Term “Margin of Dumping”**

44. 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.<sup>49</sup> However, by Brazil’s own admission, “the use of the singular is not decisive . . . .”<sup>50</sup> A term that is used in the AD Agreement in the singular form may have “both singular and plural meanings.”<sup>51</sup> In *US – Anti-Dumping Measures on OCTG*, for example, Mexico argued unsuccessfully that the reference in Article 11.3 of the AD Agreement to “any antidumping duty”, in the singular, indicates an intent not to authorize

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<sup>48</sup> See *US – Zeroing (Japan) (Panel)*, para. 7.111; see also *US – Stainless Steel (Panel)*, para. 7.127; *US – Zeroing II (EC) (Panel)*, para. 7.163.

<sup>49</sup> Brazil’s First Opening Statement, paras. 25-25.

<sup>50</sup> Brazil’s First Opening Statement, para. 13.

<sup>51</sup> *US – Anti-Dumping Measures on OCTG (AB)*, para. 146.

cumulation in the sunset reviews.<sup>52</sup> The panel rejected this argument, explaining that “the reference in Article 11.3 to ‘any anti-dumping duty’ has ‘both singular and plural meanings,’ and it could therefore apply to an anti-dumping measure covering more than one country.”<sup>53</sup> The Appellate Body sustained this analysis, explaining that “[t]he Panel’s analysis is based on the text of that provision, including its context and the object and purpose of the *Anti-Dumping Agreement*.”<sup>54</sup>

#### **D. Brazil Misinterprets Article VII:3 of the GATT 1994**

45. 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.<sup>55</sup> Brazil argues that the word “product” has different meanings in the two provisions, which apply in different contexts.<sup>56</sup> Brazil misstates the U.S. argument. It is Brazil, and not the United States, that argues that the term “product” can only have one meaning in the AD Agreement and the GATT 1994, namely “product as a whole.” In contrast, 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 and that permits the term to be understood based on the context in which it is used.

46. 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.”<sup>57</sup> 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.

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<sup>52</sup> *US – Anti-Dumping Measures on OCTG (AB)*, para. 146.

<sup>53</sup> *US – Anti-Dumping Measures on OCTG (Panel)*, para. 7.149.

<sup>54</sup> *US – Anti-Dumping Measures on OCTG (AB)*, para. 147.

<sup>55</sup> Brazil’s First Opening Statement, para. 41.

<sup>56</sup> Brazil’s First Opening Statement, para. 41.

<sup>57</sup> Brazil’s First Opening Statement, para. 42.

47. With respect to Article VII:3 of the GATT 1994, Brazil acknowledges that the market price for goods is not identical in each and every transaction, the customs value of goods varies from transaction to transaction and, thus, the customs valuation also occurs on an entry-specific, not a product-wide basis.<sup>58</sup> However, the same is true with respect to the antidumping duties under Article 9.3 of the AD Agreement. The antidumping liability is incurred with respect to specific import transactions, which have different prices and entered values, not on a product-wide basis. 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. This importer-specific or transaction-specific character of the payment of anti-dumping duties has, therefore, to be taken into consideration in interpreting Article 9.3.<sup>59</sup>

#### **E. Brazil Misinterprets AD Article VI:1 of the GATT 1994**

48. Brazil contends that the interpretation of Ad Article VI:1 offered by the United States is incorrect. 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.<sup>60</sup> However, Brazil has failed to provide any textual analysis of Ad Article VI:1. Contrary to Brazil's assertions, Ad Article VI:1 defines a particular form of dumping – “hidden dumping” – in relation to individual transactions. Specifically, Ad Article VI:1 provides:

*Hidden dumping* by associated houses (*that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country*) constitutes a *form of price dumping* with respect to which the *margin of dumping* may be calculated on the basis of the *price* at which the goods are resold by the importer.<sup>61</sup>

49. This provision *expressly* defines “a form of price dumping”, *i.e.*, something that fits squarely within the overall definition of “dumping.” The provision defines this specific form of

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<sup>58</sup> Brazil's First Opening Statement, para. 42.

<sup>59</sup> *US – Stainless Steel (Mexico) (Panel)*, para. 7.124; *see also US – Zeroing (Japan) (Panel)*, para. 7.205. In *US – Zeroing II (EC) (Panel)*, para. 7.163, the panel found this reasoning persuasive, but also found that the Appellate Body disagreed with this persuasive reasoning.

<sup>60</sup> Brazil's First Opening Statement para. 44.

<sup>61</sup> Note Ad Article VI:1, para. 1 (emphasis added).

“dumping” with respect to individual transactions, which belies Brazil’s central argument that “dumping” may only exist with respect to the “product as a whole.” Ad Article VI:1 uses terms that relate to individual transactions as a “sale”, “price”, “price invoiced” and expressly provides that the “margin of dumping” may be calculated on the basis of “the *price* at which the goods are *resold by the importer*.” 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.”

#### F. Brazil Misinterprets Article 2.2 of the AD Agreement

50. 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.<sup>62</sup> 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.<sup>63</sup>

51. This interpretation is incorrect. Under Brazil’s view, the margin of dumping may exist only for the “product as a whole,” but the normal value may be determined (on the basis of constructed value) for a subset of that product. However, the term “margin of dumping” is a result of *comparison* between the normal value and export price where the export price is less than the normal value. Article 2.2 sets forth the rules for the situations when sales in the exporting country do not permit a proper comparison for calculating the margin of dumping. Article 2.2 expressly provides that if “such sales do not permit proper *comparison*, the *margin of dumping shall be determined by comparison* with a *comparable price* of the like product when exported to an appropriate third country, provided that the price is representative, or with the *cost of production* in the country of origin plus a reasonable amount for administrative, selling and general costs and profits” (emphasis added). Article 2.2 provides strong support for the proposition that a comparison of export price and normal value is itself a *dumping margin* and not merely an intermediate comparison result when the normal value exceeds the export price.

52. Article 2.1 provides that “[f]or the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for

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<sup>62</sup> Brazil’s First Opening Statement, para. 46.

<sup>63</sup> Brazil’s First Opening Statement, para. 46.

consumption in the exporting country.” Paragraph 2 of Article VI of the GATT 1994 provides that “[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.” Thus, when all these provisions are read together, the concept of the “margin of dumping” in GATT Article VI is defined in terms of a “price difference” in a *comparison* between the export price and normal value, i.e., comparable price in the domestic market, or in the absence of such price, a comparable price in the third country or constructed value of the product. If the margin of dumping is the price difference in a comparison of the export price and normal value, and the margin of dumping exists only for the “product as a whole” as Brazil argues, then logically the export price and normal value that are used in the comparison cannot exist for a subset of the “product as a whole”. Under Article 2.2, when “sales do not permit proper *comparison*, the margin of dumping shall be determined by *comparison* with . . . the cost of production in the country of origin plus reasonable amount for administrative, selling and general costs and profits.” (emphasis added).

53. Thus, Article 2.2 of the AD Agreement confirms that the term “product” may refer to the product in the context of an individual transaction, rather than in the context of aggregated transactions. 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. For example, if there are 100 different export transactions of a product, and there are domestic market comparison sales for all but 25 of them (e.g., because the comparison sales for the remaining 25 were not in the ordinary course of trade), a Member would use third country sales or constructed normal value to determine normal value only for those 25 comparisons. It would use the domestic market sales as the normal value for the remaining 75 comparisons.

54. 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 – for example, where there are “no sales” of the like product, 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. That is, the margin of dumping for the “product as a whole,” and therefore for all aggregated comparison results, would have to be calculated using constructed normal value, even if the condition precedent for using Article 2.2 relates only to 25 of the 100 comparisons.<sup>64</sup> This would be inconsistent with the principle that constructed normal value is to be used only in limited circumstances. It also would increase the burden on respondents, who would be required to provide cost information for all models, rather than just those models for which the use of constructed value would be appropriate.

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<sup>64</sup> One of the conditions for the use of Article 2.2 is “[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country.” If “product” must mean “product as a whole,” however, Article 2.2 would only apply when there are no sales of any of the models that constitute the “product as a whole”; Members would not be able to use constructed value under Article 2.2 for some models, but not other models of the product.

55. 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. . . . We are not convinced that the Appellate Body could have intended its *US – Softwood Lumber Dumping* findings to be applied in this manner”.<sup>65</sup>

**G. Brazil’s Interpretation Cannot Be Reconciled with the Effective Functioning of Antidumping Duties as a Remedy for Dumping**

56. In our first submission, we explained that the concepts of “dumping” and “margins of dumping” apply to individual transactions, that a prohibition on this interpretation would frustrate the purpose of anti-dumping duties, and that there is nothing in the GATT 1994 or the AD Agreement that suggests that dumping that occurs with respect to one transaction is mitigated by the occurrence of another transaction made at a non-dumped price.<sup>66</sup> Contrary to Brazil’s claim, this interpretation does not assume that importers are responsible for dumping.<sup>67</sup> The United States fully understands that exporters engage in dumping, but the importer is responsible for the payment of the duty that remedies that dumping. A transaction-specific margin of dumping and antidumping duty are perfectly exporter-specific.

57. Moreover, although Brazil states that its interpretation does not frustrate the purpose of antidumping duties, 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.<sup>68</sup>

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

58. As discussed in our first written submission and at the first meeting with the Panel, Brazil’s proposed obligation to provide offsets is contrary to the very concept of a prospective normal value system provided for in Article 9. 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.”

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<sup>65</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.62.

<sup>66</sup> U.S. First Written Submission, paras. 65-68; 105-108.

<sup>67</sup> Brazil’s First Opening Statement, para. 60.

<sup>68</sup> U.S. First Written Submission, para. 108.

**A. Brazil’s Argument That the Margin of Dumping May Exist Only for the “Product as a Whole” Is Inconsistent with the Way Prospective Normal Value Systems Operate**

59. Brazil argues that the United States conflates the concepts of the “amount of the antidumping duty” that may be imposed under Article 9.4(ii) and the “margin of dumping” determined under the Article.<sup>69</sup> Brazil also asserts that “the duty collected at the time of importation under a prospective normal value system does not represent the margin of dumping” and that the rules “regarding ‘duty imposition and collection’ are ‘distinct and separate’ from those regarding ‘dumping’ determination.”<sup>70</sup>

60. The United States does not conflate these concepts. The United States accepts that the “margin of dumping” and the “amount of antidumping duty” are different things. However, “to deny the relevance of the relationship that exists in Article 9.3 between ‘margin of dumping’ and the payment of an anti-dumping duty is illogical and contrary to the text and purpose of Article 9.”<sup>71</sup> This is so because the amount of antidumping duties cannot exceed the margin of dumping. It is impossible to tell if the amount of antidumping duties exceed the margin of dumping without examining both the antidumping duty and the margin of dumping. Again, a transaction-specific calculation of a margin of dumping means that an antidumping duty calculated on that same basis will, by definition, not exceed the margin of dumping. In a prospective normal value system, final liability for payment of antidumping duties attaches at the time of importation, rather than *retrospectively*.<sup>72</sup> It is precisely the distinction between the antidumping duty and the margin of dumping, particularly in connection with prospective normal value systems, that leads to the conclusion that the margin of dumping can be calculated on a transaction-specific basis.<sup>73</sup>

61. Brazil argues, however, 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.”<sup>74</sup> Because the margin of dumping for the “product as a whole” can never be known at the time of importation, under Brazil’s interpretation,

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<sup>69</sup> Brazil’s First Opening Statement, para. 48.

<sup>70</sup> Brazil’s First Opening Statement, para. 48.

<sup>71</sup> *US – Zeroing (Japan)(Panel)*, para. 7.203.

<sup>72</sup> *US – Zeroing (Japan) (Panel)*, para. 7.205.

<sup>73</sup> Both the margin of the dumping and the antidumping duty liability could be calculated on a transaction-specific basis. While in principle those could be the same, they might not; a Member is free to fix liability for payment of duties at *less* than the full margin of dumping. *See, e.g.*, Article 9.1 (“the duty may be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.”)

<sup>74</sup> Brazil’s First Opening Statement, para. 49.

a *prospective* normal value assessment system necessarily requires *retrospective* reviews on the basis of the aggregation of transactions. 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. In fact, as we demonstrated in our responses to the Panel’s questions, Members operating prospective normal value systems normally conduct refund proceedings for an individual transaction rather than for the product “as a whole.”

62. Indeed, “Article 9.3 contains no language requiring such an aggregate examination of export transactions in determining final liability for payment of anti-dumping duties under Article 9.3.1 or in determining the amount, if any, of refund due under Article 9.3.2.”<sup>75</sup> Under a prospective normal value system, liability for payment of anti-dumping duties is collected on a transaction-specific basis.<sup>76</sup> In a prospective normal value system, the final liability for payment of antidumping duties is not determined through a review under Article 9.3.2, because such a review would be “inconsistent with the *prospective* nature of such a system.”<sup>77</sup> Article 9.4(ii) clarifies this point in that the *liability* for duty payment is calculated on the basis of a *prospective* normal value, and that value would cease to be *prospective* if it were calculated on the basis of a retrospective examination of transactions.<sup>78</sup> Moreover, while a refund procedure exists, that refund proceeding is “not a *determination of final liability for payment of anti-dumping duties*. The phrase ‘determination of the final liability for payment of anti-dumping duties’ is used in Article 9.3.1 in connection with retrospective duty assessment procedures but does not figure in Article 9.3.2.”<sup>79</sup> Thus, liability attaches at the time of importation and is not reconsidered in a later proceeding – *i.e.*, after taking into account other export transactions during a particular period of time.<sup>80</sup>

63. 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. Rather, the margin and the final liability for antidumping duties under a prospective normal value system both are determined at the time of importation. The margin of dumping and the ceiling on the liability for antidumping duties are mathematically equivalent, although the liability may be less than the margin of dumping if that is

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<sup>75</sup> *US – Zeroing (Japan) (Panel)*, para. 7.199.

<sup>76</sup> *US – Zeroing (Japan) (Panel)*, para. 7.208.

<sup>77</sup> *US – Zeroing (Japan) (Panel)*, para. 7.204.

<sup>78</sup> *US – Zeroing (Japan) (Panel)*, para. 7.204.

<sup>79</sup> *US – Zeroing (Japan) (Panel)*, para. 7.204 (emphasis in original). A refund procedure under a prospective normal value system allows an importer to receive a refund for errors in completing the importation documents for a transaction. See, e.g., Exhibit US–8, SIMA Self-Assessment Guide, <http://www.cbsa-asfc.gc.ca/sima/self-e.html#12>.

<sup>80</sup> *US – Zeroing (Japan)(Panel)*, para. 7.204.

what the Member chooses to assess. For example, according to a Canadian parliamentary report on potential changes to Canada’s prospective normal value system, under a prospective normal value system both the margin of dumping and the liability for duty payment are fixed at the time of importation, rather than on an examination of aggregated transactions.<sup>81</sup> Indeed, a proposal was made to convert Canada’s prospective normal value system to a retrospective normal value system by “determining final liability . . . on review with excess duties being returned and, where required, additional duties being demanded. This system is employed by the United States.”<sup>82</sup> Canada rejected that approach, explaining what makes a prospective normal value system *prospective* rather than retrospective:

Canada uses a prospective approach, which establishes margins of dumping . . . which apply to future importations thereby allowing authorities to determine the amount of duty liability at the time of importation.<sup>83</sup>

64. Thus, Brazil’s suggestion that the margin of dumping is determined in a subsequent refund proceeding (for the importation that already occurred) would extinguish the *prospective* nature of the system and transform it into a *retrospective* system. Further, the Canadian parliamentary report explained that it favored its existing system, rather than a system providing for reviews, because under the latter importers “will not know their ultimate duty liability on each shipment until months or even years after the date of importation.”<sup>84</sup> Yet a review is precisely what Brazil argues is required in connection with a prospective normal value system. As Canada’s example confirms, a prospective normal value system does not contemplate a review of the margin of dumping (and thus of duty liability) on the basis of a totality of transactions, to be examined retrospectively.

65. The WTO Trade Policy Review of Canada confirms that under Canada’s system the margin of dumping and liability for payment of duties are fixed on the date of importation. According to the Review:

The authorities have noted that Canada operates a prospective system in which exporters are informed of the normal values for the products that they export to Canada. If future sales are made at price levels equal to or higher than the normal value of the product, no duties are assessed. The authorities consider that Canada's prospective enforcement system operates in a manner that is very similar to, and

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<sup>81</sup> See Exhibit US-2, Report on the Special Import Measures Act, House of Commons Canada, December 1996, [http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01\\_1996-12/chap4e.html](http://www.parl.gc.ca/35/Archives/committees352/sima/reports/01_1996-12/chap4e.html) (Attachment US- 3) (hereinafter “SIMA Report”). See also Exhibit US-8, SIMA Self-Assessment Guide.

<sup>82</sup> See Exhibit US-2 (SIMA Report).

<sup>83</sup> See Exhibit US-2 (SIMA Report).

<sup>84</sup> Exhibit US-2 (SIMA Report).

has the same effect as, price undertakings at a level sufficient to remove the dumping.<sup>85</sup>

Table III.5 of that report is particularly instructive: The fourth column notes that the “definitive duty” and the “dumping margin” are mathematically equivalent and occur on the same date.

66. 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.” In *US – Softwood Lumber Dumping (Article 21.5)*, the panel explained that the notion of the margin of dumping for the “product as a whole” does not make sense when juxtaposed against the prospective normal value system:

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.<sup>86</sup>

67. Because in prospective normal value systems the liability for antidumping duties may be determined with respect to an individual transaction without regard to prices of other transactions, the panel in *US – Zeroing (Japan)* came to the conclusion that the liability may be similarly assessed in a retrospective system:

If in a prospective normal value system individual export transactions at prices less than normal value can attract liability for payment of anti-dumping duties, without regard to whether or not prices of other export transactions exceed normal value, we see no reason why liability for payment of anti-dumping duties may not be similarly assessed on the basis of export prices less than normal value in the retrospective duty assessment system applied by the United States.<sup>87</sup>

68. The panel in *US – Stainless Steel (Mexico)* similarly 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:

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<sup>85</sup> Trade Policy Review of Canada, WT/TPR/S/112, para. 68.

<sup>86</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53.

<sup>87</sup> *US – Zeroing (Japan)(Panel)*, para. 7.207.

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.<sup>88</sup>

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.”<sup>89</sup>

69. In short, the United States has offered a harmonious and coherent interpretation that gives meaning to all provisions of the AD Agreement and the GATT 1994, including those that recognize the existence of prospective normal value systems. This interpretation has been endorsed by multiple prior panels. This interpretation, in contrast to Brazil’s interpretation, is fully consistent with the text, context, and object and purpose of the covered agreements. 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.

#### **B. Brazil’s Interpretation Would Discourage Importers from Requesting Reviews under Article 9.3.2**

70. 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. Article 9.3.2 of the AD Agreement provides that:

When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in on case more than 18 months, after the date on which a request for a refund,

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<sup>88</sup> *US – Stainless Steel (Mexico) (Panel)*, para. 7.131.

<sup>89</sup> *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.

duly supported by evidence, has been *made by an importer of the product subject to the anti-dumping duty*. The refund authorized should normally be made within 90 days of the above- noted decision. (emphasis added).

71. 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. For example, the exporter or producer might sell the product subject to the antidumping duty to three unaffiliated importers (Importers A, B, and C). 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 (e.g., the exact pricing, terms of sale, shipment dates, etc.) 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”). Article 9.3.2 of the AD Agreement was drafted with the understanding that the transactions for which an importer would be seeking a refund, and the “evidence” it would have to provide to support such a request, would relate to its own individual purchases – a subset of what Brazil attempts to characterize as the “product as a whole.”

72. Brazil argues that in a prospective normal value system the amount of duty is subject to a 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.”<sup>90</sup> Brazil does not dispute that an importer would not have access to the pricing information of other importers that buy from the same exporter and, thus, would not have an adequate understanding of pricing for the “product as a whole.” Instead Brazil argues that, while this review must cover the “product as a whole,” an importer may substantiate a request for such a review solely on the basis of its own sales without knowing the information for the “product as a whole.”<sup>91</sup> Brazil draws a parallel with other situations where an interested party, such as domestic industry, could request an authority to initiate a proceeding with respect to an exporter, such as request for initiation of an investigation under Article 5, or a changed circumstances review under Article 11.2, or a sunset review under Article 11.3.

73. Brazil’s interpretation puts an importer in a difficult situation. An Article 9.3.2 review may result in an additional duty assessment or a refund depending on the specific situation.<sup>92</sup> The possibility of an additional duty assessment would discourage an importer from requesting a review in a manner suggested by Brazil. Without having full information for the “product as a

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<sup>90</sup> Brazil’s First Opening Statement at para. 49.

<sup>91</sup> Brazil’s First Opening Statement at para. 51.

<sup>92</sup> See, e.g., 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), paras. 30-31.

whole”, an importer would be uneasy in requesting a review that could potentially increase its dumping liability. An importer could have to incur the expense of participating in an Article 9.3.2 review only to find out that its dumping liability increased.<sup>93</sup> In other words, Brazil’s interpretation greatly diminishes certainty and predictability of refund reviews under the prospective system.

## **VI. Brazil’s Arguments Regarding Mathematical Equivalency Are Wrong**

74. 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.<sup>94</sup>

75. 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.<sup>95</sup> However, this argument is not supported by the text of Article 2.4.2.

76. 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. Brazil is essentially arguing that the drafters implicitly authorized Members to use a subset of export transactions, when the drafters adopted language that explicitly authorizes the use of an asymmetrical comparison methodology. Brazil’s argument is without textual support. 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.

77. The drafters demonstrated an ability to be quite clear in expressing the circumstances in which a Member is authorized to consider a subset of transactions. Article 6.10, for example, addresses the circumstances in which a Member may so limit its examination. Article 6.10 provides that “where the number of exporters, producers, importers or types of products involved

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<sup>93</sup> Even if the duties were capped at the amount paid at the time of entry, importers would be uneasy facing the added expense of participating in a refund review without having a reasonable basis for knowing whether it will be receiving a refund. If the importer knew that its refund request would be evaluated on the basis of the importer’s own prices, the importer could make an informed decision whether to request a review. Brazil’s suggested approach would run counter to the principle that is typically espoused by prospective systems – to provide greater market certainty for participants.

<sup>94</sup> U.S. First Written Submission, paras. 93-98.

<sup>95</sup> Brazil’s First Opening Statement, para 55.

is so large” a Member may limit its examination based on a statistically valid sample, or the largest percentage of volume of exports that can be reasonably investigated.

78. 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.

79. Finally, Brazil suggests that the United States must demonstrate that prohibiting zeroing in average-to-transaction comparisons would render such comparisons inutile in all, or at least most cases.<sup>96</sup> However, the United States has demonstrated that if *all* export transactions are taken into account, and zeroing is prohibited, the average-to-average and average-to-transaction comparisons produce the *same result*. The mathematical equivalence, demonstrated by the table in our response to the Panel’s questions, is obtained regardless of the particular figures used for the price or quantity of the transactions and regardless of the number of transactions or models examined.<sup>97</sup> Neither Brazil nor any other party has demonstrated the contrary.

## VII. There Is No Violation When “Zeroing” Has No Impact

80. 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.<sup>98</sup> 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.<sup>99</sup> Consequently, there can be no violation with respect to Fischer in the second administrative review (in which the dumping margin was zero).

81. Brazil also argues that, regardless of whether there is any impact, the use of zeroing is a violation of Article 2.4 of the AD Agreement because the zeroing methodology does not permit a

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<sup>96</sup> Brazil’s First Opening Statement, para 56-58.

<sup>97</sup> See U.S. Responses to the Panel’s Questions, Response to Question 14.

<sup>98</sup> Brazil’s First Opening Statement, para 66.

<sup>99</sup> Article 9.3 of the AD Agreement.

“fair comparison.”<sup>100</sup> As explained in Section II above, Brazil’s arguments regarding Article 2.4 are incorrect.

82. 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.

### **VIII. Brazil’s Claims With Respect to “Continued Use” Fail**

83. 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.

84. 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.<sup>101</sup> 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, as noted in our first written submission, under Article 4.2 of the Dispute Settlement Understanding

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<sup>100</sup> Brazil’s First Opening Statement, para 68.

<sup>101</sup> As the Appellate Body has explained, when challenging a measure “as such,” “a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged ‘rule or norm’ is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. . . .” *US – Zeroing (EC) (AB)*, para. 198. Where the challenged measure is unwritten, the Appellate Body explained further, “Particular rigour is required on the part of a panel to support a conclusion as to the existence of a ‘rule or norm’ that is not expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported ‘rule or norm’ in order to conclude that such ‘rule or norm’ can be challenged, as such.” *US – Zeroing (EC) (AB)*, para. 198.

(“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.<sup>102</sup>

85. 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. It therefore should not be surprising that the United States cites the Appellate Body’s report in that dispute. It is the entire basis for Brazil’s claim; there is no basis in the DSU for challenging such an alleged “measure.” And, 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.<sup>103</sup>

86. 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.<sup>104</sup> 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.<sup>105</sup> We further explained that the Appellate Body declined to find a violation in 14 other cases that had facts more similar to this case.<sup>106</sup> 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.<sup>107</sup> 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.”<sup>108</sup> That is not the case here.

87. Brazil argues that, regardless of whether the zeroing methodology had any impact, its presence in the program is evidence of a violation.<sup>109</sup> However, as the United States explained

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<sup>102</sup> U.S. First Written Submission, para. 52.

<sup>103</sup> U.S. First Written Submission, paras. 130-133.

<sup>104</sup> Brazil’s First Opening Statement, para. 82.

<sup>105</sup> U.S. First Written Submission, para. 131.

<sup>106</sup> U.S. First Written Submission, paras. 133.

<sup>107</sup> Brazil’s First Opening Statement, para. 85.

<sup>108</sup> *US – Continued Zeroing (EC) (AB)*, para. 191.

<sup>109</sup> Brazil’s First Opening Statement, para. 93.

above, 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.

## **IX. Conclusion**

88. For the reasons set forth above, as well as those set forth in the U.S. first written submission, oral statement at the first substantive meeting with the Panel, and responses to the Panel’s questions, the United States respectfully requests that the Panel grant the U.S. requests for preliminary rulings and reject Brazil’s “as applied” claims regarding assessment proceedings and its claim regarding the “continuous use of zeroing.”

## LIST OF EXHIBITS

- US-7 New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4<sup>th</sup> ed.), Volume 1, p. 907
- US-8 SIMA Self-Assessment Guide, <http://www.cbsa-asfc.gc.ca/sima/self-e.html#12>