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ANNEX F

EXECUTIVE SUMMARIES OF THE PARTIES' STATEMENTS AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

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ANNEX F-1

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF BRAZIL

I. INTRODUCTION

1. Zeroing has now been condemned in eight dispute settlement cases. Unfortunately, the United States continues to resist the rulings in these cases, and repeats yet again arguments that have already been rejected by the Appellate Body. Brazil is therefore compelled to address again a large number of interpretive points that should, by now, be accepted by all WTO Members.[1]

II. DEFINITIONS OF THE CONCEPTS OF DUMPING AND MARGIN OF DUMPING

A. DUMPING IS DEFINED IN RELATION TO THE PRODUCT AS A WHOLE

2. Contrary to the United States' assertion, Brazil has explained in great detail[2] that the text of Article 2 of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") shows that "dumping" and "margin of dumping" are defined in relation to the "product" as a whole, and not in relation to individual export transactions. Dumping, therefore, involves an "exporter's pricing behavior as reflected in all of its transactions over a period of time".[3] Such dumping may cause injury to the domestic industry – not on a transaction-specific basis, but through the exporter's pricing behavior over time. Brazil has shown that its interpretation of the terms "dumping" and "margin of dumping" is confirmed by the context in Articles 2, 3, 5.8, 6.10, 8.1, 9.1, 9.3, and 9.5 of the *Anti-Dumping Agreement*.

3. Given the interconnectedness of all aspects of anti-dumping proceedings, with anti-dumping duties justified only "as long as and to the extent necessary to counteract dumping which is causing injury"[4], the Appellate Body's conclusion that the crucial notion of "dumping" should be defined uniformly throughout the *Agreement* – as Article 2.1 of the *Anti-Dumping Agreement* explicitly provides – is inescapable.

4. The United States disregards the very lucid, text-based, reasoning of the Appellate Body, and replaces it with an *à la carte* interpretation.[5]

B. THE UNITED STATES' ARGUMENTS ARE CONTRARY TO THE BASIC PRINCIPLES CONCERNING THE DETERMINATION OF DUMPING

5. The US argument that "dumping" and "margin of dumping" have different meanings in different proceedings, or even within the same type of proceedings, is unavailing.

6. The different proceedings at issue *all* concern a determination of the margin – or magnitude – of dumping, because anti-dumping duties involve a justified departure from Members' bound tariffs *only so long as and to the extent* necessary to counteract "dumping". The different procedural steps at

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[1] *See* Appellate Body Report, *US – Continued Zeroing*, para. 312.
[2] *See* Brazil's First Opening Statement, paras. 12 – 37; Brazil's FWS, paras. 49 – 61.
[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98.
[4] *Anti-Dumping Agreement*, Article 11.
[5] *See*, *e.g.*, Appellate Body Report, *US – Zeroing (Japan)*, paras. 108 – 115; and Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 82 – 99.

which such magnitude is measured do not, therefore, justify a change in the definition of what is being measured, *i.e.*, dumping. At all stages, whether the *existence and extent* of the right to counter dumping is being determined in an original investigation; whether the *extent* of that right is being determined in an administrative review; or whether the *duration* of that right is being determined in a sunset review, a Member's right to take countermeasures is determined by reference to the same concept of "dumping". The *existence, extent, and duration*, of the right must be measured in the same way. The Appellate Body has made this point in no uncertain terms.[6]

7. The United States also argues that the existence of different systems for the assessment of duties justifies different interpretations of the concepts of "dumping" and "margin of dumping". At its core, the US argument is wrong because it confuses *duty collection* with the *determination of the margin of dumping*.[7] If the US argument were accepted, then a Member's administrative choices on how to *collect* duties would become the decisive consideration in how "dumping" is defined for each Member.

8. The United States adds that the multilateral character of the *Anti-Dumping Agreement* actually "*undermines*" the conclusion that "dumping" and "margin of dumping" have a single definition for purposes of the *Agreement*, because having multiple, open-ended meanings of terms is better suited to multilateral agreements, so as to "accommodate" the interpretation and practices of a large number of parties.[8]

9. The notion that the more parties there are to an agreement, the more the agreement's terms should be interpreted to accommodate all Members' practices, is absurd. This approach to treaty interpretation would unravel multilateral disciplines, replacing them with unilateralism based on the diverse practices of up to 153 Members.

10. The United States argues that the treaty interpreter should give meaning to "constructive ambiguity".[9] This confuses a negotiating tactic – *i.e.*, employing language that might seem to lend itself to a range of interpretations – with the task of treaty interpretation. Just because certain negotiators might resort to so-called "constructive ambiguity" as a negotiating tactic does not mean that the ordinary meaning of the ensuing agreement is incapable of being ascertained through the customary rules of treaty interpretation.

11. Indeed, this is the very purpose of treaty interpretation; namely, whatever the subjective views of this or that negotiator, the treaty interpreter must discern the common intent of the contracting parties as expressed through the words used.[10] Moreover, as Article 3.2 of the DSU sets forth, the purpose of dispute settlement is to resolve disputes regarding the existing covered agreements using the customary rules of treaty interpretation. The United States would deny this purpose.

12. As already explained, the text, context, and object and purpose of the *Agreement* define "dumping" uniformly "[f]or the purpose of [the] Agreement". The text of a treaty evidences the common intent and consent of the parties[11], leaving no grounds for arguing that the parties' subjective

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[6] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96: "'dumping' and 'margin of dumping' have the same meaning throughout the *Anti-Dumping Agreement*".

[7] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 120; Appellate Body Report, *US – Zeroing (Japan)*, paras. 162 – 163; Appellate Body Report, *US – Continued Zeroing*, paras. 293 – 294.

[8] US SWS, Section III:B and para. 28.

[9] US Answers, para. 34.

[10] *See* Appellate Body Report, *EC – Computer Equipment*, para. 84; and Appellate Body Report, *EC – Chicken Cuts*, para. 239.

[11] *See, e.g.*, Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, 2009, p. 36.

intent was different from that ascertained through an analysis of this text, in light of its context, and of the treaty's object and purpose.

C. THE UNITED STATES' CONTEXTUAL OBJECTIONS LACK MERIT

13. In support of its *à la carte* view of the *Anti-Dumping Agreement*, the United States reiterates several contextual arguments that have already been dismissed by the Appellate Body. Brazil is therefore compelled to address these arguments again, together with some further objections that the United States raises with regard to provisions that Brazil relies upon as context.

14. *Ad* Article VI:1 of the GATT 1994: The United States argues that *Ad* Article VI:1 defines a particular form of dumping in relation to individual transactions, and therefore proves that dumping can be transaction-specific. However, *Ad* Article VI:1 does not set out a definition of "dumping". It is Article 2.1 of the *Anti-Dumping Agreement* that does so, "[f]or the purpose of [the] Agreement".

15. Article VII:3 of the GATT 1994: As already noted, the United States refuses to acknowledge that certain provisions on anti-dumping may provide context for the interpretation of the terms "dumping" and "margin of dumping". At the same time, it argues that the term "product" should have the same meaning in Article VII:3, on customs valuation, and in the WTO provisions on anti-dumping. Yet customs valuation is concerned with the establishment of the customs value of a single transaction, with the aim of levying duties on that single transaction. Anti-dumping, on the other hand, is concerned with establishing the margin of dumping for a product as defined by the investigating authority[12], as a basis for levying duties on all subsequent entries of that product during a particular period. Thus, the US attempts to assimilate the meaning of "product" from the customs valuation context to the anti-dumping context are without basis.

16. Article 2.2 of the *Anti-Dumping Agreement*: The United States also repeats its argument that Article 2.2 supports a transaction-specific interpretation of "dumping". The US argument is without merit. The Appellate Body has clarified that the conditions in Article 2.2 for the construction of normal value may be met on a model-specific basis, and model-specific intermediate comparisons may be made under Article 2.4.2, *provided* that the results of all intermediate comparisons are aggregated to determine "dumping" on a product-wide basis to meet the definition in Article 2.1. It does not exempt Members from the obligation to determine dumping for the product as a whole.[13]

17. Mathematical equivalence under Article 2.4.2 of the *Anti-Dumping Agreement*: The United States argues that the mathematical implication of a "general prohibition on zeroing" is that the second sentence of Article 2.4.2 "would be reduced to inutility", and therefore, there can be no general prohibition on zeroing.[14] But an exception such as that set out in the second sentence of Article 2.4.2, which is, moreover, inapplicable to the facts at issue in this dispute, cannot govern the interpretation of the general rule regarding the determination of dumping.[15] Further, the US argument is premised on the US interpretation of the third methodology set out in the second sentence, whereas "there is considerable uncertainty regarding how precisely the third methodology should be applied".[16]

18. Article 5.8 of the *Anti-Dumping Agreement*: While the United Sates insists that the meaning of "dumping" in Article 5.8 is unrelated to the meaning of "dumping" in other provisions of the *Anti-*

[12] *See, e.g.*, Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 115.

[13] Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 82 and 97. *See* Brazil's First Opening Statement, para. 46; and Brazil's SWS, para. 5.

[14] US SWS, paras. 74 – 79.

[15] Brazil's First Opening Statement, paras. 52 – 58; Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 97; and Appellate Body Report, *US – Continued Zeroing*, para. 297.

[16] Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 98, *cited in* Brazil's Answers, para. 58.

Dumping Agreement, Brazil welcomes the United States' recognition that "in the context of an Article 5 investigation" the term "margin of dumping" "may refer to multiple transactions", by which it seems to mean "product as a whole".[17]

19. Article 6.10 of the *Anti-Dumping Agreement*: The United States' reliance on the Spanish language version of the text of Article 6.10 in support of its contention that Article 6.10 leaves open the possibility of establishing dumping in relation to individual transactions is based on a mistranslation of this language version ("a margin" in lieu of "the margin").[18] Brazil's interpretation gives meaning to the English, French and Spanish versions of Article 6.10.[19]

20. The Use of the Singular: According to the United States, Brazil overstates the significance of the term "margin of dumping" in the singular in Articles 6.10, 8.1, 9.1 and 9.3 of the *Anti-Dumping Agreement*. However, Brazil's interpretation is based on the text and context of the provisions relating to "dumping" and "margin of dumping", and on the object and purpose of the treaties in which these provisions are set out.[20] Brazil relies on the use of the singular as part of the textual choices made by negotiators. The US also refers to *US – OCTG from Mexico*. But in that case, the language at issue was the phrase "*any* anti-dumping duty", and the panel, upheld by Appellate Body, relied on the fact that "any" was different from "an", in that the former has both singular and plural meanings.[21]

21. Prospective Normal Value ("PNV") Systems: The United States repeats that "margin of dumping" must have a transaction-specific meaning because, in PNV systems, a margin of dumping is established for each import entry of the goods subject to measures. As explained by the Appellate Body, this argument is unfounded, because the United States is confusing the method for duty collection with the determination of the margin of dumping.[22] The United States argues that Brazil's interpretation transforms PNV systems into retrospective systems. This is not correct. Under PNV systems, duties on importation are still collected on the basis of a PNV. However, to ensure that the amount of duty collected is not excessive, the *Anti-Dumping Agreement* provides for a refund mechanism based on the product as a whole. The United States also argues that Brazil's view would discourage importers from requesting refund reviews under Article 9.3.2, because they could, as a result, "find out that [their] dumping liability increased".[23] This too is wrong. In a prospective duty assessment, based on the text, the outcome of a refund review is: (i) a refund; or (ii) no action. Even if the authority establishes that "the actual margin of dumping" was higher than that established prospectively, it may not, as a result, retrospectively increase the anti-dumping duty liability, because the treaty refers to a "refund" procedure. Finally, the United States relies on the practice of one Member operating a PNV system, arguing that it gives preference to transaction-specific refunds. Yet, the practice of one – or even some – Members does not establish the proper interpretation of a treaty counting 153 parties.[24]

III. ARTICLE 2.4 OF THE *ANTI-DUMPING AGREEMENT* IMPOSES AN OBLIGATION TO CONDUCT A FAIR COMPARISON, AND IS NOT LIMITED TO ISSUES OF PRICE COMPARABILITY

22. The United States argues that "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

[17] US SWS, para. 34.
[18] US SWS, para. 41.
[19] *See* Appellate Body Report, *US – Stainless Steel (Mexico)*, footnote 200.
[20] Brazil's FWS, paras. 49 – 69; and Brazil's First Opening Statement, paras. 6 – 34.
[21] Panel Report, *US – OCTG from Mexico*, para. 7.149; and Appellate Body Report, *US – OCTG from Mexico*, paras. 146 – 147.
[22] Brazil's First Opening Statement, paras. 47 – 49; and Brazil's SWS, para. 5.
[23] US SWS, para. 73.
[24] *See, e.g.*, Appellate Body Report, *EC – Chicken Cuts*, paras. 258 ff.

comparability'".[25] This arguments overlooks the text of Article 2.4, as well as the case law setting out the proper interpretation of this provision.

23. Article 2.4 consists of a series of distinct sentences, the first of which states succinctly: "A fair comparison shall be made between the export price and the normal value". Thus, the panel in *Egypt – Steel Rebar*, for example, held that the "fair comparison" requirement in Article 2.4 generally concerns "the *nature of the comparison* of export price and normal value"[26], with the first sentence explicitly focused on the "the *fairness* of the *comparison*". Only the third, fourth and fifth sentences of Article 2.4 address issues relating to "price comparability".[27]

24. The Appellate Body confirmed this understanding in *US – Zeroing (EC)*. It saw "nothing incorrect" in the reasoning of the panel in that case. The Appellate Body "also agree[d] with the Panel that the legal rule set out in the first sentence of Article 2.4 is expressed in terms of a general and abstract standard", noting that "[o]ne implication of this is that this requirement is also applicable to proceedings governed by Article 9.3".[28] Contrary to the US arguments, the Appellate Body has repeatedly held that the use of zeroing in administrative reviews is inconsistent with the fair comparison requirement of Article 2.4.[29]

25. The negotiating history of the *Anti-Dumping Agreement* confirms that Article 2.4 imposes an independent obligation to conduct a fair comparison between export price and normal value. This conclusion is compelled by the fact that the drafters of the *Anti-Dumping Agreement* explicitly modified the text of this provision – as compared to that of the prior Anti-Dumping Codes[30] – to separate the "fair comparison" requirement in the first sentence of Article 2.4 into a stand-alone obligation.

IV. THE USE OF ZEROING IS INCONSISTENT WITH ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994, REGARDLESS OF ITS IMPACT

26. Brazil has demonstrated that the USDOC *used* zeroing in the First and Second Administrative Reviews, and that it *continues to use* zeroing under the Orange Juice Order.[31] The United States has not contested that it used or continues to use zeroing in these instances; rather, it has argued that the use of zeroing had *no impact* on *one* of the exporters in the First Administrative Review (*i.e.*, Cutrale) and on *one* of the exporters in the Second Administrative Review (*i.e.*, Fischer). In all other situations, it has no defence. But even in the two limited situations it identifies, the *use* of zeroing is inconsistent with Articles 2.4 and 9.3, and Article VI:2 of the GATT 1994, *regardless of its impact*.

A. ARTICLE 9.3 OF THE *ANTI-DUMPING AGREEMENT* AND ARTICLE VI:2 OF THE GATT 1994

27. Article 9.3, which parallels Article VI:2, sets forth two requirements: (i) that a margin of dumping be established in accordance with Article 2 of the *Anti-Dumping Agreement*; and (ii) that the amount of the anti-dumping duty not exceed the margin so established.

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[25] US SWS, para. 4 and Section II.A.

[26] Panel Report, *Egypt – Steel Rebar*, paras. 7.333 – 7.335 (emphasis added). *See also* Panel Report, *Argentina – Poultry*, para. 7.265; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.140.

[27] Panel Report, *Egypt – Steel Rebar*, para. 7.333 (original emphases).

[28] Appellate Body Report, *US – Zeroing (EC)*, para. 146.

[29] Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 138; Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135; and Appellate Body Report, *US – Zeroing (Japan)*, paras. 190(c) and 190(e).

[30] Article 2(f) of the Kennedy Round Anti-Dumping Code and Article 2.6 of the Tokyo Round Anti-Dumping Code.

[31] *See* Brazil's FWS, paras. 62 – 97, 98 – 104, and 114 – 117; and Brazil's First Opening Statement, paras. 66 – 69 and 74 – 75.

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28. With respect to the first requirement, the obligation to comply with Article 2 in determining margins of dumping is *independent* of any other aspect of the anti-dumping proceeding or of the outcome of that proceeding in terms of duty collection. A failure to comply with Article 2 in determining the margin vitiates a determination made under Article 9.3, irrespective of the amount of duties that is ultimately collected.[32]

29. In *US – Zeroing (Japan) (21.5)*, the United States argued that Japan had not proven the impact of zeroing in the challenged administrative reviews, and that therefore Japan's challenge had to fail. The panel rejected the U.S. argument.[33] The United States did not appeal this aspect of the panel's findings, and the Appellate Body upheld the panel's finding that the application of zeroing in these reviews was inconsistent with Article 9.3 of the *Anti-Dumping Agreement*, as well as Article 2.4, and Article VI:2 of the GATT 1994.[34]

30. Further, in *US – Continued Zeroing*, the United States argued that the EU's "continued use" claim failed because there was no evidence of the impact of zeroing in any specific determinations. In particular, the United States argued that there was no evidence that there would be negative comparison results that would be zeroed in each and every determination. The Appellate Body rejected this argument, finding that the continued use of zeroing under a specific anti-dumping order is inconsistent with, among others, Article 9.3 of the *Anti-Dumping Agreement* irrespective of the outcome of the calculation.[35]

B. ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

31. The United States' use of zeroing in the administrative reviews at issue is also inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, irrespective of its impact. As discussed earlier, the "fair comparison" requirement in the first sentence of Article 2.4 concerns "the *nature of the comparison* of export price and normal value"[36], and is focused on "the *fairness* of the *comparison*".[37] Because the obligation concerns "the nature of the comparison" that is made by an anti-dumping authority, it applies independently of the amount of anti-dumping duties that are collected by an importing Member.

32. In terms of ordinary meaning, "[t]he term 'fair" [in Article 2.4] is generally understood to connote impartiality, even-handedness, or lack of bias".[38] The Appellate Body has held that there "is an inherent bias in a zeroing methodology".[39] It has also said that, as a "*way of calculating*" margins, the zeroing methodology "cannot be described as impartial, even-handed, or unbiased".[40] A panel and the Appellate Body have, therefore, ruled that *the maintenance and application* of zeroing procedures in administrative reviews is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.[41]

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[32] *See*, in particular, Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162. *See* also Mexico's Answers, paras. 21-23; the EU's Answers, para. 9; and Korea's Answers, para. 13.

[33] Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162.

[34] Appellate Body Report, *US – Zeroing (Japan) (21.5)*, paras. 195 and 197.

[35] Appellate Body Report, *US – Continued Zeroing*, para. 192.

[36] Panel Report, *Egypt – Steel Rebar*, paras. 7.333 – 7.335 (emphasis added). *See also* Panel Report, *Argentina – Poultry*, para. 7.265; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.140.

[37] Panel Report, *Egypt – Steel Rebar*, para. 7.333 (original emphasis).

[38] Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 138.

[39] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[40] Appellate Body Report, *US – Zeroing (Japan)*, para. 146, *quoting* Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 142.

[41] Panel Report, *US – Zeroing (Japan)(21.5)*, paras. 7.168 and 8.1(b); Appellate Body Report, *US – Zeroing (Japan)(21.5)*, paras. 195, 197 and 213(c); and Appellate Body Report, *US – Zeroing (Japan)*, paras. 169, 176, 190(d) and 190(e).

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33. Thus, irrespective of impact, the use of zeroing in making determinations for all of the companies in all of the measures at issue violates Article 2.4 of the *Anti-Dumping Agreement* because it involves an unfair comparison.

V. THE CONTINUED USE OF ZEROING IS INCONSISTENT WITH ARTICLES 2.4 AND 9.3 OF THE *ANTI-DUMPING AGREEMENT*, AND ARTICLE VI:2 OF THE GATT 1994

34. Brazil claims that the United States has violated Articles 2.4, 2.4.2 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994, also through the continued use of zeroing under the Orange Juice Order.[42]

35. The United States maintains that Brazil's "continued use" claim is not a measure that may be subject to dispute settlement.[43] However, in *US – Continued Zeroing*, the Appellate Body found "no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement".[44] The US argument is also surprising because the United States is challenging a "continued use" measure in *EC – Large Civil Aircraft*, explicitly and extensively relying on the Appellate Body's reasoning in *US – Continued Zeroing*, which it is nonetheless encouraging this Panel to disregard.[45]

36. The United States also argues that Brazil has not made the evidentiary showings required for an "as such" challenge. However, as Brazil has explained[46], a challenge to the "continued use" of zeroing under the Orange Juice Order is narrower than a challenge to zeroing "as such" and, therefore, not subject to the identical evidentiary requirements.

37. Brazil has established that there is a sufficient "density of factual findings", that is not "fragmented" over time, showing that zeroing has been used in successive proceedings under the same order.[47] As Brazil has demonstrated, the USDOC used zeroing in the original investigation; in the First and Second Administrative Reviews; and in the Third Administrative Review. Indeed, with regard to the latter review, Brazil notes that while the United States stated before the Panel that it could not foretell whether it would continue to use zeroing under the Orange Juice Order, it then used zeroing shortly after the first meeting with the Panel, in the Third Administrative Review.[48] Thus, the United States has used zeroing with perfect consistency in *every* proceeding under the Orange Juice Order, including very recently.[49]

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[42] *See* Brazil's FWS, paras. 98 – 117; Brazil's First Opening Statement, paras. 80 – 96; and Brazil's Answers, paras. 7 – 20.

[43] *See* U.S. SWS, paras. 83 – 87.

[44] Appellate Body Report, *US – Continued Zeroing*, para. 181.

[45] US Other Appellant's Submission, *EC – Large Civil Aircraft*, 23 August 2010, paras. 53-58, available at http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/measures-affecting-t-0.

[46] *See* Brazil's Answers, paras. 3 – 6.

[47] *See* Brazil's SWS, paras. 29 – 30 and Appellate Body Report, *US – Continued Zeroing*, paras. 191 and 194.

[48] *See* Brazil's SWS, paras. 31 – 45.

[49] *See* Brazil's SWS, para. 42. It has also repeatedly affirmed its intent to persist in this conduct under the Orange Juice Order, despite WTO rulings. *See* IDM in the First Administrative Review, pp. 5 – 6; IDM in the Second Administrative Review, pp. 4 – 6; and IDM in the Third Administrative Review, pp. 4 – 6. Exhibits BRA-28, BRA-43 and BRA-50. On IDMs, s*ee* Appellate Body Report, *U.S. – Continued Zeroing*, footnote 767.

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ANNEX F-2

EXECUTIVE SUMMARY OF THE ORAL OPENING STATEMENT OF THE UNITED STATES

1. In our statement today, we would like to focus on rebutting arguments made by Brazil in its second written submission and in response to the Panel's questions. We hope that our oral statement will clarify our views as Brazil's opening statement did not present them accurately. We first will highlight that interpreting the terms "dumping" and "margin of dumping" to have meaning in relation to individual transactions is a permissible and perfectly coherent interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement"). Brazil's proposed interpretation, in contrast, has no textual basis. In addition, Brazil's interpretation is inconsistent with the very concept of a prospective normal value system, both as provided for in the text and as such systems are actually used. Indeed, as we show in the exhibits submitted with this oral statement, and contrary to Brazil's representations, Brazil's own use of prospective normal value is inconsistent with Brazil's insistence that the Antidumping Agreement prohibits a transaction-specific definition of dumping.

2. We will then respond to four other lines of argument in this dispute: First, with respect to mathematical equivalence, as we demonstrated empirically in our response to the Panel's questions, Brazil's proposed interpretation of the Antidumping Agreement would render the second sentence of Article 2.4.2 meaningless. Second, with respect to "fair comparison" under Article 2.4, Brazil's interpretation invites a subjective examination that is not based on the text. Third, Brazil's arguments regarding cash deposits are similarly not based on the text of the Antidumping Agreement, which plainly allows Members to collect a cash deposit as security for payment of antidumping duties. Finally, with respect to its assertion that the "use" of "zeroing" is inconsistent with the covered agreements regardless of whether any duties were collected or whether there even were any negative comparison results to "zero", Brazil's interpretation is completely inconsistent with the text. Brazil has failed to demonstrate any basis for finding an inconsistent "continued use" measure, even were such a measure within the Panel's terms of reference.

I. A TRANSACTION-SPECIFIC INTERPRETATION OF "DUMPING" AND "MARGIN OF DUMPING" IS PERMISSIBLE

3. The text and context of the covered agreements, interpreted in accordance with the customary rules of interpretation of public international law, make clear that the terms "dumping" and "margin of dumping" may have meaning for individual transactions. Brazil's interpretation, in contrast, is not consistent with either the text, or with how prospective normal value systems operate.

A. STANDARD OF REVIEW

4. As we have noted previously, in a dispute involving the Antidumping Agreement, the relevant standard of review includes that set forth in Article 17.6(ii) with respect to various permissible interpretations of a provision of the Agreement.

5. The question under Article 17.6(ii) is whether an investigating authority's action rests upon a permissible interpretation of the Antidumping Agreement. Article 17.6(ii) confirms that there are provisions of the Agreement that "admit[] of more than one permissible interpretation". Where that is the case, and where the investigating authority's action rests upon one such interpretation, a panel is to find the action consistent with the Agreement.

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6. The United States has argued – and multiple previous panels have agreed – that an interpretation of the Antidumping Agreement that does not require offsets is permissible. This interpretation is permissible because the text and context of the Antidumping Agreement, interpreted in accordance with customary rules of interpretation of public international law, make clear that the terms "dumping" and "margin of dumping" may have meaning for individual transactions. The mere fact that this interpretation differs from another interpretation is not a basis for finding it impermissible.

7. An interpretation of the provisions of the Antidumping Agreement and the GATT 1994 that not only is consistent with the text, but also reflects how business is conducted, how trade in goods occurs, and the point at which duties are imposed – that is, in individual transactions – is hardly, as Brazil alleges, "incoherent". Multiple previous panels, applying the customary rules of interpretation of international law, have confirmed that this interpretation is permissible.

8. The interpretation by previous panels does not allow a Member to define dumping any which way it wants. As noted earlier, there is a definition of "dumping" in Article 2.1 of the Antidumping Agreement. The question is whether this definition, "the difference between normal value and export price", can apply at the level of individual transactions or must be applied to "the product as a whole", a term that does not even appear in the text. Brazil argues that the term "dumping margin" must relate, solely and exclusively, to the "product as a whole" regardless of the text and context of the provision in which the term is used. The United States argues – and previous panels have confirmed – that "dumping margin" may be understood as relating to the "product" that is the subject of an individual transaction, in accordance with the ordinary meaning of the word "product", and permits the text and context of the relevant provisions to inform the appropriate interpretation of the term as it is used.

B. THERE IS NO TEXTUAL BASIS FOR THE OBLIGATION THAT BRAZIL PROPOSES

9. To require, as Brazil asserts, that a Member calculate a "margin of dumping" only for the "product as a whole" does not reflect a "harmonious" interpretation of the Antidumping Agreement. There is no textual basis for such an obligation in either the Antidumping Agreement or the GATT 1994. Not surprisingly, then, in arguing that an investigating authority must calculate a margin of dumping for the "product as a whole" in assessment proceedings, Brazil does not rely on the text of the GATT 1994 or the Antidumping Agreement.

10. To accept Brazil's argument would mean that the major users of dumping remedies, which were not granting offsets at the time the WTO Agreements were negotiated, agreed to an obligation to provide offsets without including an express provision for such an obligation in the Antidumping Agreement and the GATT 1994. In fact, there were negotiating proposals to restrict "zeroing", but these proposals were not adopted. The major users of dumping remedies continued to use "zeroing" after the agreements came into effect. If the negotiators of the Uruguay Round agreements intended to make such a fundamental change in the meaning of "margin of dumping" as to require offsets, they would have been clear about it. As we noted in our first written submission, in settling disputes among Members, panels and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

11. A panel should not build an interpretation on terms that do not appear in the covered agreements, such as "product as a whole". Prior panels have found that there is no textual basis in the Antidumping Agreement for the obligation that Brazil proposes today. All these panels made an objective assessment of the matter before them and came to the same conclusion that no offsets are required in assessment proceedings. We respectfully request that this Panel reach the same conclusion in this proceeding.

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C. BRAZIL'S ARGUMENTS ARE INCONSISTENT WITH BOTH THE CONCEPT OF, AND ITS OWN APPLICATION OF, A PROSPECTIVE NORMAL VALUE SYSTEM

12. The United States has demonstrated that the obligation that Brazil seeks to impose on Members is contrary to the very concept of a prospective normal value system provided for in Article 9 of the Antidumping Agreement. 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. For example, an importer who imports a product the export price of which is equal to or higher than the prospective normal value cannot incur liability for payments of antidumping duties. The converse is also true. A liability for a dumped sale would be determined by comparing the price of an individual export transaction with a prospective normal value and the prices of other transactions have no relevance to this determination. As the panel in *US – Zeroing (Japan)* found, "there is no textual support in Article 9 for the proposition that export prices in other transactions are of any relevance".

13. The United States has provided evidence that demonstrates how prospective normal value systems operate and that the refund mechanism under a prospective normal value system normally addresses specific individual transactions. In contrast, there is no evidence to support the assertions that a refund mechanism must recalculate a margin of dumping based on an aggregation of all comparisons. Indeed, Brazil acknowledged that it has never granted a single refund when collecting antidumping duties on the basis of a prospective normal value.

14. Brazil nonetheless argues that an obligation to calculate the margin of dumping with respect to "product as a whole" is consistent with prospective normal value systems. In its answers to the Panel's Questions, Brazil asserts that when it has applied prospective normal value, "the collection of the duty was limited to a dumping margin determined in accordance with Article 2 of the *Anti-Dumping Agreement*". A review of the facts, however, raises questions about how this assessment comports with Brazil's proposed interpretation of the Antidumping Agreement.

15. Brazil has used prospective normal value to collect antidumping duties on products from at least seven countries: the United States, Mexico, Romania, Germany, France, Spain, and the United Kingdom. In each case, Brazil calculated the antidumping duty as the absolute difference between the normal value (or reference price) and the adjusted export price of a specific transaction. Brazil assessed the antidumping duty in instances where the price of the imported product (an entry) was lower than the established normal value. However, Brazil assessed no duty if the result of the comparison was less than or equal to zero. And, Brazil has never provided a refund or an offset based on non-dumped transactions.

16. The way that Brazil has collected duties on imports of polyvinylchloride from the United States and Mexico, for example, does not appear consistent with the arguments that Brazil made in this dispute. In that case, Brazil assessed duties on a transaction-specific basis without providing any offsets for non-dumped transactions. In addition, Brazil's Official Gazette specifically states that the antidumping duty is calculated on a transaction-specific basis:

> The anti-dumping duty is calculated on the basis of the absolute difference between the reference price and the *price at which the transaction by which the product is imported from the USA or Mexico is executed,* as the case may be. The anti-dumping duty will be charged only in a case in which the price of the imported product is lower than the proposed reference price.

17. There is no reason why liability for payment of antidumping duties in the retrospective system applied by the United States may not be similarly assessed on the basis of transaction-specific export prices. Accepting the interpretation that a Member must aggregate the results of *"all"*

comparisons on an exporter-specific basis would require that retrospective reviews be conducted even in a prospective normal value system. This result is contrary to the very concept of a prospective normal value system.

18. Despite its arguments that Members have an affirmative and fundamental obligation to determine the antidumping liability for the "product as a whole" regardless of the context, Brazil has never conducted a review under Article 9.3.2. Brazil suggests this is because no importer has ever asked for a review or a refund. As we explained previously, however, it is difficult to see why an importer would request such a review when the importer does not have information for the "product as a whole" and as such does not know if the importer's liability could actually increase. And, when importers do not request refunds, no offsets are provided.

19. It should be noted that Brazil's arguments in this respect are entirely inconsistent with its arguments regarding cash deposits. Under Brazil's argument, the supposed obligation to calculate a margin for the "product as a whole" in a prospective normal value system is apparently only triggered when someone requests a refund. In the meantime, duties are collected on a transaction-specific basis without providing offsets for non-dumped transactions. Of course, in a retrospective system such as that operated by the United States, cash deposits are expressly not a final assessment of duties. Cash deposits are only a security pending the final assessment of duties, which occurs later in a review initiated upon a request. Yet according to Brazil, cash deposits that similarly do not reflect offsets for non-dumped transactions are themselves WTO-inconsistent.

20. Before moving on, we would like to make one final but important point on the topic of prospective normal value systems: It is implausible to think that the negotiators of the Antidumping Agreement would provide explicitly for a prospective normal value system and at the same time, without making any textual provision whatsoever, require that such systems conduct retrospective assessment proceedings that aggregate all the transactions occurring over some unspecified period of time. Articles 9.3, 9.3.1, and 9.3.2 are silent as to the period of review for any such proceeding. These articles include no requirements with respect to whether an assessment proceeding must cover a time period of a certain length or even that assessment proceeding coverage be time-based at all.

21. In its responses to the Panel's questions, Brazil suggested that the period of review for refund proceedings is specified in footnote 4 to Article 2.2.1. Article 2.2.1 specifies certain conditions under which a Member may choose to disregard sales at prices below the per unit cost of production in the domestic market of the home country or a third country if "such sales are made within an extended period of time in substantial quantities and at prices which do not provide for the recovery of all costs". Footnote 4 specifies that "extended period of time" is "normally one year but shall in no case be less than six months". Contrary to Brazil's suggestion, footnote 4 specifies what constitutes an "*extended period of time*". It does not specify the length of a "period of review" or "refund proceeding". Moreover, Article 2.2.1 and footnote 4 only apply in specific circumstances, when a Member decides to disregard certain below-cost sales. They do not apply in any other context.

22. If the drafters of the Antidumping Agreement had intended to adopt an obligation to provide an "offset" for non-dumped transactions, one would have expected the drafters also to agree on an obligation for assessment proceedings to cover some established time period over which transactions must be aggregated. Otherwise a Member's obligations might have differed in a significant, substantive fashion depending solely upon whether it elects to cover more or fewer entries, or more or less time, in conducting its assessment proceedings. Thus, Brazil's assertion that the Antidumping Agreement imposes, with no textual basis, an obligation to grant offsets for non-dumped transactions implies that the drafters neglected to provide for an essential element of the obligation, namely, the time period over which such an offset would be granted. Such an interpretation should not be adopted by the Panel.

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II. BRAZIL'S INTERPRETATION RENDERS THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTIDUMPING AGREEMENT A NULLITY

23. The United States would recall that it has demonstrated that Brazil's interpretation of the Antidumping Agreement does not fit with the text of Article 2.4.2 of the Antidumping Agreement. This is because the exceptional methodology provided for in the second sentence of Article 2.4.2 mathematically must yield the same result as an average-to-average comparison as provided for in the first sentence of Article 2.4.2 if, in both cases, non-dumped comparisons are required to offset dumped comparisons. Accordingly, Brazil's interpretation would be disfavored under a key tenet of customary rules of treaty interpretation, namely, as explained by the Appellate Body in *US – Gasoline*, that an "interpretation must give meaning and effect to all the terms of the treaty".

24. The United States demonstrated the mathematical equivalency empirically in its response to the Panel's questions. Brazil's only response to the mathematical equivalency argument is to cite certain Appellate Body reports. These reports are not persuasive because their reasoning is not based upon the text of the Antidumping Agreement and does not adequately resolve the problem of mathematical equivalency. Panels have specifically addressed all of the situations under which it was argued that there would not be mathematical equivalence and found these situations did not represent methodologies consistent with the Antidumping Agreement. The United States has demonstrated that if *all* export transactions are taken into account, and "zeroing" is prohibited, average-to-average and average-to-transaction comparisons produce the *same result.*

III. BRAZIL'S BROAD INTERPRETATION OF ARTICLE 2.4 OF THE ANTIDUMPING AGREEMENT SHOULD BE REJECTED

25. As the United States has explained, Brazil's arguments under Article 2.4 of the Antidumping Agreement – like its other interpretations of the Antidumping Agreement – require reading into the text of the Agreement words that are not there and were never agreed. 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. Moreover, if Article 2.4 required offsets, there would be no need for such a requirement in Article 2.4.2 (which was the basis for the Appellate Body's finding in *US – Softwood Lumber Dumping*).

26. Brazil's proposed interpretation that Article 2.4 applies to the *results* of comparisons between export price and normal value is erroneous. 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". Contrary to Brazil's assertions, 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. The phrase "fair comparison" in Article 2.4 simply has nothing to do with the aggregation of comparison results, and Brazil has not explained 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.

27. Instead, Brazil would have the Panel use Article 2.4 to examine any and all antidumping calculations to determine whether they are "impartial, even-handed, or unbiased". However, such an open-ended approach would result in disputes that are nearly impossible to resolve in any principled, text-based way. The Panel should reject an expansive interpretation of a "fair comparison" requirement that requires a subjective evaluation of what is "fair" or "unfair".

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IV. CASH DEPOSITS ARE A SECURITY, NOT DUTIES

28. The United States explained in its First Written Submission and in its responses to Panel questions that cash deposits are not duties covered by Article 9 of the Antidumping Agreement, but rather a security governed by separate provisions of the GATT 1994. The Ad Note to paragraphs 2 and 3 of GATT Article VI expressly provides that a Member may collect a "reasonable security (bond or cash deposit) for the payment of anti-dumping duty ... pending final determination of the facts". In the retrospective system used by the United States, cash deposits are held as a security pending determination of the antidumping duty to ensure that funds are available to pay the duties. None of the cash deposit rates at issue in this dispute were applied as assessment rates.

29. In response to the US showing that cash deposits are a security, Brazil relies on the Appellate Body report in the *United States – Shrimp Bonding* dispute. That report, however, is inapposite to the issue in this dispute regarding cash deposits. In *Shrimp Bonding*, the Appellate Body analyzed the WTO-consistency, including the "reasonableness", of an extra bonding requirement that applied above cash deposits. The purpose of this extra requirement was to secure potential additional liability that might arise if the margin of dumping was determined to be greater than the cash deposit – that is, to address defaults on that portion of the duties that exceed the amount of cash deposited as a security. That is not an issue in this dispute, nor is it the standard for whether or not cash deposits are in fact a security.

V. BRAZIL'S ARGUMENTS REGARDING THE "USE" OF ZEROING HAVE NO BASIS IN THE TEXT

30. In the last meeting with the Panel, and in its second written submission, Brazil insists that the "use" of "zeroing" violates various provisions of the Antidumping Agreement and the GATT 1994, regardless of whether any duties were collected, and regardless of whether any transaction-specific comparisons were in fact "zeroed". To be clear, we have a defense to all of Brazil's claims as there is no basis in the text of the agreements for the obligations Brazil seeks to impose. However, in response to Brazil's claims on this point we would like to explain further how these assertions with respect to the "use" of "zeroing" are inconsistent with the text of the relevant provisions.

31. In this dispute, Brazil's allegations of WTO-inconsistency based on its "zeroing" theories extend to certain instances in which the United States in fact assessed no antidumping duties. As the United States has explained, where no antidumping duties have been assessed, there can be no breach of Article 9.3 of the Antidumping Agreement or Article VI:2 of the GATT.

32. In its second written submission, Brazil asserts that Article 9.3 and Article VI:2 – both of which expressly refer to the amount of the antidumping duty – can be violated "irrespective of the amount of duties that is ultimately collected". The United States fails to see how, as Brazil argues, it makes sense to find a violation of an obligation not to collect duties, when no duties are collected. Article VI:2 allows a Member to "levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping ...". Article 9.3 directs that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Finding a violation of these provisions where no antidumping duties are levied and the antidumping duty is zero would render meaningless the provisions' references to "levy ... an anti-dumping duty" and "[t]he amount of the anti-dumping duty".

33. Brazil's meaning of the term "use" is different from what was at issue in prior panel and Appellate Body reports. Brazil claims that "use" refers to the line in the computer program. Prior reports refer to the final duties assessed. Consequently, those earlier reports do not support Brazil.

34. Brazil does not address the fact that these provisions specifically address the amount of the duty. Instead, Brazil's only support for its argument that there could be a violation even when no duties are assessed is (i) a cite to the Appellate Body report in *Continued Zeroing* and (ii) an argument that the *chapeau* of Article 9.3 refers to Article 2.

35. With regard to the *Continued Zeroing* report, it is not pertinent to the issue in this dispute. In particular, it does not address the argument in this case that there can be no violation of Article 9.3 or GATT Article VI:2 where a Member assesses no duties. That dispute involved the issue of whether alleged "continued use" was outside of the terms of reference because it purported to capture future measures. However, the argument in this case is not only about what might happen in the future. In this dispute, Brazil's own evidence demonstrates that zeroing had no effect in certain of the proceedings at issue.

36. Brazil's argument as to the *chapeau* is based solely upon the fact that the *chapeau* mentions Article 2. However, Brazil fails to cite the actual text of the *chapeau*, which states that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". The text is clear that the obligation is based upon "the amount of duty" not *exceeding* the margin of dumping. Where the United States has applied an assessment rate of zero, "the amount of duty" is zero, which cannot exceed the margin of dumping.

37. The United States fails to see how there can be a violation of an alleged obligation to provide offsets for non-dumped transactions when there are no non-dumped transactions. As just noted, unlike in the *Continued Zeroing* dispute, in this dispute we are not just presented with a request to find an inconsistency with respect to measures that do not exist even though we do not know whether there will be any non-dumped transactions. We are also presented with a request to base a finding of future inconsistency on a proceeding in which the evidence shows there actually were no non-dumped transactions. Zeroing is not and cannot be "used" in such circumstances. It is mathematically impossible. In such circumstances, the comparisons made, and the amount of duties collected, are exactly the same as they would have been if there were no "zeroing" line in the computer program. Brazil's own evidence indicates the United States calculated the dumping margins in the orange juice investigation on the basis of *all* comparable transactions.

VI. ASIDE FROM THE FACT THAT IT IS OUTSIDE THE TERMS OF REFERENCE, BRAZIL'S CLAIMS WITH RESPECT TO THE "CONTINUED USE" MEASURE FAIL

38. Even if Brazil's "continued use" claim were properly before this Panel, it must fail because there is no evidence that zeroing affected any margin in the investigation, nor certain rates in the assessment proceedings at issue. Brazil has relied heavily upon the Appellate Body's report in *Continued Zeroing*, and the United States has explained why that reliance is misplaced. We have demonstrated that the Appellate Body's analysis in *Continued Zeroing* does not apply here. In that dispute, the Appellate Body found an inconsistency only in circumstances that included zeroing in the initial less than fair value investigation, zeroing in four successive administrative reviews, and reliance in a sunset review upon rates determined using the zeroing methodology.

39. In response to the US arguments, Brazil attempts to distinguish the circumstances in the current dispute from the cases in which the Appellate Body declined to find a violation in *Continued Zeroing* by arguing that the evidence of zeroing was "fragmented" in those cases. However, in this dispute, Brazil's own evidence shows that there was no zeroing in the investigation, zeroing had no effect on certain rates in the assessment proceedings, and there has been no sunset review. This is not a case where, to quote the Appellate Body report in *Continued Zeroing*, "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". Moreover, as explained earlier, there is no textual basis for

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finding a violation where no duties are collected, or where there were no non-dumped transactions. Individual proceedings that are not inconsistent cannot be the basis of a finding of "ongoing" inconsistency stretching indefinitely into the future.