BCI deleted, as indicated [[XX]]

ANNEX C

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

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ANNEX C-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF BRAZIL AT THE FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. Brazil responds, in turn, to the legal and factual arguments in the US First Written Submission ("FWS"). At the outset, Brazil notes that in this dispute, the US consistently encourages the Panel to depart from established precedent in *Zeroing* disputes. Brazil regrets such arguments, noting that "WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports".[1] Contrary to the US suggestions, Article 11 of the DSU does not imply that relevant previous rulings by the Appellate Body should not be followed. On the contrary, respecting previous and repeated rulings – which have been adopted by the WTO Membership in the DSB – is part and parcel of, and even facilitates, a panel's objective assessment under Article 11 of the DSU.[2]

II. THE ANTI-DUMPING AGREEMENT AND THE GATT 1994 DEFINE "DUMPING" IN RELATION TO THE "PRODUCT" AS A WHOLE

2. The US rightly notes that "this dispute is about the definitions of 'dumping' and 'margin of dumping'".[3] Brazil argues that these concepts are defined by reference to the product as a whole. Conversely, the US argues that these concepts are sufficiently "flexible" that they may be defined by individual Members in relation (1) to the "product" as a whole; (2) to each individual transaction relating to the "product"; or even (3) to both conceptions.

3. As a basis for its plea for unilateral discretion, the U.S. relies on Article 17.6(ii) of the *Anti-Dumping Agreement*, but misreads it. Article 17.6(ii) comprises two sentences. The first enjoins a panel to interpret the *Anti-Dumping Agreement* using the customary rules of treaty interpretation. The second provides that, when these rules yield multiple permissible interpretations, a measure is WTO-consistent if it rests on one permissible interpretation. As the Appellate Body said in *US – Continued Zeroing*, "Article 17.6(ii) contemplates a sequential analysis", with a panel first applying the customary rules of interpretation in a "conscientious" manner. "Only *after* engaging in this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies".[4]

4. The Appellate Body has applied the rules of treaty interpretation to the definitions of "dumping" and "margin of dumping" in the past, and found that they lead to a product-wide meaning, and that therefore there is no room for resorting to the second sentence of Article 17.6(ii).[5] It has added that the notion of multiple permissible interpretations cannot be stretched to include *rival* interpretations.[6]

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[1] Appellate Body Report, *US – Stainless Steel*, para. 160.
[2] *See* Appellate Body Report, *US – Stainless Steel*, paras. 157 – 162.
[3] US FWS, para. 60.
[4] Appellate Body Report, *US – Continued Zeroing*, para. 271. Original emphasis. *See also*, Appellate Body Report, *US – Hot-Rolled Steel*, para. 60.
[5] Appellate Body Report, *US – Zeroing (Japan)*, para. 189.
[6] Appellate Body Report, *US – Continued Zeroing*, para. 273 and Concurring Opinion, para. 312.

5. Brazil has set forth its interpretation of these terms, explaining that they refer to the product as a whole, in its FWS.[7] Brazil recalls that Article 2.1 of the *Anti-Dumping Agreement*, by defining "dumping" "[f]or the purpose of this Agreement", makes plain that "dumping" has the same meaning "in all provisions of the Agreement and for all types of anti-dumping proceedings".[8] The requirement to give the concept of "dumping" a consistent meaning throughout the *Anti-Dumping Agreement* is crucial because: "Nothing could be more important than the definition of the concept of "dumping". It is foundational and applies throughout the Agreement, as the clear wording of Article 2.1 makes plain. It cannot have variable or contradictory meanings, for that would infect the entire Agreement."[9]

6. The US argues that Brazil is wrong to interpret "dumping" and "margin of dumping" uniformly throughout the *Anti-Dumping Agreement* and Article VI:1 and VI:2 as referring to the product as a whole, and finds support in the use of the singular words "product" and "price" in Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*. However, the cited provisions use "price" in the singular also when referring to "normal value", which is not defined in relation to a single transaction. Normal value is the "comparable price, *in the ordinary course of trade, for the like product*". "The ordinary course of trade" cannot be ascertained on the basis of one transaction; and the adjective "normal" indicates that the price is the "regular", "usual", "standard" or "common" price for "the like product". Such a "price" cannot be ascertained on the basis of one transaction, but must be based on all relevant transactions contributing to the "normal" price. The French and Spanish language versions of Article 2.1 confirm this view.

7. Numerous contextual provisions of the *Anti-Dumping Agreement* confirm that "dumping" and "margin of dumping" are defined in relation to the product as a whole. For example, *first*, Article 5.8 of the *Anti-Dumping Agreement* requires the termination of an investigation into an exporter if "the margin of dumping" is *de minimis*. The US position would mean that an authority's termination decision would be made for each individual export transaction. This is absurd.[10] *Second*, 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".[11] Similar language appears in Articles 6.10.2 and 9.5. *Third*, under Article 3, an authority must assess the injurious effects of "dumped imports", a term that covers *all* imports from an exporter engaged in "dumping".[12] For purposes of Article 3, and consistent with Article 6.10, a single dumping determination, based on all export transactions, is made for an exporter, and that single determination influences the treatment of all imports from that party.[13] *Fourth*, under Articles 8 and 9 of the *Anti-Dumping Agreement* and the GATT 1994, the extent of permissible remedial action to counter injurious "dumping" is fixed by reference to a single margin of dumping, and that remedy applies to *all* future imports of the "product".[14]

8. In sum, there is both consistency and logic to the text of the *Anti-Dumping Agreement*. By defining "dumping" in relation to the product as a whole, the *Anti-Dumping Agreement* ensures parallelism between the scope of a dumping determination and the scope of the legal consequences this determination entails. This parallelism is important because, under Article II:2(b) of the GATT 1994, anti-dumping duties frequently exceed the level of a Member's bound rates. To justify

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[7] *See* Brazil's FWS, paras. 49 – 61.

[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

[9] Appellate Body Report, *US – Continued Zeroing*, Concurring Opinion, para. 307. *See* also, e.g., Appellate Body Report, *US – Stainless Steel*, para. 107, and Appellate Body Report, *US – Continued Zeroing*, para. 285.

[10] *See* Appellate Body Report, *US – Continued Zeroing*, para. 283.

[11] *See* Appellate Body Report, *US – Softwood Lumber V*, footnote 158, citing Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

[12] Appellate Body Report, *EC – Bed Linen (21.5)*, para. 115. *See also* Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303.

[13] *See, e.g.*, Appellate Body Report, *US – Stainless Steel*, para. 108.

[14] *See* Articles 8.1, 9.1 and 9.3, and Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 108.

imposing anti-dumping duties on a product-wide basis, a dumping determination must be made on an equivalent product-wide basis.[15]

9. The U.S. also argues that "dumping" may have a transaction-specific meaning because the word "product" in Article VII:3 of the GATT 1994, on customs valuation, refers to individual transactions. The US confuses proximity (of Article VII:3 with Articles VI:1 and VI:2) with context. The purpose and consequences of a customs valuation decision and of anti-dumping proceedings are altogether different.[16]

10. The Note *Ad* Article VI:1, on which the US also relies, does not alter the requirement to determine dumping for the product as a whole, but simply provides for the situation where sales to an importer may not be relied upon directly because the exporter and the importer are related. The US argument that a product-wide definition of "dumping" and a prohibition on zeroing under Article 9.3 prevent anti-dumping duties from being effective is also flawed, because "it is the exporter, not the importer, that engages in" dumping.[17] Other US arguments have been comprehensively dealt with and rejected by the Appellate Body, and in some cases by panels, too.[18]

III. ZEROING AS A MATTER OF FACT IN THE MEASURES AT ISSUE

A. USDOC PROGRAM LOGS

11. For the First Review, Brazil inadvertently submitted as Exhibit BRA-30 a log generated by its expert, Mr. Ferrier, when rerunning the USDOC software earlier this year. In *US – Continued Zeroing*, the Appellate Body has questioned the significance of the fact that logs were replicated using the USDOC programs, rather than being directly generated by the USDOC.[19] In any event, in Exhibit BRA-45, Brazil now submits the log that Fischer received from the USDOC with its final results in the First Review. The US also contests the provenance of the log for Fischer's

[15] Brazil also rejects the argument, in footnotes 8 and 144 of the US FWS, that cash deposits are not subject to the disciplines in Article 9.3 of the *Anti-Dumping Agreement*. In several disputes, the DSB has ruled that cash deposits rates calculated with zeroing are inconsistent with this provision (Appellate Body Reports, *US – Stainless Steel*, paras. 133 – 134 and 156(a); *US – Continued Zeroing*, paras. 315 – 316 and 395(d); *US – Zeroing (EC) (21.5)*, para. 294; and Panel Report, *US – Zeroing (Japan) (21.5)*, paras. 7.166 – 7.168 and 8.1(b). *See* also Appellate Body Report, *US – Zeroing (Japan)*, para. 156). In compliance proceedings in *US – Zeroing (Japan)*, the US itself argued in vain that its implementation obligations under Article 9.3 applied *solely* to cash deposit rates, and not assessment rates (*see* Panel Report, *US – Zeroing (EC) (21.5)*, para. 8.155(b); Appellate Body Report, *US – Zeroing (EC) (21.5)*, para. 6; Panel Report, *US – Zeroing (Japan) (21.5)*, para. 3.3; and Appellate Body Report, *US – Zeroing (Japan) (21.5)*, para. 12). Thus, the applicability of Article 9.3 to cash deposit rates is well-established, and has been accepted by the US.

[16] Under Article 1.1 of the *Customs Valuation Agreement*, the customs value is the price actually paid or payable in a specific import transaction. The authority does not value goods following an investigation into a large number of transactions relating to a "product" that the authority itself has defined. Nor does the act of customs valuation for an individual entry necessarily entail, for example, the imposition of duties in excess of bound rates on all entries of the product.

[17] Appellate Body Report, *US – Zeroing (Japan)*, para. 156.

[18] *See*, respectively: (i) on Article 2.2, Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 82, 97 and 104; (ii) on prospective normal value systems and the US confusion between duty collection under prospective normal value systems and the determination of the margin of dumping, Appellate Body Report, *US – Zeroing (Japan)*, paras. 160, 162 – 163 and 166; and Appellate Body Report, *US – Continued Zeroing*, para. 294; Panel Report, *US – Stainless Steel*, para. 7.131; and Appellate Body Report, *US – Stainless Steel*, para. 120; (iii) and on "mathematical equivalence", Appellate Body Report, *US – Zeroing (Japan)*, paras. 133 – 135; Appellate Body Report, *US – Softwood Lumber V (21.5)*, paras. 97 – 100; Appellate Body Report, *US – Stainless Steel*, paras. 126 – 127; Appellate Body Report, *US – Continued Zeroing*, para. 297.

[19] Appellate Body Report, *US – Continued Zeroing*, para. 340.

Third Administrative Review (Exhibit BRA-25), although without explanation.[20] Fischer received the log in Exhibit BRA-25 directly from the USDOC, as evidenced by USDOC's email that Brazil submits as Exhibit BRA-46.

B. CUTRALE'S FIRST AND FISCHER'S SECOND ADMINISTRATIVE REVIEWS

12. The US argues that Brazil has not met its burden of proving that zeroing was applied to, or had an impact on, the margin of dumping for Cutrale in the First Review, because the USDOC determined a margin of dumping lower than the US *de minimis* threshold. The US makes similar arguments regarding Fischer in the Second Review, because the cash deposit and importer-specific assessment rates were zero. The US is wrong on a number of counts.

13. *First*, as a matter of law, the *use* of zeroing is, in itself, sufficient to establish a violation of the *Anti-Dumping Agreement* and the GATT 1994.[21]

14. In this dispute, the use of zeroing to calculate margins of dumping in administrative reviews violates Articles 2.4 and 9.3 of the *Anti-Dumping Agreement*, and Article VI:2 of the GATT 1994. Brazil has already presented arguments on Article 9.3 and Article VI:2[22], and now presents arguments based on Article 2.4.[23] The Appellate Body has held that, as a "*way of calculating*" margins, the zeroing methodology "cannot be described as impartial, even-handed, or unbiased", because it necessarily excludes any negative comparisons results.[24] The Appellate Body has, therefore, ruled that the "maintenance" of zeroing procedures in administrative reviews is inconsistent with Article 2.4 of the *Anti-Dumping Agreement*.[25] Consequently, by including zeroing in its methodology for determining margins of dumping in the administrative reviews at issue, the US failed to conduct a "fair comparison".

15. Brazil has established that the USDOC *used* zeroing for Cutrale's determination in the First Review, and for Fischer's determination in the Second Review[26], and the US does not contest this. As a result, the US violated Articles 2.4 and 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 in its dumping determinations for Cutrale in the First Review, and for Fischer in the Second Review.

16. Moreover, even though it was not required to do so, Brazil has also shown that the use of zeroing had an *impact* on the USDOC's calculation.[27] The logs and outputs for Cutrale and Fischer show that the vast majority of export transactions – in number, volume and value – generated negative comparison results, but were excluded from the calculation of the margins of dumping.[28] These facts provide an illustration of the "inherent bias in a zeroing methodology".[29]

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[20] US FWS, footnote 145.

[21] *See, e.g.*, Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162.

[22] Brazil's FWS, paras. 62 – 76 and 97.

[23] Brazil's panel request, p. 3, includes claims under Article 2.4.

[24] Appellate Body Report, *US – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 142. *See also* Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 138; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[25] Appellate Body Report, *US – Zeroing (Japan)*, paras. 169 and 190(d).

[26] As explained in detail in Exhibit BRA-31.

[27] This is explained in detail at paras. 35 – 38 and 40 – 44 of the Ferrier Affidavit. Exhibit BRA-31.

[28] For Cutrale, Exhibit BRA-29, p. 63 and Exhibit BRA-34, last page. For Fischer, Exhibit BRA-38, p. 76 and Exhibit BRA-39, last page. *See also* Exhibit BRA-31, paras. 38 and 56.

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

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17. The resulting overall weighted average margin of dumping for Cutrale in the First Review was 0.45 per cent, and not zero.[30] Furthermore, also using zeroing, the USDOC determined an importer-specific assessment rate for Cutrale's goods that above the US *de minimis* threshold, with anti-dumping duties collected at that rate.[31] Thus, zeroing had an impact on the calculation, and also led to the collection of duties where none would have otherwise been collected. For Fischer in the Second Review, the tiny minority of sales with a positive comparison result generated a positive margin, albeit a small one, of 0.002 per cent[32], whereas without zeroing the margin would not have been positive.

C. EXISTENCE OF THE CONTINUED USE MEASURE

18. The US argues that Brazil has not proven the existence of the Continued Use measure to the standard set out in *US – Continued Zeroing*. In that case, the Appellate Body sought to complete the analysis on the continued use measures, which the panel had ruled to be outside the terms of reference. The Appellate Body found that the existence of continued use of zeroing in a specific anti-dumping case was established when it was proven that the zeroing methodology had been used, without interruption, in different types of proceedings over an extended period of time[33], or in other words, when there was a "density of factual findings"[34] showing that zeroing had been used in successive proceedings in the same case.

19. In this dispute, Brazil has shown that zeroing has been used by the USDOC at *every available opportunity* under the Order in proceedings extending over five years from the original investigation, initiated in February 2005, through the First and Second Reviews, to the preliminary determination in the Third Review in April 2010. Furthermore, in its Issues and Decision Memoranda under the Order, the US affirmed its continued use of zeroing in administrative reviews, stating expressly that its zeroing policy in reviews is unchanged despite WTO rulings.[35] These Memoranda show that the use of zeroing continues to be part of the USDOC's calculation methodology. In sum, there is the required "density" of facts.

20. The US also repeats its arguments on the impact of zeroing. However, the conduct at issue is the continued *use* of zeroing over time, and not the continued *impact* of zeroing. It is well-established that, irrespective of the impact of zeroing, it is contrary to WTO law to maintain zeroing procedures to calculate margins, whether for their continued use in proceedings under specific anti-dumping orders[36] or for their continued use in anti-dumping proceedings generally.[37] The Appellate Body reached this conclusion in reply to a similar US argument made in *US – Continued Zeroing*.[38]

21. The US arguments that the Second and Third Review are outside the panel's terms of reference are, in this context, irrelevant, because with regard to the Continued Use measure, these reviews serve as *evidence* of the continued use of zeroing.

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[30] Exhibit BRA-34, p. 93, "wt avg percent margin". *See also* Exhibit BRA-20.
[31] Exhibit BRA-34, p. 92, "percent ad valorem assessment".
[32] Exhibit BRA-39, p. 106, right-most column "Wt avg percent margin".
[33] Appellate Body Report, *US – Continued Zeroing*, para. 195. The Appellate Body also explained that the approach it was taking was "cautious", because the panel had failed to make findings on continued use, and the Appellate Body has no mandate to find facts.
[34] Appellate Body Report, *US – Continued Zeroing*, para. 191.
[35] Exhibit BRA-28, pp. 5 – 6; and Exhibit BRA-43, pp. 4 – 6.
[36] Appellate Body Report, *US – Continued Zeroing*, paras. 199 and 395(a)(v).
[37] Appellate Body Report, *US – Zeroing (Japan)*, paras. 166, 169 – 170, 190(c) and 190(d).
[38] Appellate Body Report, *US – Continued Zeroing*, para. 192.

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ANNEX C-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

1. The United States would like to focus on a few points concerning Brazil's arguments. First, we will discuss how Brazil is improperly trying to include measures that fall outside of the scope of the Panel's terms of reference. Second, we will refute Brazil's claims that the United States has acted inconsistently with obligations under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). A plain reading of the text of those agreements makes clear that there is no obligation to provide offsets outside of the context of average-to-average comparisons in original investigations. Reading the text to impose such obligations would render certain provisions of the Antidumping Agreement meaningless. In addition, with respect to the challenged "continued use" of "zeroing", Brazil has failed to show any basis for concluding that such alleged "ongoing conduct" exists, or any basis for a dispute settlement panel to make findings based on speculation about what measure may or may not exist in the future.

2. We recognize that this is not the first time a dispute settlement panel has considered the issue of "zeroing," that is, the alleged obligation to provide offsets for non-dumped transactions. On the one hand, the Appellate Body has found in other disputes that "zeroing" in Article 9 assessment proceedings is inconsistent with provisions of the Antidumping Agreement and the GATT 1994. Reliance upon those findings is the basis of Brazil's claims. On the other hand – as panels have found in those disputes, and as discussed fully in the US first written submission – there is no textual basis for imposing the obligations that Brazil suggests. Consistent with the standard of review provided for in Article 17.6 of the Antidumping Agreement, and the responsibilities of panels provided for in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), we ask this Panel to remain faithful to the text of the negotiated agreements and refrain from making the findings that Brazil suggests.

Standard of Review

3. Article 11 of the DSU generally defines a panel's task in reviewing the consistency with the covered agreements of measures taken by a WTO Member. In a dispute involving the Antidumping Agreement, a panel must also take into account the standard of review set forth in Article 17.6(ii) with respect to various permissible interpretations of a provision of the Antidumping Agreement.

4. 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 that interpretation consistent with the Agreement.

5. Under Article 11 of the DSU, this Panel is charged with making an objective assessment of the matter before it, including an objective assessment of the facts and the conformity of the challenged measures with the relevant covered agreements, applying the customary rules of interpretation. The Panel cannot make findings or recommendations that add to or diminish the rights and obligations provided in the covered agreements.

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6. The United States is aware that the Appellate Body has rejected the view that the covered agreements do not impose an obligation to provide offsets in assessment reviews. However, the fact that for the Appellate Body there is an interpretation under which there would be an obligation to provide offsets is not a basis for concluding that no other interpretation is permissible. The very inclusion of Article 17.6(ii) confirms that the text of the Antidumping Agreement may be susceptible to more than one interpretation. To find that it is not possible to find that there are conflicting interpretations of the text would mean depriving the second sentence of Article 17.6(ii) of meaning. If the permissible interpretations are all "harmonious", then it is difficult to see how a measure could be in conformity with only one of the interpretations. And it is not surprising that the Antidumping Agreement could be subject to more than one permissible interpretation. For example, in many instances, the text was drafted to cover varying and complex antidumping systems around the world. A number of previous panels that considered the issue have found that the interpretation that there is no obligation to provide offsets beyond the context of the average-to-average comparison methodology in investigations rests on a permissible interpretation of the Antidumping Agreement. It is difficult to understand how, if these various panels found that this interpretation is permissible, then it is not permissible.

Scope of this Dispute

7. The United States has requested a preliminary ruling that two of the measures identified in Brazil's panel request are outside the Panel's terms of reference.

8. Brazil suggests that the scope of a dispute includes any measure, adopted at any time (from before consultations through implementation), as long as the measures share the same "essence" or "close substantive connections" and together "manifest a common 'problem' that the complaining Member's claims are seeking to 'fix'". Such a sweeping approach is not based in the text of the DSU.

9. The Appellate Body has explained that the identification in a panel request may be considered to include subsequent measures in more limited circumstances, namely where those measures do not change the essence of the measure properly identified in the panel request. However, this is not the case here. Each administrative review is separate and distinct from the reviews that proceed or follow it. The second administrative review is not a measure with the same "essence" as the first administrative review. It is a distinct measure dealing with different entries during a different period of time with different results. The final results of one administrative review do not apply to entries of merchandise for any other review. The fact that the second administrative review is a distinct measure is confirmed by Article 17 of the Antidumping Agreement which requires that there have been "final action" to "levy antidumping duties". The "final action" under the second administrative review is distinct from the "final action" under the first administrative review.

10. In addition, with respect to Brazil's claims concerning the "continued use of the US 'zeroing procedures'", this is not a "measure" that even exists. Brazil purports to include in this "measure" an indefinite number of future proceedings, none of them in existence. Any findings with respect to any such hypothetical future measure would be based only on speculation. It is not possible to have consulted on a measure not in existence or to "identify" a "specific" non-existent measure, and any findings based only on speculation could not comport with an "objective assessment" of the matter.

11. Moreover, the "essence" of a non-existent measure is nothing but speculation. In that vein, it should be noted that, apart from the *US – Zeroing II* dispute, the cases cited by Brazil in support of its broad approach to a panel's jurisdiction address situations in which the challenged "future" measures were in fact in existence, such that there was a measure that the panel could evaluate. This is not the case here with respect to the "continued use of the US 'zeroing procedures'". Rather, Brazil requests the Panel to speculate as to whether any such measure will come into existence, what that measure will consist of, and find inconsistent an indefinite number of measures that do not exist. It is not

known whether any of these hypothetical future measures will even reflect "use of the US 'zeroing procedures'". For example, there may be no negative value comparisons that could be "zeroed", such that neither the margin of dumping nor the duties assessed will reflect "zeroing". (Indeed, as discussed in our first written submission, the facts Brazil itself presents bear this out.) The Panel of course is unable to analyze any such future measure since there are no details or specifics to analyze.

12. Brazil's assertion that such an indeterminate measure could be within a panel's terms of reference is based on the reasoning of the Appellate Body in the *US – Zeroing II (EC)* dispute. As just explained, however, we fail to see how a reference to the "continued use of the US 'zeroing procedures' in successive anti-dumping proceedings" can in any way meet the requirement of Article 6.2 of the DSU to identify the specific measures at issue. Whether something is a "measure" goes to the very question of what a Member may challenge under the DSU, and therefore what may fall within a panel's terms of reference. If something is not a "measure", then it is not, and cannot be, a measure "specifically" identified within the meaning of Article 6.2. Brazil may wish to be free of needing to provide evidence as to the existence, content, and relationship of any future measure to the WTO agreements, but that is not consistent with the WTO dispute settlement system.

13. Furthermore, Article 17.4 of the Antidumping Agreement provides that, if consultations have failed, and if "final action" has been taken by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings, a Member may refer "the matter" to dispute settlement. At the time of Brazil's consultations request, neither the second administrative review nor the alleged "continued use of the US 'zeroing procedures'" involved a final action to levy definitive antidumping duties or accept price undertakings. (While provisional measures may also be challenged in certain circumstances, Brazil has made no allegations in this regard.) Including the second administrative review and "continued use" within the terms of reference would ignore the fact that, for any given importation, the imposition of antidumping duties is grounded in a specific final action.

14. The United States first requests a preliminary ruling that the "Second Administrative Review", which appeared in Brazil's panel request but was not the subject of consultations, is outside the Panel's terms of reference. Under Article 7.1 of the DSU, the measures within a panel's terms of reference are determined by the complaining party's request for the establishment of a panel. Article 6.2 in turn provides that a panel request must "identify the specific measures at issue" in a dispute. Under Article 4.7, however, a Member may not request the establishment of a panel with respect to any measure, but only with respect to a measure that was subject to consultations. Article 4.4 requires that the request for consultations state the reasons for the request, "including identification of the measures at issue and an indication of the legal basis for the complaint". As the United States explained in its first written submission, the Antidumping Agreement contains parallel requirements in Articles 17.3 through 17.5.

15. The covered agreements therefore establish a clear progression between the measures that are discussed in consultations conducted pursuant to Article 4.4 of the DSU and the measures identified in a request to establish a panel, which, in turn, form the basis of the panel's terms of reference. This is not a question of form over substance. Under the relevant provisions in the DSU and the Antidumping Agreement just discussed, a panel's terms of reference cannot include measures that were not the subject of a request for consultations.

16. Brazil seeks to include the second administrative review in this dispute. However, the final determination in the second administrative review was issued after Brazil's request for consultations, and even after those consultations were held. It was not, and could not have been, the subject of consultations and is therefore outside this Panel's terms of reference. Brazil's argument to the contrary is based on its assertion that the second administrative review "has the same essence as" the first administrative review. However, as explained earlier, the second administrative review is not

essentially the same measure as the first administrative review, and is not within the scope of this dispute.

17. The United States also asks that the Panel find that Brazil's reference in its panel request to the "continued use of the US 'zeroing procedures' in successive anti-dumping proceedings" does not meet the specificity requirement of DSU Article 6.2. As noted above, by including this purported "measure" in its panel request, Brazil is merely speculating as to what might happen in the future, and speculation as to what might happen is not identification of a specific measure.

18. In addition, Article 3.3 of the DSU contemplates the "prompt settlement of situations where a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being impaired*" by another Member's measures. While it appears that Brazil is challenging an indeterminate number of future measures by identifying "the continued use" in its panel request, a non-existent measure cannot be impairing any such benefits and cannot fall within the scope of a dispute.

19. Finally, we note that Brazil makes repeated references to what it suggests is the desired remedy in this dispute as justifying the expansion of the scope of this proceeding. First, there have been no recommendations and rulings yet in this dispute. Moreover, a Member's desired remedy (whatever that may be) does not dictate a panel's jurisdiction and does not provide a basis for departing from the requirements of the DSU. In determining its terms of reference, a panel does not start from what the complaining Member describes as the appropriate relief and work backwards. Rather, the Panel should be guided by the requirements of the DSU, including the requirement to identify the specific measures at issue.

The Claimed Obligation to Provide Offsets

20. We now turn to comments related to Brazil's argument that the Antidumping Agreement contains an obligation to provide offsets for instances of non-dumping in the context of assessment proceedings. Brazil argues that the Antidumping Agreement imposes on Members an obligation to provide an offset to dumping in all types of antidumping proceedings, including assessment proceedings. The key issue here is whether the text of the Antidumping Agreement actually contains such an obligation that applies in assessment proceedings. The starting point must be what the text of the Agreement actually says. It is fundamental that a treaty interpreter must not impute into an agreement words and obligations that are not contained in the text. But, in this dispute, Brazil asks this Panel to read an obligation into the Antidumping Agreement, notwithstanding the fact that there is no textual basis for the obligation that Brazil proposes.

21. In particular, Brazil seeks to infer an obligation to reduce antidumping duties to account for instances of non-dumping. This treats non-dumped imports as though they were a remedy for dumped imports. Brazil does so despite the fact that there is no textual basis for such an obligation and that there is a permissible interpretation of the Antidumping Agreement that does not require such offsets.

22. In the disputes that have addressed this issue, the only textual basis panels have identified for an obligation to provide offsets has been the "all comparable export transactions" language in the text of Article 2.4.2 of the Antidumping Agreement. This is entirely consistent with the approach articulated by the Appellate Body in *US – Softwood Lumber Dumping*. The phrase "all comparable export transactions" in Article 2.4.2 applies only to antidumping investigations and only when authorities use average-to-average comparisons pursuant to Article 2.4.2. Panels have consistently characterized as persuasive the argument that the obligation to provide offsets applies only as a consequence of the text-based obligation to include all comparable export transactions when making weighted-average to weighted-average comparisons in an investigation. With respect to the argument

that there is an obligation to provide offsets outside this context, the panels addressing this question have consistently reasoned that there is no textual basis for such an obligation. The analysis offered by the prior panels is persuasive and correct.

23. Article 2.4.2 provides for three different types of comparisons: two symmetrical comparison types, average-to-average and transaction-to-transaction; and a third asymmetrical comparison type, average-to-transaction, which may be used under certain conditions. With respect to the average-to-average comparisons, the phrase "all comparable export transactions", as interpreted by the Appellate Body in *US – Softwood Lumber Dumping*, addresses whether the relevant comparison may be made at the level of averaging groups (or "models"). Under this reading, the word "all" in "all comparable export transactions" refers to all transactions across all models of the product under investigation. This is the textual basis for the conclusion that margins of dumping based on average-to-average comparisons must relate to the "product as a whole", rather than individual averaging group comparisons. This phrase, "all comparable export transactions", however, applies only to the use of average-to-average comparisons in an investigation. It does not apply to the use of transaction-to-transaction or average-to-transaction comparisons. Such comparisons will necessarily result in multiple comparisons where there are numerous transactions because each export transaction will result in its own separate comparison. The text of Article 2.4.2 does not address whether or how a Member should aggregate the results of such multiple comparisons into a single overall margin of dumping.

24. A general prohibition of zeroing that applies in all proceedings and with respect to all comparison types would negate and contradict the interpretation of the phrase "all comparable export transactions" that was the basis of the obligation to provide offsets in the context of average-to-average comparisons, and for the conclusion that the margin of dumping must be calculated for "the product as a whole".

25. Brazil argues that margins of dumping calculated in assessment proceedings must relate to the "product as a whole", and cannot be calculated for individual transactions. However, "product as a whole" is not a term found in the Antidumping Agreement, nor does it have any defined meaning. Furthermore, to the extent the concept of "product as a whole" has any relevance to the Antidumping Agreement, it is only as a shorthand for the operation of the phrase "all comparable export transactions" in the context of average-to-average comparisons in investigations. Brazil's argument relies entirely on the concept of "product as a whole" being applied in a manner detached from that underlying textual basis.

26. Brazil offers no textual analysis to support its claim that offsets are required by Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994. This is because the text of these provisions defines and describes dumping as occurring in the course of individual commercial transactions. Prices are generally set in individual transactions, and products are "introduced into the commerce" of the importing country in individual transactions. In other words, dumping – as defined under these provisions – may occur in a single transaction. This is entirely consistent with the exporter-specific understanding of dumping because individual transactions are also exporter-specific. There is nothing in either the GATT 1994 or the Antidumping 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. To the extent that some transactions introduce merchandise into the market of an importing country at a price above normal value, this benefits the seller, but does not undo the effects on the domestic industry of other (dumped) transactions made at less than normal value.

27. Nevertheless, Brazil asserts that dumping and margins of dumping "are defined in relation to a product under investigation as a whole, encompassing all of the export transactions of the product pertaining to an investigated exporter, and they cannot be found to exist only for a type, model, or category of that product". The Appellate Body reports relied upon by Brazil for this proposition are

unpersuasive because they cannot alter the simple fact that the relevant text of these provisions, the relevant context for interpreting the meaning of these terms, and the well-established prior understanding of these concepts all confirm that dumping and margins of dumping do have a meaning in relation to individual transactions. Our written submission sets forth the textual, contextual, and other evidence that the concepts of dumping and margins of dumping, as defined in the Antidumping Agreement and GATT 1994, are applicable to individual transactions. That evidence establishes that the terms dumping and margins of dumping as used in Article 2.1 of the Antidumping Agreement and Article VI of the GATT 1994 do not support the existence of an obligation to provide offsets for instances of non-dumping in assessment proceedings.

28. Brazil has not demonstrated any inconsistency with Article 9.3 of the Antidumping Agreement or Article VI:2 of the GATT. Article 9.3 requires that the amount of the antidumping duty assessed shall not exceed the margin of dumping. The term "margin of dumping" may be applied to individual transactions. Individual transactions are both the means by which less than fair value prices are determined and by which the product is introduced into commerce. Antidumping duties are similarly assessed on individual entries resulting from those individual transactions. The obligation in Article 9.3 to assess no more in antidumping duties than the margin of dumping, just like the term "margin of dumping" itself, may be applied at the level of individual transactions.

29. In this same vein, Brazil attempts to tie an obligation to provide offsets to a determination of injury, arguing that "injury cannot be found to exist in relation to an individual transaction, but only for the *product as a whole*". However, Brazil's argument actually reinforces the interpretation that any such obligation would be limited to the context of investigations because, in contrast to investigations, there is no obligation to address the existence of injury in Article 9.3 duty assessment proceedings.

30. In addition, Brazil's interpretation of Article 9.3, requiring that antidumping duty liability be determined for the product "as a whole", cannot be reconciled with the specific provision in Article 9 that recognizes the existence of prospective normal value systems of assessment. Under such systems, 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. If the margin of dumping must relate exclusively to the "product as a whole", as Brazil argues, the administration of such an assessment system is an impossibility. This is because, among other reasons, future transactions that would need to be taken into account in such a margin of dumping would not yet have occurred. An obligation to account for other imports in assessing antidumping duties on a particular entry is contrary to the very concept of a prospective normal value system and, if accepted, would effectively render prospective normal value systems WTO-inconsistent unless they were converted to a retrospective system by adopting periodic retrospective assessment reviews.

31. Antidumping duties are applied at the level of individual entries for which importers incur the liability. An importer's cost of acquiring the entered merchandise is the sum of the dumped price and the antidumping duty. Accordingly, the importer has an incentive to raise resale prices to cover the full normal value of the merchandise, thereby providing an effective remedy for the dumping. The antidumping duty will be insufficient to have this effect if, instead, the amount of the duty must be reduced to account for the amount by which some other transaction was sold at above normal value, possibly involving an entirely different importer. The importer would remain in a position to profitably resell the exporter's dumped product at a price that continues to be less than normal value. If Brazil's reading of "margin of dumping" is accepted as the sole permissible interpretation of Article 9.3, the remedy provided under the Antidumping Agreement and the GATT 1994 will be prevented from fully addressing dumping.

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31. In addition, as the panel in *US – Softwood Lumber Dumping (21.5)* observed, and as described in detail in our written submission, providing offsets creates perverse incentives and "absurd results" that undermine the remedial effect of antidumping duties.

32. Any interpretation that gives rise to a general prohibition of zeroing also renders the second sentence of Article 2.4.2 inutile. This is because the exceptional methodology provided for in Article 2.4.2 mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons.

Brazil has not satisfied its Burden of Proving that "Zeroing" was applied to, or had an Impact on, the challenged Margins of Dumping

34. As detailed in our first submission, Brazil has also failed to make a *prima facie* case as to the facts for certain of its claims. Brazil has challenged the calculation of dumping margins determined for two respondents, Fischer and Cutrale, in two administrative reviews. However, aside from the fact that the second administrative review is outside the Panel's terms of reference, in each of the reviews, the margin was zero or *de minimis* for one of these two respondents. Consequently, Brazil cannot establish that the margin should have been any lower to be consistent with the covered agreements.

35. Also, with respect to the assessment for Fischer in the first administrative review, the exhibits Brazil submitted in support of its claim with its first written submission are not the actual computer program logs created by Commerce.

The "Continued Use of the US 'Zeroing Procedures'"

36. Brazil's claim with respect to the "continued use of the US 'zeroing procedures'" should also be rejected. Aside from the fact that this alleged "measure" is outside the Panel's terms of reference, as explained in our first written submission, even were there an obligation to provide offsets outside the context of average-to-average comparisons in investigations, there is no basis for concluding that such "continued use" constitutes "ongoing conduct" that violates Article VI:2 of the GATT 1994 or Articles 2.4.2 and 9.3 of the Antidumping Agreement.

37. First, Brazil's own evidence refutes its claim that "zeroing" had any impact on the dumping margins in the original investigation. As such, even applying Brazil's interpretations of the relevant provisions of the covered agreements, there is no basis for finding the margins in the original investigation were inconsistent with any provision of the covered agreements.

38. The evidence with respect to each of the first and second administrative reviews also undermines Brazil's claims regarding the alleged "continued use" of "zeroing." One of the two companies reviewed had a *de minimis* margin in the first administrative review, which Commerce essentially treats as zero. One of the two companies reviewed had a zero margin in the second administrative review.

39. Thus, each of the proceedings concluded to date in the orange juice case – the investigation, the first administrative review, and the second administrative review – include margins that were not impacted (or "inflated") by "zeroing". As explained in our submission, this does not reflect a sequential string of determinations applying "zeroing", contrary to Brazil's assertion. It does not provide a basis for in turn projecting that the United States will act inconsistently in the future with respect to measures that may never come into existence.

40. As noted in our first written submission, our experience in the *US – Zeroing II (EC)* dispute demonstrates further that there is no basis to assume that "zeroing" will be used in any antidumping proceeding. In that dispute, the Dispute Settlement Body adopted recommendations and rulings with

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respect to the use of "zeroing" in four original investigations. Commerce then issued new determinations with respect to those four investigations. In doing so, however, Commerce discovered that in three of the four investigations there were no offsets to provide (that is, there was no "zeroing") because all of the comparisons demonstrated dumping, or the rates determined in the original determinations were based upon facts available rates that did not involve "zeroing". As such, the dumping margins did not change in Commerce's new determinations. Accordingly, among the many problems under Brazil's approach would be the fact that 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 that condition were fulfilled – that is, if zeroing were in fact used in any individual proceeding.

41. As noted in our first written submission, we have serious concerns about the approach taken by the Appellate Body in the *US – Zeroing II (EC)* dispute. However, because Brazil relies heavily upon the Appellate Body's reasoning in that dispute, it bears repeating that, as a factual matter, there is no basis for such an approach in this case. The facts of this case are not "virtually identical" to the cases in that dispute found to be WTO-inconsistent. They are instead more similar to the cases where the evidence was considered insufficient to support such a finding.

42. In summary, even were the alleged "continued use of the US 'zeroing procedures'" within the Panel's terms of reference, Brazil has failed to establish that any such "ongoing conduct" exists or is likely to continue into the future. Brazil has not and cannot demonstrate a basis for concluding that any measures that may come to be with respect to imports of orange juice will involve the application of "zeroing" and be inconsistent with the covered agreements.

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ANNEX C-3

CLOSING STATEMENT OF BRAZIL AT THE FIRST MEETING OF THE PANEL

1. Mr. Chairman, Members of the Panel, Brazil thanks you for the opportunity to appear before you and answer your questions.

2. During the hearing yesterday, we heard opposing interpretations of the foundational terms "dumping" and "margin of dumping" in the *Anti-Dumping Agreement* and Article VI of the GATT 1994. According to Brazil, these concepts are defined by reference to the product as a whole. According to the United States, they are sufficiently "flexible" that they may be defined in relation to: the "product" as a whole; individual transaction; or, even a combination of these different conceptions.

3. Brazil takes the view that the meaning given to these terms must be based on the text, context, object and purpose of the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994. The treaty interpreter must strive for an interpretation that "is harmonious and coherent and fits comfortably in the treaty as a whole".[1] Brazil also notes that the terms at issue have been interpreted numerous times in previous disputes concerning zeroing. The Appellate Body has now clarified the interpretation of these terms beyond any reasonable doubt. An important part of ensuring "security and predictability"[2] through the dispute settlement system is that panels must, in making an objective assessment under Article 11 of the DSU, follow the Appellate Body's rulings when the same legal questions are presented. Brazil, therefore, urges the Panel to adopt the interpretation of "dumping" and "margin of dumping" that the Appellate Body has given.

4. Yesterday, we also had a discussion on the relevance of the impact of zeroing to Brazil's claims. Brazil argues that the *use* of zeroing is prohibited, irrespective of its particular impact. In previous disputes, the use and maintenance of zeroing has been found to be WTO-inconsistent in original investigations and administrative reviews, irrespective of the impact of zeroing.[3]

5. The Panel has also enquired about the impact, "in the real world", of zeroing in the present case. Brazil therefore briefly summarizes the impact of zeroing under the Orange Juice Order.

6. *First*, the use of zeroing under this Order has resulted in the determination of positive margins in the administrative reviews completed so far under the Orange Juice Order, where there would have been negative margins had zeroing not been used.

7. *Second*, the use of zeroing under the Orange Juice Order has resulted in the imposition of duties, where no duties would have otherwise been imposed. Cutrale and Fischer have so far incurred final anti-dumping duty liabilities of [[XX]] million US dollars, whereas they would have owed zero duties had the United States not used zeroing. Thus, "in the real world", zeroing has enabled the imposition of significant amounts of duties on Brazil's exports.

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[1] Appellate Body Report, *US – Continued Zeroing*, para. 268.

[2] Article 3.2 of the DSU.

[3] *See, e.g.*, Panel Report, *US – Zeroing (Japan) (21.5)*, para. 7.162 and 8.1(b); Appellate Body Report, *US – Zeroing (Japan)*, paras. 190(b) and (c) ; Appellate Body Report, *US – Continued Zeroing*, para. 395(a)(v), second indent.

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8. *Third*, under US law, the USDOC routinely terminates an anti-dumping order for any exporter that has zero margins in three consecutive administrative reviews.[4] Under the Orange Juice order, Cutrale and Fischer would both have had consecutive zero margins in the first two administrative reviews, with the final results of the third due in August 2010. Had the United States not used zeroing, the Brazilian exporters could now expect termination of the Order. Thus, "in the real world", zeroing perpetuates the duration of the order.

9. To answer the Panel's enquiry, the use of zeroing has a significant "real world" impact on the Brazilian exporters covered by the Order.

10. As regards Brazil's continued use claim, the United States goes not much further than to say that this "ongoing conduct" is based on "speculation". Brazil need only remind the Panel of the latest Issues and Decision Memorandum relative to the Orange Juice Order at issue, where the USDOC restates its position of maintaining the zeroing methodology.[5] That is indeed a new meaning to the word "speculation", especially in light of the facts in this dispute, where the "density" of facts is beyond doubt, not fragmented, and where zeroing is about to be re-used in the Third Administrative Review.

11. Finally, the continued used claim, already accepted by the Appellate Body[6], allows Members to avoid being victims of the "moving target" and "hit and run" scenarios typical of measures that are sequential over time.

12. Mr. Chairman, Members of the Panel, staff of the Secretariat, Brazil once again thanks you for this opportunity and for your hard work in this dispute.

[4] 19 C.F.R. § 351.222(b), available at http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=68qIUf/103/2/0&WAISaction=retrieve.

[5] Exhibit BRA-43, pp. 4 – 6, "Department's Position".

[6] *See* Appellate Body Report, *US – Continued Zeroing*, para. 185.

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ANNEX C-4

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

Mr. Chairman, members of the Panel:

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

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

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

4. Turning to the issues of interpretation, Brazil argues that the term "margin of dumping" must always relate to the "product as a whole" regardless of the context in which the term is used. At the same time, Brazil also asserts, "The fact that the same word appears in two (or more) proximate treaty provisions does not mean that the word carries the same meaning in each provision ... a single word used in two provisions may have different meanings in each provision, depending upon the context". The United States agrees that context matters. As we have explained, the precise meaning of the term "margin of dumping" may be informed by the context in which the term is used. The terms "dumping" and "margin of dumping" are defined in relation to the term "product". The ordinary meaning of "product" may refer to a single transaction, or multiple transactions, or both. For example, in Article II of the GATT 1994, the term "product" is used, including with respect to the imposition of an antidumping duty on a "product" "at the time of importation". Clearly, Article II is using "product" in the sense of an individual transaction and not in the sense of "product as a whole". No one has argued that tariffs on a product can exceed the bound rate for some transactions as long as they are below the bound rate in enough other transactions such that the average does not exceed the bound rate.

5. In particular, contrary to Brazil's assertion at paragraph 20 of its opening statement, the United States agrees that in the context of Article 5.8 the margin of dumping may refer to an aggregation of multiple transactions. Article 6.10 concerns the question of what information should

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

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

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

8. Under Brazil's interpretation, a prospective normal value assessment system necessarily requires retrospective reviews on the basis of the aggregation of transactions because the margin of dumping for the "product as a whole" can never be known at the time of importation. Nothing in the text of Article 9, however, suggests that the refund proceeding described therein necessarily must relate to an aggregated examination of all transactions. Nor does Brazil attempt to explain why, if refund proceedings under Article 9.3 require aggregation of transactions for the "product as a whole", Article 9.3 fails to provide for any time frame over which the transactions would be aggregated.

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

10. In its opening statement, Brazil categorically asserts that "the same legal questions must be resolved in the same way in subsequent disputes". On the contrary, the authority to adopt interpretations of the covered agreements rests exclusively with the Ministerial Conference and the General Council.[1] Therefore, while the dispute settlement system serves to resolve a particular

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

dispute, and to clarify agreement provisions in the context of doing so, neither panels nor the Appellate Body can adopt authoritative interpretations that are binding with respect to another dispute.

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

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

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

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

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