

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

**(WT/DS382)**

**Answers of the United States of America  
to Questions from the Panel to the Parties  
in connection with the Second Substantive Meeting of the Panel**

**October 29, 2010**

### Table of Reports

<b>Short Form</b>	<b>Full Citation</b>
<i>Argentina – Poultry (Panel)</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>EC – Audio Cassettes</i>	GATT Panel Report, <i>European Communities – Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan</i> , ADP/136, circulated 28 April 1995 (unadopted)
<i>EC – Bed Linen (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R
<i>EC – Bed Linen (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001
<i>EC – Cotton Yarn</i>	GATT Panel Report, <i>EC – Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil</i> , ADP/137, adopted 30 October 1995
<i>US – Anti-Dumping Measures on PET Bags (Panel)</i>	Panel Report, <i>United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand</i> , WT/DS383/R, adopted 18 February 2010
<i>US – Shrimp (Ecuador) (Panel)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted 20 February 2007
<i>US – Shrimp (Thailand) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Shrimp from Thailand</i> , WT/DS343/R, adopted 1 August 2008, as modified by the Appellate Body Report, WT/DS343/AB/R
<i>US – Softwood Lumber Dumping (AB)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004
<i>US – Softwood Lumber Dumping (Article 21.5) (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to 21.5 of the DSU by Canada</i> , WT/DS264/RW, adopted 1 September 2006, as modified by the Appellate Body Report, WT/DS264
<i>US – Stainless Steel (Panel)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, adopted 20 May 2008, as modified by the Appellate Body Report, WT/DS344/AB/R

<i>US – Zeroing (EC) (Panel)</i>	Panel Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R
<i>US – Zeroing (Japan) (Panel)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by the Appellate Body Report, WT/DS322
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007

## United States

**17. The United States asserts, in paragraph 11 of its Second Opening Statement, that “[t]he major users of dumping remedies continued to use ‘zeroing’ after the agreements came into effect”. Please identify which WTO members the United States is referring to in this statement, and please explain:**

- (i) the extent to which they may or may not have changed their “zeroing” practices in light of the adopted panel and Appellate Body reports concerning “zeroing”; and**
- (ii) why these (or any other) WTO Members may or may not have decided to adopt such changes.**

1. By referencing “major users of dumping remedies,” the United States referred to the practice of denying offsets by the United States, as well as the EU and others. In 1995, the EU had the largest number of initiations of antidumping investigations (33), followed by Argentina (27), South Africa (16), and the United States (14).<sup>1</sup> In subsequent disputes, both the EU and the United States were found to have used “zeroing.”<sup>2</sup> In addition, in *Argentina – Poultry*, a panel applied the rationale of *EC – Bed Linen* to a case where Argentina’s investigating authority “excluded those export transactions with a price that was higher than or equal to the normal value” and calculated the weighed-average export price “using only those transactions with a price lower than the normal value.”<sup>3</sup> The panel concluded that “if zeroing is inconsistent with Article 2.4.2, then Argentina’s practice of totally disregarding certain export transactions [i.e., transactions with a price that was higher than or equal to normal value] would also be inconsistent with Article 2.4.2 because it does not compare the weighted average normal value with the weighted average of prices of *all* comparable transactions.”<sup>4</sup> In that dispute, Argentina stated that its methodology was also used by other WTO Members.<sup>5</sup> The United States is also aware of at least one instance in which South Africa used “zeroing” in an antidumping duty investigation following the Uruguay Round agreements.<sup>6</sup>

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<sup>1</sup> See Statistics on Antidumping: Anti-dumping initiations: by reporting Member, available at [http://www.wto.org/english/tratop\\_e/adp\\_e/ad\\_init\\_rep\\_member\\_e.pdf](http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_member_e.pdf). In recent years, other Members have increasingly used antidumping remedies. For example, the Members reporting the highest number of new initiations during July-December 2008 were India (42), Brazil (16), China (11) and Turkey (10). See “WTO Secretariat reports increase in new anti-dumping investigations”, May 7, 2009, available at [http://www.wto.org/english/news\\_e/pres09\\_e/pr556\\_e.htm](http://www.wto.org/english/news_e/pres09_e/pr556_e.htm).

<sup>2</sup> See e.g., *US – Softwood Lumber Dumping (AB)*, paras. 86-103; *EC – Bed Linen (AB)*, para. 86(1).

<sup>3</sup> *Argentina – Poultry (Panel)*, paras. 7.76-7.77.

<sup>4</sup> *Argentina – Poultry (Panel)*, para. 7.78 (emphasis in the original).

<sup>5</sup> *Argentina – Poultry (Panel)*, Annex B-4 (Replies of Argentina to Questions of the Panel – First Meeting, reply to question 11(b), at B-94).

<sup>6</sup> See Exhibit US-13 (Board of Tariffs and Trade, *Investigation into the Alleged Dumping of Meat of Fowls of the Species Gallus Domesticus, Originating in or Imported from the United States of America: Final Determination*, Report No. 4088 (September 12, 2000)), p. 48 (“In determining the dumping margin the Board

2. It is not surprising that WTO Members continued “zeroing” following the entry into force of the Uruguay Round agreements. As detailed in our First Written Submission,<sup>7</sup> the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement) was negotiated against the background of the Tokyo Round Antidumping Code and the antidumping investigation methodologies of individual Contracting Parties under the Code. The methodology of not offsetting dumping based on comparisons where the export price was greater than normal value was examined by two panels established under the Antidumping Code (*EC – Audio Cassettes* and *EC – Cotton Yarn*) and was found to be consistent with the Code. The Uruguay Round negotiators actively discussed whether the use of “zeroing” should be restricted. However, the text of Article VI of the *General Agreement on Tariffs and Trade* did not change as a result of the Uruguay Round agreements.

3. The United States does not have complete information about how other WTO Members operate their dumping systems, and, without information about the legal basis for these systems and how they are applied, it is difficult to answer the question definitively. That said, as discussed in our prior submissions, countries that assess duties on the basis of prospective normal value (such as Canada and Brazil), assess duties on a transaction-specific basis without reducing the total amount of dumping found on one transaction by the amount by which an export price in another transaction exceeds normal value. If a sale is made at a price equal to or higher than the normal value, no duties are assessed on the importation of the merchandise sold in that transaction. Where the export price is below the normal value, the difference is payable as an antidumping duty on the entry of the merchandise sold at less than normal value in that transaction.<sup>8</sup> The United States is not aware of any instances when Canada or Brazil accounted for non-dumped transactions by granting offsets to reduce the duty imposed on dumped entries.<sup>9</sup>

4. The United States is not in a position to speculate as to why other WTO Members may or may not have decided to adopt changes to their systems, whether in response to WTO Appellate Body reports on “zeroing” or otherwise. Ultimately, the issue in this dispute is whether an

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applied the ‘zeroing’ methodology. . . . This methodology is applied by a number of jurisdictions including the European Union and the United States.”).

<sup>7</sup> See U.S. First Written Submission, paras. 69-72.

<sup>8</sup> *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, para. 5.53 (“Under a prospective normal value duty assessment system, anti-dumping duties are assessed as individual import transactions occur, by comparing a transaction-specific export price against a prospective normal value. . . . In the context of such transaction-specific duty assessment, it makes no sense to talk of a margin of dumping being established for the product as a whole, by aggregating the results of all comparisons, since there is only one comparison at issue.”)

<sup>9</sup> See U.S. Answers to the Panel’s Questions in connection with the First Substantive Meeting, para. 26 and footnote 11 (discussing Exhibit US-6 with respect to “redetermination” procedures in Canada). Unlike Canada, Brazil has apparently never conducted a refund proceeding and, thus, retained all antidumping duties collected without providing offsets by non-dumped comparisons.

obligation to provide offsets by the amount of non-dumped transactions in assessment proceedings exists under the covered agreements. The Dispute Settlement Understanding expressly provides that “in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>10</sup>

5. The Appellate Body found in *US – Softwood Lumber Dumping (AB)*, and several subsequent panels have agreed, that the obligation to provide offsets has a textual basis in the phrase “all comparable export transactions” when interpreted in an integrated manner with the term “margins of dumping” in Article 2.4.2.<sup>11</sup> Each of these panels that considered the issue also found that just as the textual basis for the obligation to provide offsets was limited to the context of average-to-average comparisons in the investigation phase, the obligation to provide offsets is also limited to the context in which that phrase applies. On December 27, 2006, the U.S. Department of Commerce (“Commerce” or “USDOC”) announced that it would not deny offsets in conducting average-to-average comparisons in original investigations effective as of February 22, 2007.<sup>12</sup> In making such comparisons in investigations, Commerce grants offsets for non-dumped comparisons that reduce the total amount of dumping found by the amount by which any comparison reflected an average export price in excess of normal value. And, as we explained in our prior submissions, the covered agreements do not contain an obligation to provide offsets outside of that specific context.

## Brazil

**18. In its answer to Panel Question 3, Brazil asserts that the Appellate Body emphasized, in the US - Shrimp / Bond dispute, that even under United States' law, the role of a cash deposit differs from a security, such as a bond posted pending the issuance of an anti-dumping order. Please explain precisely what it is about United States' law that Brazil considers led the Appellate Body to make the asserted observation?**

**19. Brazil argues (in its answer to Panel Question 3) that a "reasonable security" under the Ad Note to Article VI:2 and VI:3 of the GATT 1994 is a "measure taken by the importing Member to guarantee against the risk of non-payment of anti-dumping duties that are payable in the future". Is Brazil therefore of the view that a security can never be equivalent to and/or take the form of an anti-dumping duty? Please explain your answer.**

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<sup>10</sup> See Article 19.2 of the Dispute Settlement Understanding.

<sup>11</sup> *US – Softwood Lumber Dumping (AB)*, paras. 86-103; *EC – Bed Linen (Panel)*, para. 6.117; *US – Zeroing (EC) (Panel)*, paras. 7.27, 7.271; *US – Softwood Lumber Dumping (Article 21.5) (Panel)*, paras. 5.20, 5.21, 5.28-5.30; *US – Zeroing (Japan) (Panel)*, para. 7.82; *US – Stainless Steel (Panel)*, para. 7.61; *US – Shrimp (Thailand) (Panel)*, paras. 7.33, 7.35; *US – Shrimp (Ecuador) (Panel)*, paras. 7.38, 7.41; *US – Anti-Dumping Measures on PET Bags (Panel)*, paras. 7.22, 7.24.

<sup>12</sup> See Exhibit BRA-10 (*Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dec. 27, 2006)).

## United States

### **20. Please explain the methodology used by the USDOC to calculate cash deposit rates?**

6. The USDOC normally sets cash deposit rates as equal to the amount of the estimated antidumping duties that will be due. In past instances, it has been common to calculate those estimated antidumping duties by dividing the aggregate amount of dumping determined for a specific exporter or producer by the aggregate export prices or constructed export prices of that exporter or producer. In simple terms, the formula for calculating the estimated antidumping duties uses the net *sales* value of all transactions as a denominator. For the numerator, the sum of the amounts by which normal value exceeds export price for each transaction is used as the amount of dumping found. Where the export price exceeds normal value for any transaction, no amount of dumping is found. If the estimated antidumping duties were calculated in a different manner, Commerce would expect to set the cash deposit rate equal to the amount resulting from that different calculation.

7. Cash deposit rates are set prospectively for future entries that have not yet occurred at the time when the cash deposit rate is determined. In the retrospective system used by the United States, the amount of dumping liability, and the antidumping duties, is not known at the time of entry. Accordingly, the cash deposit is a security for payment of antidumping duties. If the cash deposit exceeds the amount of the final liability, the difference is refunded to the importer with interest.

### **21. Assuming the weighted-average margin of dumping determined for an exporter in an administrative review is 0%, what would be the cash deposit rate imposed by the USDOC?**

8. If a zero percent margin is calculated, the cash deposit rate would be zero, and the importers would not be required to post cash deposits for goods from that exporter. A 0% weighted-average margin of dumping reflects that the exporter was not dumping during the period of review. Commerce would then estimate that no antidumping duties would be due in the future (unless and until the exporter in question is found to have a non-*de minimis* margin of dumping in a subsequent administrative review), so no security (cash deposit) would be required for the payment of dumping duties.

### **22. Assuming the USDOC imposes a 0% cash deposit rate, what security, if any, would be requested from importers at the time of entry of subject imports?**

9. The cash deposit is a security for payment of dumping duties. If it is estimated that no antidumping duties will be owed, then the cash deposit rate will be 0% and there will be no security requested for payment of antidumping duties from the importers at the time of entry of subject imports. A 0% cash deposit rate reflects the estimate that no antidumping duties will be

due in the future (unless and until the exporter in question is found to have a non-*de minimis* margin of dumping in a subsequent administrative review). In other words, no security for the payment of dumping duties is required if it is estimated that no duties will be due.

**23. At the Second Substantive Meeting with the Panel, the United States appeared to suggest that even if cash deposits were considered to be anti-dumping duties, their collection in the context of the United States’ retrospective system of collection would not be unlike collecting anti-dumping duties in systems of duty collection applying a prospective normal value. Assuming this to be a correct characterization of the United States’ view, please explain and elaborate what the United States means?**

10. 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. In Brazil’s view, not providing offsets while collecting duties is WTO-consistent because there is a possibility that a subsequent refund review might be initiated upon request. Yet, Brazil also argues that cash deposits in a retrospective system (aside from the fact that they are not antidumping duties) that similarly do not reflect offsets for non-dumped transactions are themselves WTO-inconsistent.

11. However, in a retrospective system, retrospective reviews are conducted to determine the final liability for antidumping duties. Under Brazil’s argument with respect to prospective normal value systems, even if cash deposits were deemed to be duties collected without providing offsets, cash deposits are nonetheless WTO-consistent because there is a possibility of a subsequent review to be initiated upon request. The Antidumping Agreement is neutral with respect to retrospective and prospective assessment systems.<sup>13</sup> Either the possibility of a future review (or refund) would render collection of duties under both retrospective and prospective normal value systems WTO-consistent, or both systems would be WTO-inconsistent.

**24. Does the United States contest Brazil’s assertion that the computer programme log, computer programme output and affidavit evidence it has advanced [ ] demonstrate that the computer programmes used by the USDOC in the Original Investigation and the First, Second and Third Administrative Reviews for each of the two relevant respondents, contained the instruction Brazil characterizes to represent the “zeroing methodology”? If not, please explain why not.**

12. As noted in paragraph 126 of our First Written Submission, the third administrative review is not within the Panel’s terms of reference. In addition, with respect to the affidavits and calculations provided for Fischer in the original investigation (Exhibit BRA-33), these

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<sup>13</sup> See, e.g., *US – Zeroing (Japan) (AB)*, para. 163.

documents were generated by Brazil's consultant, not by USDOC, and only after the USDOC made the relevant final determinations.

13. To the extent that a USDOC-generated computer program log contains a specific line of a computer code, the United States does not contest that the line is present in the computer program. However, if the line itself is conditional, and the necessary conditions are not present, the line of the computer code does not function. As such, it is not used. A computer program can only act on the data that it is given. Depending on that data, any number of instructions may not be used in a given case.

14. In any event, Brazil's own evidence shows that there were no negative comparisons in the investigation on certain orange juice from Brazil. Accordingly, "zeroing", *i.e.*, treating a comparison where the export price exceeds normal value as resulting in no amount of dumping rather than a negative amount of "dumping" while aggregating the comparison results, was not used in the investigation for any of the investigated companies. "Zeroing", and any "zeroing" language in a computer program, is conditional. There is and can be no "zeroing" where there are no comparisons to "zero", and there are no comparisons on which a computer program could act.

## **Brazil**

**25. Brazil argues that the USDOC calculated a weighted average margin of dumping for Fischer in the Second Administrative Review of [ ], and that in the absence of "zeroing", this margin of dumping would have fallen to 0%. Does Brazil make a similar argument with respect to the [ ] importer-specific assessment rate determined for entries of Fischer's products in the same administrative review or is Brazil's complaint in respect of this calculation limited to the alleged use of "zeroing" and not its impact?**

**EXHIBIT LIST**

- US-13 Board of Tariffs and Trade, *Investigation into the Alleged Dumping of Meat of Fowls of the Species Gallus Domesticus, Originating in or Imported from the United States of America: Final Determination*, Report No. 4088 (September 12, 2000)