

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

**(WT/DS382)**

**Comments of the United States of America  
on Brazil's Answers to the Questions from the Panel to the Parties  
in connection with the Second Substantive Meeting of the Panel**

**November 12, 2010**

### Table of Reports

<b>Short Form</b>	<b>Full Citation</b>
<i>US – Continued Zeroing (AB)</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Shrimp (Thailand) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand</i> , WT/DS343/AB/R, adopted 1 August 2008
<i>US – Stainless Steel (AB)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008
<i>US – Zeroing (EC) (AB)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins</i> , WT/DS294/AB/R, adopted 9 May 2006
<i>US – Zeroing (Japan) (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007
<i>US – Zeroing (Japan) (21.5)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009

## 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.**

## 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?**

1. As an initial matter, none of the U.S. laws and regulations cited by Brazil in its response to Question 18 are measures within the Panel’s terms of reference. In any event, the provisions of U.S. laws and regulations cited by Brazil simply reflect the fact that cash deposits are required in an amount equal to the estimated antidumping duty. They do not state or provide that a cash deposit is itself a duty.

2. Brazil argues that a cash deposit lacks the “essential characteristics” of a “security,” based on the report of the Appellate Body in the *Shrimp* dispute. However, as explained at the second substantive meeting with the Panel, Brazil relies on language in that report that reflects an evaluation of the WTO-consistency of an extra bonding requirement that applied *above* cash deposits.<sup>1</sup> The cash deposit is a security for payment of antidumping duties. Indeed, in one of the passages relied on by Brazil,<sup>2</sup> the Appellate Body quotes the panel in the *Shrimp* dispute with

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<sup>1</sup> See, e.g., *US – Shrimp (Thailand) (AB)*, para. 258 (“[A] two-step approach is necessary to assess the ‘reasonableness’ of a security such as the EBR [extra bonding requirement].”); para. 259 (“[W]e agree with the Panel that *additional security* could be taken only: . . . if a Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase (such that the cash deposits provided for in the anti-dumping order would not provide sufficient security for the relevant case of suspected dumping).”) (emphasis added). In contrast, for measures at issue in this dispute, the United States did not impose any extra bonding requirements or require an additional security above the cash deposits.

<sup>2</sup> Brazil’s Response to Question 18, n. 6.

approval, where the panel there was clear that it was referring to the cash deposit as a security.<sup>3</sup> The purpose of the extra bonding requirement at issue in the *Shrimp* dispute, in contrast, 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 exceeded 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.

3. Moreover, the Appellate Body specifically stated in the *Shrimp* dispute that it was not ruling on the question of whether a cash deposit is a “duty” or a “security,” recognizing that doing so was not necessary; cash deposits were “not a measure at issue” in that dispute.<sup>4</sup> Rather, it was considering the WTO-consistency, including the “reasonableness,” of an extra bonding requirement that applied above cash deposits.

4. Brazil’s analysis (including its suggestion that requiring a cash deposit, as opposed to a bond, means that a cash deposit is not a security)<sup>5</sup> ignores the fact that the term “cash deposit” is used in the text of both the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and the *Agreement on Implementation of Article VI of the GATT 1994* (Antidumping Agreement) to refer to a “security,” not a “duty.” Ad Note Article VI of the GATT 1994 provides, “As in many other cases in customs administration, a contracting party may require reasonable security (bond *or* cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.”<sup>6</sup> In the retrospective system used by the United States, the determination of a cash deposit rate does not reflect such a final determination of the facts. Rather, in the context of a retrospective duty assessment system, the “determination of the facts” referenced in the Ad Note is the determination that in Article 9.3.1 of the Antidumping Agreement is referred to as the “determination of final liability for payment of anti-dumping duties.” The amount of the cash deposit results from an estimate of the final liability; it is not itself the final liability. The duties assessed may be less than, equal to, or more than the amount of the cash deposits, based upon the final determination of the facts at the end of an administrative review.

5. Article 7.2 of the Antidumping Agreement likewise distinguishes a “cash deposit” as a form of “security” from “duties” in stating that “provisional measures may take the form of a provisional duty, or, preferably, a security – by cash deposit or bond.” Insofar as it indicates a preference for requiring payment of cash deposits rather than duties, Article 7.2 demonstrates

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<sup>3</sup> *US – Shrimp (Thailand) (AB)*, para. 259 (“[W]e agree with the Panel that additional security could be taken only: . . . if a Member properly determined that the rates of dumping provided for in the anti-dumping order were likely to increase (such that the cash deposits provided for in the anti-dumping order would not provide sufficient security for the relevant case of suspected dumping.)”).

<sup>4</sup> *US – Shrimp (Thailand) (AB)*, paras. 242, 240.

<sup>5</sup> Brazil’s Response to Question 18, para. 9.

<sup>6</sup> Emphasis added.

that there is in fact a substantive difference between a cash deposit requirement and a duty. There is no basis in the text of the covered agreements to conclude that a “cash deposit” is itself a “duty.”

6. Brazil suggests that a determination of the likelihood of an increase in the margin of dumping of an exporter and the likelihood of default, including the creditworthiness and financial condition, of individual importers, is a prerequisite for something to be a security for an antidumping duty.<sup>7</sup> A security for the payment of antidumping duties, after the imposition of the antidumping order, is subject to the limitation in the Ad Note, which, as noted above, 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.”<sup>8</sup> The Ad Note does not specify a particular limit on the amount of security that is “reasonable.” Nor does it state that a Member may collect a security for the payment of antidumping duties only when there is a likelihood of an increase in the margin of dumping and a likelihood of default by specific importers. Contrary to Brazil’s assertion,<sup>9</sup> setting the amount of the security (cash deposit) to cover the amount of estimated dumping duties due on an import does not convert the cash deposit into a duty. If the criteria for collecting antidumping duties have been established, it is reasonable to require a security equal to the estimated amount of duties for future entries.

**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.**

7. Contrary to Brazil’s response to question 19, there is no basis in the text of the covered agreements to conclude that a “cash deposit” is itself a “duty.” If cash deposits were duties, there would be no reason for the text of Article 7.2 and Ad Note Article VI to distinguish between the two. The ordinary meaning of the terms, as well as the text of the agreements, support the conclusion that a “security” is not the same as a “duty.” To read the text to say that cash deposits are duties would not accord with this basic rule of treaty interpretation, namely that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>10</sup>

8. With respect to Brazil’s arguments about the criteria for distinguishing between a security and a duty, please see the U.S. comment on Brazil’s response to Question 18 above.

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<sup>7</sup> Brazil’s Response to Question 18, paras. 4, 13-14.

<sup>8</sup> Emphasis added.

<sup>9</sup> Brazil’s Response to Question 18, paras. 12-13.

<sup>10</sup> Article 31(1) of the Vienna Convention on the Law of Treaties.

## United States

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

## **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?**

9. As an initial matter, the United States notes that – as explained during the first meeting with the Panel and in our first written submission – the Second Administrative Review is not within the terms of reference of this proceeding. In addition, the figure specified in the first set of brackets in Question 25 is not in fact the weighted average margin of dumping for Fischer in the Second Administrative Review. The Department of Commerce publishes the final results of administrative reviews in the *Federal Register*. As shown in the *Federal Register* notice of the final results of the Second Administrative Review (Exhibit BRA-22), the weighted-average margin percentage for Fischer in the Second Administrative Review was in fact zero (0) percent.

Beyond that, we note that Brazil, in its response to Question 25, appears to concede that “zeroing” had no impact on Fischer’s margin in the second administrative review.<sup>11</sup>

10. Finally, the United States notes that Brazil is incorrect in stating that it is not contested that “zeroing” was “used” in the Second Administrative Review.<sup>12</sup> To the contrary, as explained in previous U.S. submissions,<sup>13</sup> Brazil’s purported distinction between “use” and “impact” of “zeroing” makes no sense in circumstances where no antidumping duties are collected, or where there were no transactions with “negative” dumping margins.

11. Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT 1994 explicitly refer to the amount of the antidumping duty. 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 . . . .”, while 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 deprive the express references in the text to “levy . . . an anti-dumping duty” and “[t]he amount of the anti-dumping duty” of any meaning. In addition, with respect to Brazil’s arguments as to Article 2.4, the determination of a zero dumping margin cannot be characterized as “artificially inflate[d]” or “inherently unfair” even under the rationale in Appellate Body reports relied upon by Brazil.<sup>14</sup> And with respect to Brazil’s “continued use” arguments, an individual determination that is not itself a violation of provisions of the covered agreements is not evidence of “ongoing conduct” that constitutes a violation of those provisions.

12. In conclusion, 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, however, refer to the final duties assessed.<sup>15</sup> Contrary to Brazil’s suggestion, the citation to the panel report in *US – Zeroing (Japan) (21.5)* in particular

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<sup>11</sup> Brazil’s Response to Question 25, para. 20 (“The question asks whether Brazil argues that the use of zeroing had an impact on Fischer’s ISAR in the Second Administrative Review. Brazil does *not* make this argument.” (emphasis added)).

<sup>12</sup> Brazil’s Response to Question 25, para. 22.

<sup>13</sup> U.S. Second Written Submission, paras. 80-82; U.S. Oral Statement at the Second Panel Meeting, paras. 31-38.

<sup>14</sup> U.S. Second Written Submission, paras. 17-18.

<sup>15</sup> *US – Continued Zeroing (EC) (AB)*, paras. 314-315; *US – Stainless Steel (AB)*, para. 133; *US – Zeroing (Japan) (AB)*, para. 155, para. 168 (“If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a ‘fair comparison’ within the meaning of the first sentence of Article 2.4. This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously.”) (footnotes omitted); *US – Zeroing (EC) (AB)*, para. 131.

does not support a conclusion that Article 9.3 and Article VI:2 are violated even where no duties are collected. The panel report in that dispute did not address circumstances in which no duties were collected.<sup>16</sup> For these reasons, Brazil has no basis for arguing that “zeroing” was “used” in the Second Administrative Review, or for arguing that the Second Administrative Review shows an alleged “continued use” of zeroing.

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<sup>16</sup> In light of the fact that it considered that the “Appellate Body’s findings in the original proceeding were not based on evidence that particular importers had sales with negative margins or that individual importer-specific assessment rates were affected by the application of zeroing procedures,” the Article 21.5 panel reasoned that Japan did not need to show that given importers had sales with negative margins, or the effect of zeroing on the importer-specific assessment rates. *US – Zeroing (Japan) (21.5)*, para. 7.162. However, the panel found that, as a practical matter, Japan had submitted evidence showing the quantitative impact of zeroing on the duty rates. The panel did not address circumstances in which the complainant’s own evidence showed that there were no sales with negative margins, as is the case with respect to the orange juice investigation.