

**UNITED STATES – CONTINUED EXISTENCE AND APPLICATION  
OF ZEROING METHODOLOGY**

**(WT/DS350)**

**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**

**May 2, 2008**

## Table of Reports

Short Form	Full Citation
<i>EC – Biotech</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, circulated 29 September 2006
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS/146/R, WT/DS175/R, adopted 5 April 2002
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998
<i>US – Corrosion-Resistant Steel CVD (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – Zeroing (Mexico) (Panel)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, circulated to WTO Members 20 December 2007

## ZEROING IN PERIODIC REVIEWS

### EUROPEAN COMMUNITIES

**Q1.** The Panel needs to clarify the facts relating to the EC's claims concerning the 37 administrative reviews at issue. In that regard, the Panel notes the US' response to Question 7(b) sent by the Panel following the First Meeting. With regard to Exhibit EC-31, which contains documentation pertaining to the administrative review on *Ball Bearings and Parts Thereof from Italy*, the United States acknowledges that the documents submitted in Appendixes I and II have been produced by the USDOC during the administrative review at issue and that they demonstrate that the USDOC did apply simple zeroing. The United States, however, casts doubt as to whether the documents presented in the subsequent appendixes have also been produced by the USDOC. The United States argues that "the burden is on the EC to prove its case, including demonstrating the accuracy, source, and relevance of its exhibits."

a) What is your reaction to the US' argument concerning the Exhibits submitted by the European Communities in connection with the administrative reviews at issue?

### UNITED STATES

b) The Panel notes that the Issues and Decision Memorandum in Appendix II of Exhibit EC-31 provides in relevant parts:

**"Department's Position:** We have not changed our methodology with respect to the calculation of the weighted-average dumping margins for the final results. We included U.S. sales that were not priced below normal value in the calculation of the weighted-average margin as sales with no dumping margin. The value of such sales is included with the value of dumped sales in the denominator of the calculation of the weighted-average margin. We do not allow U.S. sales that were not priced below normal value, however, to offset dumping margins we find on other U.S. sales."<sup>1</sup> (emphasis added)

The Panel also notes that 29 of the 36 remaining Exhibits (EC-33 through EC-68) concerning the administrative reviews at issue contain language identical, or similar, to the above quotation. Specifically, the Panel notes that such language is found in the following parts of the mentioned exhibits:

<b>Exhibit EC-33</b>	<b>Appendix II, Issues and Decision Memorandum, p. 29-30</b>
<b>Exhibit EC-34</b>	<b>Appendix II, Issues and Decision Memorandum, p. 15-16</b>
<b>Exhibit EC-35</b>	<b>NONE</b>
<b>Exhibit EC-36</b>	<b>Appendix II, Issues and Decision Memorandum, p. 10</b>

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<sup>1</sup> Exhibit EC-31, Appendix II, p. 11.

<b>Exhibit EC-37</b>	<b>Appendix II, Issues and Decision Memorandum, p. 12</b>
<b>Exhibit EC-38</b>	<b>Appendix II, Issues and Decision Memorandum, p.14</b>
<b>Exhibit EC-39</b>	<b>Appendix II, Issues and Decision Memorandum, p. 11</b>
<b>Exhibit EC-40</b>	<b>Appendix II, Issues and Decision Memorandum, p. 10</b>
<b>Exhibit EC-41</b>	<b>Appendix II, Issues and Decision Memorandum, p. 12</b>
<b>Exhibit EC-42</b>	<b>Appendix II, Issues and Decision Memorandum, p. 14</b>
<b>Exhibit EC-43</b>	<b>Appendix II, Issues and Decision Memorandum, p. 10</b>
<b>Exhibit EC-44</b>	<b>Appendix II, Issues and Decision Memorandum, p. 11</b>
<b>Exhibit EC-45</b>	<b>Appendix II, Issues and Decision Memorandum, p. 12</b>
<b>Exhibit EC-46</b>	<b>Appendix II, Issues and Decision Memorandum, p. 14</b>
<b>Exhibit EC-47</b>	<b>NONE</b>
<b>Exhibit EC-48</b>	<b>NONE</b>
<b>Exhibit EC-49</b>	<b>Appendix II, Issues and Decision Memorandum, p. 10</b>
<b>Exhibit EC-50</b>	<b>Appendix II, Issues and Decision Memorandum, p. 16</b>
<b>Exhibit EC-51</b>	<b>Appendix II, Issues and Decision Memorandum, p. 13</b>
<b>Exhibit EC-52</b>	<b>Appendix II, Issues and Decision Memorandum, p. 11</b>
<b>Exhibit EC-53</b>	<b>Appendix II, Issues and Decision Memorandum, p. 11</b>
<b>Exhibit EC-54</b>	<b>Appendix II, Issues and Decision Memorandum, p. 24</b>
<b>Exhibit EC-55</b>	<b>Appendix II, Issues and Decision Memorandum, p. 10</b>
<b>Exhibit EC-56</b>	<b>Appendix II, Issues and Decision Memorandum, p. 12</b>
<b>Exhibit EC-57</b>	<b>NONE</b>
<b>Exhibit EC-58</b>	<b>NONE</b>
<b>Exhibit EC-59</b>	<b>Appendix II, Issues and Decision Memorandum, p. 13</b>
<b>Exhibit EC-60</b>	<b>Appendix II, Issues and Decision Memorandum, p. 5</b>
<b>Exhibit EC-61</b>	<b>Appendix II, Issues and Decision Memorandum, p. 14</b>
<b>Exhibit EC-62</b>	<b>NONE</b>
<b>Exhibit EC-63</b>	<b>Appendix II, Issues and Decision Memorandum, p. 16-17</b>
<b>Exhibit EC-64</b>	<b>Appendix II, Issues and Decision Memorandum, p. 16</b>
<b>Exhibit EC-65</b>	<b>NONE</b>
<b>Exhibit EC-66</b>	<b>Appendix II, Issues and Decision Memorandum, p. 6</b>
<b>Exhibit EC-67</b>	<b>Appendix II, Issues and Decision Memorandum, p. 13</b>
<b>Exhibit EC-68</b>	<b>Appendix II, Issues and Decision Memorandum, p. 8</b>

**Does the United States argue that the copies of the Memoranda cited in the table are not accurate? If not, do, in your view, the USDOC's statements in the Issues and Decision Memorandum in Exhibit EC-31 and in those in 29 of the 36 Exhibits contained in the table above show that the USDOC did indeed apply simple zeroing in the relevant administrative reviews? Please elaborate in connection with each Exhibit cited above.**

1. The United States does not contest the accuracy of the Issues and Decision Memoranda contained in 30 of the EC’s exhibits (i.e., Exhibits EC-31, 33-34; 36-46; 49-56; 59-61; 63-64;

66-68), nor the accuracy of the Panel’s citations thereto. The United States confirms that these 30 exhibits include language identical or similar to the quotation contained in the Panel’s question. The United States further confirms the Panel’s observation that Exhibits EC-35; 47-48; 57-58; 62 and 65 do not include corresponding Issues and Decision Memoranda.

2. The United States does not contest that, where the quoted language, or identical or similar language, appears in specific Issues and Decision Memoranda, the United States did not provide offsets in the individual proceeding to which each specific Issues and Decision Memorandum pertains. However, because each assessment review involves a distinct product, country, period of time, and sales data, findings, statements or conclusions made within the context of one assessment review are not relevant or applicable to any other proceeding before the U.S. Department of Commerce (“Commerce”). Therefore, any statement as to offsets made within the context of a particular assessment review, *only* provides evidence as to that individual assessment review, and offers *no* indication or evidence as to whether the United States provided offsets in any other proceeding before Commerce.

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**c) Please explain the reason why the European Communities has not submitted a copy of the USDOC's Issues and Decision Memorandum in relation to 7 of the 36 Exhibits contained in the table above. You may, if you so wish, submit copies of the Memoranda pertaining to the mentioned 7 administrative reviews, along with your answers to these questions.**

## ZEROING IN SUNSET REVIEWS

### UNITED STATES

**Q2. The Panel needs to clarify the facts pertaining to the 11 sunset reviews at issue in this case. Specifically, the Panel needs to know which past margins were relied upon by the USDOC in its determinations in the sunset reviews at issue, and whether those margins were obtained through either model zeroing in investigations or simple zeroing in periodic reviews. To this end, the Panel directed Question 13 to the United States after the First Meeting. In its response, the United States argues that it is unable to confirm the accuracy of those documents, presented in Exhibits EC-69 through EC-79, that were not issued by the USDOC in the relevant sunset reviews. The United States also contends that in some cases it is not possible to determine whether the documents presented in the EC's exhibits were issued by the USDOC. The United States also takes issue with the fact that the European Communities has not submitted program logs that, in the US' view, would have clarified whether zeroing had been applied in respect of the margins relied upon by the USDOC in the sunset reviews at issue. The United States acknowledges that the European**

**Communities provided program logs in Exhibits EC-69 and EC-70, but contends that it is not clear whether such logs had been generated by the USDOC.**

**a) Please explain the legal basis of your argument that the European Communities has to provide the program logs pertaining to the calculation of the margins relied upon by the USDOC in the sunset reviews at issue.**

3. In its report in *US – Corrosion-Resistant Steel CVD*, the Appellate Body explained that the complaining party has the burden of proof with respect to its claims:

The complaining Member bears the burden of proving its claim. In this regard, we recall our observation in *US – Wool Shirts and Blouses* that:

...it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that, the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative claim or defence. (emphasis added).<sup>2</sup>

The burden is thus on the EC, as the complaining party, to prove all components of its claims.

4. The EC argues that the U.S. determinations in the challenged sunset reviews are inconsistent with Articles 11.1 and 11.3 of the Antidumping Agreement because when making its determinations that removal of the antidumping duty would likely lead to a continuation or recurrence of dumping, the United States relied upon margins that were calculated in “proceedings using model zeroing,” and therefore “did not comply with its obligations pursuant to Articles 2.1, 2.4 and 2.4.2.”<sup>3</sup> Accordingly, the EC, at a minimum, must provide evidence indicating that the United States relied upon margins that were calculated using zeroing.<sup>4</sup> Absent program logs generated by Commerce or other proof that shows the calculation of the margins relied upon, it is not apparent from the evidence submitted by the EC that Commerce relied upon margins that were calculated by using zeroing in all of the sunset determinations challenged by the EC.

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<sup>2</sup> *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157 (footnote omitted).

<sup>3</sup> EC First Written Submission, para. 259.

<sup>4</sup> As the United States explained previously, the EC must also demonstrate that zeroing was germane to the outcome of the sunset review. The magnitude of the margin of dumping is not a relevant consideration in sunset reviews. The question is whether dumping is likely to continue or recur, and whether injury is likely to continue or recur, if the duty is terminated. As a result, it is insufficient for the EC simply to state that the assessment rates were higher than they would have been had Commerce provided offsets; the EC must, at a minimum, demonstrate that those margins would have been zero. Even then, as footnote 22 of the Antidumping Agreement demonstrates, a zero margin is not necessarily grounds for termination of the order. See U.S. Answer to Panel Question 12 Following the First Substantive Meeting.

**b) Please show to the Panel, with respect to each sunset review at issue, which zeroed margins the USDOC relied upon in its sunset determination.**

**c) The Panel notes that the order in the sunset review for which evidence has been submitted in Exhibit EC-77 has been revoked. Please clarify what findings the European Communities seeks from the Panel in connection with the mentioned sunset review.**

#### **BOTH PARTIES**

**d) Please clarify the date of revocation of the order addressed in Exhibit EC-77, and explain whether a WTO panel can address claims pertaining to measures that expire before the completion of panel proceedings.**

5. The antidumping duty order as to Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, addressed in Exhibit EC-77, has been revoked. The order was revoked on May 4, 2007, pursuant to a section 129 proceeding to implement DSB recommendations and rulings in the dispute *US – Zeroing (EC)* (DS294), and the effective date of the revocation was April 23, 2007.<sup>5</sup> The final results of the sunset review cited by the EC in Exhibit EC-77 recognized that the order on Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands had already been revoked and that therefore “in the absence of an order currently in force, the Department cannot make a finding that revocation of the antidumping duty order would lead to the continuation or recurrence of dumping.”<sup>6</sup> The final results of the sunset review changed the effective date of revocation to November 29, 2006 (i.e., the fifth anniversary of the date of publication of the order).<sup>7</sup>

6. As a general matter, if a measure was originally within a panel’s terms of reference, and expires or is withdrawn during the course of the panel proceedings, it is still within the panel’s terms of reference, and the panel may make findings regarding the WTO consistency of the measure.<sup>8</sup>

7. The United States notes that two of the determinations that are related to the order on Certain

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<sup>5</sup> *Implementation of the Finding of the WTO Panel in US-Zeroing (EC): Notice of Determination Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261, 25,262 (May 4, 2007)(Exhibit US-6).

<sup>6</sup> *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order*, 72 Fed. Reg. 35,220, 35,220 (June 27, 2007) (Exhibit EC-77, Appendix II).

<sup>7</sup> *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of the Sunset Review of Antidumping Duty Order and Revocation of the Order*, 72 Fed. Reg. 35,220, 35,221 (June 27, 2007) (Exhibit EC-77, Appendix II).

<sup>8</sup> *EC – Biotech*, paras. 7.1306 - 7.1319 (citing *India – Autos*, para. 7.26, and *Indonesia – Autos*, para. 14.9); see also *US – Zeroing (Mexico)(Panel)*, paras. 7.48-7.50.

Hot-Rolled Carbon Steel Flat Products from the Netherlands are not properly before the Panel, as they were not included in the EC’s consultations request, nor were they final at the time of Panel establishment.<sup>9</sup> They are therefore outside the Panel’s terms of reference.

**UNITED STATES**

**e) The Panel notes that the Issues and Decision Memoranda, provided in the table below, prepared by the USDOC and submitted in Exhibits EC-69 through EC-79, show that in all of the 11 sunset reviews at issue, the USDOC used margins from the relevant prior investigations and/or administrative reviews. Does the United States argue that the copies of the Memoranda cited in the table are not accurate? If not, would the United States agree that the mentioned memoranda demonstrate that in the 11 sunset reviews at issue, the USDOC did indeed use margins from prior investigations and/or administrative reviews? Please elaborate in connection with each Exhibit cited above.**

Exhibit EC-69	"The Department conducted three administrative reviews since issuance of the order in which it found that dumping continued..." "After considering the dumping margins determined in the investigation and subsequent reviews...."	Issues and Decision Memorandum, Appendix III, p. 4.
Exhibit EC-70	"There is no basis to reject margins we calculated in the investigation..." "LM's administrative review margins have been lower than the investigation margin....Therefore, for these final results, we will continue to use the margin from the investigation for LM"	Issues and Decision Memorandum, Appendix II, pp. 5-6.
Exhibit EC-71	"We disagree with ... claim that the margins calculated during the original investigations are invalid..." "Thus, we conclude that the rates we calculated at the investigations and in administrative reviews demonstrate that..."	Issues and Decision Memorandum, Appendix II, pp. 7-8.
Exhibit EC-72	"Thus, we conclude that the rates we calculated at the investigations and in administrative reviews demonstrate that..."	Issues and Decision Memorandum, Appendix III, p. 8.
Exhibit EC-73	"Thus, we conclude that the rates we calculated at the investigations and in administrative reviews demonstrate that..."	Issues and Decision Memorandum, Appendix III, p. 8.
Exhibit EC-74	"The Department has conducted three administrative reviews since issuance of the order in which it found that dumping continued at levels above <i>de minimis</i> ." "After considering the weighted-average dumping margins determined in the investigation and subsequent reviews, the	Issues and Decision Memorandum, Appendix III, pp. 4-5.

<sup>9</sup>U.S. First Written Submission, paras. 49 & nn.49 & 50; 73 & n. 70.



	Department determines ..."	
Exhibit EC-75	"The preference for selecting a margin from the investigation is because it is the only calculated rate that reflects the behaviour or exporters without the discipline of an order in place. As discussed below, the Department believes it is appropriate to report those figures to the ITC as the magnitude of the margin likely to prevail if the orders were revoked...."	Issues and Decision Memorandum, Appendix III, p. 6.
Exhibit EC-76	"We disagree with NSK Corp.'s claim that the margins calculated during the original investigations are invalid..." "Therefore, the methodologies we used to calculate the margins in the original investigations and subsequent administrative reviews were and remain valid under U.S. law."	Issues and Decision Memorandum, Appendix III, pp. 7-8.
Exhibit EC-77	<b>ORDER REVOKED.</b>	
Exhibit EC-78	"In the investigation and in each of the three administrative reviews of these orders, dumping margins were found." "[T]he Department finds that the margins from the original investigation are probative of the behaviour of Italian and Turkish producers and exporters of pasta if the orders were revoked."	Issues and Decision Memorandum, Appendix III, pp. 4-5.
Exhibit EC-79	"In this second sunset review the Department again finds that it is appropriate to provide the ITC with the rate from the investigation for Wieland because it is the only calculated rate that reflects the behaviour of exporters without the discipline of an order in place."	Issues and Decision Memorandum, Appendix III, p. 7.

8. The United States does not contest the accuracy of the Issues and Decision Memoranda contained in each of the Exhibits-EC 69-79, nor does it contest the accuracy of the Panel’s citations thereto. The Issues and Decision Memoranda attached to Exhibits EC-69 to -79 demonstrate that when determining whether dumping would continue to exist or recur absent an antidumping order, Commerce based its determination, in part, upon the existence of dumping as demonstrated by margins calculated in prior investigations and/or administrative reviews, and, in part, upon decreased volumes of imports since the implementation of the antidumping order.

**PREJUDICE**

**EUROPEAN COMMUNITIES**

**Q3. Regarding the alleged inconsistency of the EC's panel request with Article 6.2 of the DSU, the Panel notes the US' contention that the DSU does not require the defending**

**Member to show that the lack of precision in the complaining Member's panel request has prejudiced its right of defence.<sup>10</sup> What is the EC's reaction to this argument? Please explain the legal basis of your argument that the United States has to show that the alleged lack of precision in the EC's panel request with regard to the continued application of the 18 anti-dumping duties has prejudiced the US' right of defence.**

**Q.4. The Panel notes the phrase "or any other" in paragraph 266 of the EC's First Written Submission. Please explain the significance of this term, if any, with regard to the findings and recommendations that the European Communities seeks from the Panel in these proceedings.**

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<sup>10</sup> Second Written Submission of the United States, para. 28.