

# US – ZEROING (EC)<sup>1</sup>

## (DS294)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	ADA Arts. 9.3, 2.4 and 2.4.2 GATT Art. VI:2	Establishment of Panel	19 March 2004
			Circulation of Panel Report	31 October 2005
Respondent	United States		Circulation of AB Report	18 April 2006
			Adoption	9 May 2006

### 1. MEASURE AT ISSUE

- **Measure at issue:** US application of the so-called “zeroing methodology” in determining dumping margins in anti-dumping proceedings as well as the zeroing methodology as such.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

*As applied claims*

- **ADA Art. 9.3 and GATT Art. VI:2 (imposition and collection of anti-dumping duties):** Reversing the Panel, the Appellate Body found that the zeroing methodology, as applied by the United States in the administrative reviews at issue, was inconsistent with ADA Art. 9.3 and GATT Art. VI:2, as it resulted in amounts of anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping. Under ADA Art. 9.3 and GATT Art. VI:2, investigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter.
- **ADA Art. 2.4, third to fifth sentences (dumping determination – due allowance or adjustment):** The Appellate Body agreed with the Panel that, conceptually, zeroing is not “an allowance or adjustment” falling within the scope of Art. 2.4, third to fifth sentences, which covers allowances or adjustments that are made to take into account the differences relating to characteristics of the export and domestic transactions, such as differences in conditions and terms of sale, taxation, levels of trade, etc. Thus, the Appellate Body upheld the Panel's finding that zeroing is not an impermissible allowance or adjustment under Art. 2.4, third to fifth sentences.

*As such claims*

- **Zeroing methodology as such:** Although it disagreed with some aspects of the Panel's reasoning, the Appellate Body upheld the Panel's finding that the United States' zeroing methodology (which is not in a written form), as it relates to original investigations in which the weighted-average-to-weighted-average comparison method is used to calculate margins of dumping, can be challenged, as such, in WTO dispute settlement (given the sufficient evidence before the Panel), and that it is a “norm” that is inconsistent, as such, with ADA Art. 2.4.2 (original investigation) and GATT Art. VI:2.

### 3. OTHER ISSUES<sup>2</sup>

- **Measure:** The Appellate Body found that an unwritten rule or norm can be challenged as a measure of general and prospective application in WTO dispute settlement. It emphasized, however, that particular rigour is required on the part of a panel to support a conclusion as to the existence of such a “rule or norm” that is not expressed in the form of a written document. A complaining party must establish, through sufficient evidence, at least (i) that the alleged “rule or norm” is attributable to the responding Member; (ii) its precise content; and (iii) that it does have “general and prospective” application.

<sup>1</sup> *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*

<sup>2</sup> Other issues addressed: standard of review (ADA Art. 17.6(ii)); ADA Art. 2.4, first sentence (fair comparison); conditional appeal (Art. 2.4.2); ADA Art. 11.1 and 11.2; “measure” (general (DSU Art. 3.3) and under ADA); mandatory/discretionary distinction; DSU Art. 1.1 (Panel's obligations); prima facie case; judicial economy (Panel); “standard zeroing procedures”; zeroing “practice” as such; dissenting opinion (Panel).

## US – ZEROING (EC) (Article 21.5 – EC)<sup>1</sup> (DS294)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	European Communities	DSU Arts. 8.7, 11, 19 and 21.5 ADA Arts. 9.3, 9.4 and 11.3 GATT Art. VI:2	Referred to the Original Panel	25 September 2007
			Circulation of Panel Report	17 September 2008
Respondent	United States		Circulation of AB Report	14 May 2009
			Adoption	11 June 2009

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- The United States discontinued the use of zeroing in original investigations in which the weighted average-to-weighted average comparison methodology was used. The United States Department of Commerce issued Section 129 determinations in which it recalculated, without zeroing, the margins of dumping for the orders covered in the original proceedings.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>2</sup>

- Terms of reference (DSU Art. 21.5 panels):** The Appellate Body reversed the Panel's finding that the reviews subsequent to the original determination that pre-dated the adoption of the recommendations and rulings of the DSB did not fall within the Panel's terms of reference. The Appellate Body found, instead, that five specific sunset reviews had a sufficiently close nexus with the declared measures taken to comply, and with the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference. The Appellate Body upheld the Panel's finding that two specific periodic reviews, which established assessment rates calculated with zeroing after the end of the reasonable period of time (RPT), fell within the Panel's terms of reference, insofar as those periodic reviews had a sufficiently close nexus, in terms of nature, effects, and timing, with the declared measures taken to comply and with the recommendations and rulings of the DSB.
- ADA Art. 9.3 and GATT Art. VI:2 (scope of compliance obligations):** The Appellate Body reversed the Panel and found that the recommendations and rulings of the DSB required the United States to cease using zeroing by the end of the RPT, even when the assessment review had been concluded before the end of the RPT. The Appellate Body considered that the United States' implementation obligations extended to connected and consequent measures that were mechanically derived from the results of an assessment review and applied in the ordinary course of the imposition of anti-dumping duties. The Appellate Body upheld the Panel's findings that the United States had acted inconsistently with ADA Art. 9.3 and GATT Art. VI:2 by assessing and collecting anti-dumping duties calculated with zeroing in two specific periodic reviews concluded after the end of the RPT.
- ADA Art. 11.3 (review of anti-dumping duties – zeroing):** Having reversed the Panel's findings in this regard, the Appellate Body found that the United States had acted inconsistently with ADA Art. 11.3 in five sunset reviews in which zeroing was relied upon. This resulted in the extension of the relevant anti-dumping duty orders beyond the expiry of the RPT.
- Alleged arithmetical error:** The Appellate Body reversed the Panel's finding that the European Communities could not raise claims before the Art. 21.5 Panel in relation to an alleged arithmetical error in the calculation of margins of dumping because it could have raised them in the original proceedings, but failed to do so. However, the Appellate Body was unable to complete the analysis and therefore did not rule on whether the United States had failed to comply by not correcting such alleged error in one of its implementing measures.
- ADA Art. 9.4 (calculation of the “all others” rate):** The Appellate Body disagreed with the Panel's interpretation that Art. 9.4 imposes no obligation in the calculation of the “all others” rate when all margins of investigated exporters individually are zero, *de minimis*, or based on facts available. However, the Appellate Body found it unnecessary to make findings on the European Communities' claim regarding the calculation of the “all others” rate in three specific cases.

<sup>1</sup> *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities*

<sup>2</sup> Other issues addressed: panel composition (DSU Arts. 8.7 and 21.5 and the Director-General's composition of the Panel with three new panelists); a request for a suggestion on implementation (DSU Art. 19.1).