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UNITED STATES – ANTI-DUMPING MEASURE ON SHRIMP FROM ECUADOR

Report of the Panel

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EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
Japan – Agricultural Products II	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.
US – Gambling	Appellate Body Report, *United States – Measures Affecting Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005.
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004.
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US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V,1875
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*,WT/DS294/AB/R, adopted 9 May 2006.

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I. INTRODUCTION

A. COMPLAINT OF ECUADOR

1.1 On 17 November 2005, the Government of Ecuador ("Ecuador") requested consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("the GATT"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the Anti-Dumping Agreement") concerning certain anti-dumping measures on frozen warmwater shrimp from Ecuador and, in particular, the United States Department of Commerce ("USDOC")'s practice of "zeroing" when calculating dumping margins, as applied in these measures.[1] Ecuador and the United States consulted on 31 January 2006 and on several occasions thereafter, but failed to resolve the dispute.

1.2 On 8 June 2006, Ecuador requested the Dispute Settlement Body ("the DSB") to establish a panel pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT, and Article 17 of the *Anti-Dumping Agreement*.[2]

1.3 At its meeting on 19 July 2006, the DSB established a Panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by Ecuador in document WT/DS335/6.[3] The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Ecuador in document WT/DS335/6, the matter referred to the DSB by Ecuador in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 26 September 2006, the parties agreed that the Panel would be composed as follows:

Chairman: Mr. Alberto Juan Dumont

Members: Ms. Deborah Milstein
Ms. Stephanie Sin Far Man

1.5 Brazil, Chile, China, the European Communities, India, Japan, Korea, Mexico and Thailand reserved their third-party rights.

1.6 The Panel's meetings with the parties and the third parties were held on 3 November 2006.

II. FACTUAL ASPECTS

2.1 At issue in this dispute is the use by the USDOC of zeroing *as applied* in respect of three anti-dumping measures on certain frozen warmwater shrimp from Ecuador. The measures as identified by Ecuador are the final determination of dumping, the amended final determination of dumping, and the anti-dumping order.

2.2 The USDOC, on 27 January 2004, initiated an anti-dumping investigation on Certain Frozen and Canned Warmwater Shrimp from Ecuador. On 4 August 2004, the USDOC published a notice of a preliminary determination of dumping in this investigation. In the notice, the USDOC indicated that

[1] WT/DS335/1.
[2] WT/DS335/6, appended to this Report as Attachment 1.
[3] WT/DS335/7.

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it had selected the three largest producers/exporters of the subject merchandise, Exporklore S.A. ("Exporklore"), Exportadora De Alimentos S.A. ("Expalsa") and Promarisco S.A. ("Promarisco") as mandatory respondents and had calculated margins of dumping for these three respondents, as well as an "all others" rate.[4]

2.3 On 23 December 2004, the USDOC's final dumping determination was published,[5] reporting that the following margins of dumping had been calculated: Expalsa, 2.62%, Exporklore, 2.35%, Promarisco, 4.48%, and "all others", 3.26%. On 1 February 2005, in response to comments received from interested parties, the USDOC published an amended final margin determination and anti-dumping duty order.[6] The amended final margins of dumping calculated by the USDOC were as follows: Exporklore 2.48%, Promarisco, 4.42%, "all others", 3.58%. The amended final margin of dumping calculated for Expalsa was *de minimis*. Expalsa was therefore not made subject to the final anti-dumping duty order.

2.4 Ecuador contends that the USDOC engaged in "zeroing" in determining the respective margins of dumping for Exporklore, Promarisco and "all others"[7] in the final dumping determination, the amended final determination, and the anti-dumping order, and that as a consequence the measures at issue violate Article 2.4.2 of the *Anti-Dumping Agreement*.

III. PROCEDURAL ASPECTS

3.1 On 12 October 2006, at the organizational meeting of the Panel, Ecuador and the United States informed the Panel that they had reached an agreement concerning certain procedural aspects of this dispute.[8] The Agreement provides, *inter alia*, that the Parties would cooperate to enable the Panel to circulate its report as quickly as possible and that to that end, the parties would seek to reach agreement on expedited working procedures that they would jointly ask the Panel to adopt, and that would allow for the adoption of the Panel Report by the DSB no later than 31 October, 2006.[9] At the organizational meeting, the parties did jointly present such proposed working procedures, as well as a proposed accelerated timetable, for the Panel's consideration, emphasizing that they understood that it was up to the Panel to decide on the timetable and working procedures after consulting with the parties.

3.2 The Agreement also provides that the United States would not contest Ecuador's claims that the measures identified in Ecuador's request for the establishment of a panel are inconsistent with Article 2.4.2, first sentence, on the grounds stated in *US – Softwood Lumber V*.[10] The Agreement

[4] Exhibit Ecu-1 to answers of Ecuador to questions from the Panel (13 November 2006), Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from Ecuador, 69 Fed. Reg. 47091.

[5] Notice of Final Determination of Sales at less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Ecuador, 69 Fed. Reg. 79613, Exhibit Ecu-2 to the written submission of Ecuador.

[6] Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Ecuador, 70 Fed. Reg. 5156, Exhibit Ecu-3 to the written submission of Ecuador.

[7] Ecuador describes the "all others" rate as "[t]he amended final weighted average of [Exporklore and Promarisco's] margins, which applies to all non-investigated Ecuadorian producers that export to the United States." See answers of Ecuador to questions from the Panel (13 November 2006), Annex A-3 (question 1).

[8] The "Agreement on Procedures", WT/DS335/8, also submitted to the Panel as Exhibit Ecu-1 to the written submission of Ecuador, is appended as Attachment 2.

[9] The parties did not, in their jointly proposed timetable, ask the Panel to abide by that date. This would in any case not have been possible given that the organizational meeting was only held on 12 October 2006.

[10] Agreement on Procedures, para. 3.

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further recognizes that the scope of Ecuador's request for the establishment of a panel does not include any claim regarding the margin of dumping calculated for Expalsa, and that the parties would so inform the Panel. The Agreement provides in this respect that if the Panel were to make findings consistent with the parties' understanding as to the exclusion of Expalsa, implementation would not involve a recalculation of the margin for Expalsa.[11]

3.3 The Agreement also provides that Ecuador would not request that the panel suggest, pursuant to the second sentence of Article 19.1 of the DSU, ways in which the United States could implement the Panel's recommendations.[12]

3.4 On 17 October 2006 the Panel adopted its timetable and working procedures, after considering the parties' joint proposal. Given the special circumstances of this case, the Panel decided to adopt an expedited timetable, based on the parties' joint proposal.

IV. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. ECUADOR

4.1 Ecuador requests the Panel to find that the United States acted inconsistently with Article 2.4.2, first sentence, of the *Anti-Dumping Agreement* by using "zeroing" when calculating the dumping margins for Exporklore, Promarisco and "all others" in the anti-dumping investigation of certain shrimp from Ecuador.[13] Ecuador relies, *inter alia*, on the reasoning in the Appellate Body Report in *US – Softwood Lumber V*, in this respect, arguing that in that case, the DSB ruled that a similar measure was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

B. UNITED STATES

4.2 The United States does not contest Ecuador's claims. To the contrary, the United States "acknowledges" the accuracy of Ecuador’s description of the USDOC’s use of "zeroing" in the measures at issue and "recognizes" that a measure using a similar calculation, which was the subject of the *US – Softwood Lumber V* Report, was ruled by the DSB to be inconsistent with Article 2.4.2, first sentence.[14]

V. ARGUMENTS OF THE PARTIES AND OF THE THIRD PARTIES

5.1 The arguments of the parties and third parties are set out in their written submissions, oral statements to the Panel and answers to Panel questions that are set forth in the Annexes to this Report. (See list of annexes, at page ii, *supra*).

VI. INTERIM REVIEW

6.1 The Panel's Interim Report was issued to the parties on 4 December 2006. On 11 December 2006, the United States submitted a written request to review precise aspects of the Interim Report. Ecuador submitted no request for review and, in addition, indicated that it had no comments on the United States' request for review.

6.2 The United States, in its request, suggested that the Panel insert additional language into paragraph 7.38 of the Interim Report to more accurately reflect the reasoning of the Appellate Body in *US – Softwood Lumber V*. The United States also suggested that paragraph 7.41 be amended in line

[11] *Ibid*., para. 7
[12] *Ibid*., para. 4.
[13] Written submission of Ecuador, Annex A-1, para. 22.
[14] Written submission of the United States, Annex B-1, para. 5.

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with its proposed amendments to paragraph 7.38. After carefully reviewing these suggestions, the Panel has modified aspects of paragraphs 7.38 and 7.41 of the Interim Report, incorporating some of the language proposed by the United States and making additional modifications where it considered that doing so would provide additional clarity to the Panel's discussion of the Appellate Body's reasoning in *US – Softwood Lumber V*.

6.3 Finally, the Panel amended the last sentence of paragraph 3.2 to remove ambiguity in its wording and to more clearly reflect the contents of the parties' Agreement on Procedures. The Panel also made some technical corrections to other paragraphs.

VII. FINDINGS

A. GENERAL ISSUES

1. Role of the Panel under Article 11 in disputes where the responding party does not object to the complaining party's claims

7.1 The dispute before us is unusual in that, as mentioned above, the responding party, the United States, does not contest any of the complaining party's claims. The parties have not, however, characterized their shared view of the substantive aspects of the dispute as a "mutually agreed solution", and thus Article 12.7 does not apply.[15] We therefore start by considering whether the lack of substantive disagreement between the parties affects our responsibilities as a Panel.

7.2 In this regard, we consider that we must be guided in this dispute, as we would be in any other dispute subject to the DSU, by the provisions in Article 11 of the DSU, "Function of Panels", which provides:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, *a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements*, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.[16] (emphasis added)

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[15] We note that Article 12.7 of the DSU provides that, where the parties to the dispute have developed a "mutually satisfactory solution", the report of the panel "shall be confined to a brief description of the case and to reporting that a solution has been reached". In contrast, where no such solution has been reached, "the panel shall submit its findings in the form of a written report to the DSB", which report "shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes."

[16] Article 11 DSU. We note that Article 17.6 *Anti-Dumping Agreement* – setting forth the special standard of review applicable to disputes under the *Anti-Dumping Agreement* – also applies to this dispute. Article 17.6 provides that:

> "17.6 In examining the matter referred to in paragraph 5:
> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the

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7.3 Given that, notwithstanding their common view as to how the dispute should be resolved, the parties have not reached a mutually agreed solution (which would require us only to "report[] that a solution has been reached"[17]), we understand that our responsibility is as set forth in Article 11 DSU, i.e., to make an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

7.4 We note that the the parties and third parties share this view. For instance, Ecuador and the United States, in their (identical) response to a question from the Panel addressing this issue,[18] indicate that they:

> [consider] that the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement, is nevertheless to make an objective assessment of the matter, as required by Article 11 of the DSU, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. The matter before this Panel is a narrow one – whether Commerce's calculation of the weighted average to weighted average margins of dumping for the two separately investigated Ecuadoran exporters and for "all other" exporters breaches the first sentence of Article 2.4.2. Therefore, the Parties are not asking the Panel to "sanction" their Agreement, but rather, to consider that the Agreement facilitates the Panel's assessment of the facts of the case and the applicability and conformity of the measures with the covered agreements. Nevertheless, it is correct to say that they are seeking a decision that would allow the rest of the provisions of the Agreement to be implemented.[19]

7.5 A number of third parties formulate similar views on the issue. For instance, the European Communities submit that:

> Article 11 of the DSU does not expressly refer to a panel "sanctioning the mutual understanding of the parties". Rather it refers to a panel making an "objective assessment" and making "findings". Such an "objective assessment" and such "findings" are always made by a panel "on its own", in the sense that the panel takes sole responsibility for them, and is not *compelled* to follow the opinion of one or both Parties.[20]

7.6 India indicates that, in its view,

> panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

Given that the United States does not contest Ecuador's claims, it is not necessary for us to consider in detail the implications of the standard of review in this dispute.

[17] Article 12.7 DSU.

[18] The Panel asked the parties and third parties to provide their views on the following question:

> "What does your delegation consider is the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement? Can the Panel limit itself to sanctioning the mutual understanding of the parties, or must the Panel, on its own, determine whether the measure at issue is inconsistent with the cited provisions?"

[19] Answers of the United States to questions from the Panel (13 November 2006) (answer to question 5), Annex B-3; answers of Ecuador to questions from the Panel (13 November 2006) (answer to question 5), Annex A-4.

[20] Answer of the European Communities to question posed by the Panel, Annex C-8, para. 4.

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> the panel's obligation under Article 11 of the DSU to examine and resolve the claim put forward by Ecuador is not affected by the fact that the United States has indicated that it will not contest Ecuador's claim. Even though the United States is not contesting the claim, the panel must still examine whether Ecuador has made a *prima facie* case that the use of zeroing in the measure at issue was inconsistent with Article 2.4.2 and make a finding on that issue.[21]

2. Burden of proof

7.7 Because of its singularity, this dispute raises in a particularly acute fashion the issue of the burden of proof.

7.8 The burden of proof lies, in WTO dispute settlement proceedings, with the party that asserts the affirmative of a particular claim or defence.[22] Ecuador, as the complaining party, must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements. The burden would then shift to the responding party (here the United States), to adduce evidence to rebut the presumption that Ecuador's assertions are true. In this context, we recall that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[23]

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[21] Answer of India to question posed by the Panel, Annex C-10 (footnote omitted). The responses of other third parties are also consistent with our approach. Korea provides detailed reasoning under the provisions of the DSU as to why the Panel could not limit itself to sanctioning the parties' Agreement. It notes that such "understandings" do not have the legal effect of constraining the function of a panel until they have been converted into a mutually agreed solution and notified to the DSB accordingly. See answer of Korea to question posed by the Panel, Annex C-12. Brazil submits that, unless the Panel were to consider that it constitutes a mutually agreed solution, the partie's Agreement has not, and could not have, revoked Article 11 of the DSU and that the Panel is therefore bound by its duty to make an objective assessment of the matter before it. See answer of Brazil to question posed by the Panel, Annex C-2. Chile, on the basis of the obligation on panels in DSU Article 11 to perform an objective evaluation of the matter before them, argues that the role of this Panel, considering the agreement reached between the parties, is to perform an objective evaluation of the facts, of the applicability of the cited provisions, and of the conformity of the measures in question with those provisions, all on the bases presented by Ecuador and not contested by the United States. See answer of Chile to question posed by the Panel, Annex C-5. Mexico draws a distinction between WTO dispute settlement and commercial arbitration, arguing that in the latter context an agreement between the parties may be submitted to an arbitrator for approval. In the WTO context, by contrast, Mexico argues that if a panel were simply to sanction an agreement between two parties as to the interpretation of a provision, this could not, via the negative consensus rule, substitute for an authoritative interpretation by Members pursuant to Article IX of the WTO Agreement. See answer of Mexico to question posed by the Panel, Annex C-15.

[22] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; Appellate Body Report, *EC – Hormones*, para. 98. In *US – Wool Shirts and Blouses*, the Appellate Body noted that a number of GATT Panels had adopted this approach; it also indicated that most jurisdictions adopt a similar rule:

> "In addressing [the issue of the burden of proof], we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, 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 of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."
> *US – Wool Shirts and Blouses*, p. 14 (footnotes omitted).

[23] *EC – Hormones*, para. 104, citing *US – Wool Shirts and Blouses*, p. 14.

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7.9 In our view, the issue of the burden of proof is of particular importance in this case. This is because Ecuador has made factual and legal claims before the Panel which the United States does not contest. Yet, the fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case. We take note in this regard that the Appellate Body has cautioned panels against ruling on a claim before the party bearing the burden of proof has made a *prima facie* case. In *EC – Hormones*, the Appellate Body ruled that the Panel erred in law when it absolved the complaining parties from the necessity of establishing *a prima facie* case and shifted the burden of proof to the responding party:

> In accordance with our ruling in *United States - Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel ... Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.[24]

7.10 More recently, in *US – Gambling*, the Appellate Body indicated that "[a] panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case",[25] and noted that:

> A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.
>
> In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request:
>
> > ... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.
>
> Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a *prima facie* case—made in the course of submissions to the panel—demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[26]

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[24] *EC – Hormones*, para. 109 (footnotes omitted); see also, *inter alia*, the Appellate Body Report in *Japan – Agricultural Products II*, paras. 122, 130

[25] *US – Gambling*, para. 139.

[26] *Ibid.*, paras. 140-141 (footnotes omitted, emphasis original). See also the Appellate Body Report in *US – Zeroing (EC)*, para. 217.

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7.11 Thus, notwithstanding the fact that the United States is not seeking to refute Ecuador's claims, we must satisfy ourselves that Ecuador has established a *prima facie* case of violation, and notably that it has presented "evidence and argument... sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision."

7.12 We now proceed to examine whether Ecuador has met its burden to make a *prima facie* case.

B. SUBSTANTIVE ISSUE - USE OF "ZEROING" BY THE USDOC IN THE MEASURES AT ISSUE

1. Ecuador's arguments

(a) Introduction

7.13 Ecuador contends that the USDOC's final determination of 23 December 2004[27] and its amended final margin determination and anti-dumping order of 1 February 2005[28] are inconsistent with the United States' obligations under the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement* as that provision applies to the weighted average-to-weighted average methodology. Ecuador's claims are limited to the calculation of the dumping margins for two Ecuadorian exporters (Promarisco and Exporklore) and the "all others" rate. Ecuador's challenge is limited to the USDOC's use of zeroing in an original investigation and does not address such use in the context of annual administrative review proceedings or any other types of proceedings.[29]

7.14 Ecuador describes the "zeroing" methodology at issue in this dispute as follows:

> (1) different "models," i.e. types, of products are identified using "control numbers" that specify the most relevant product characteristics, (2) weighted average prices in the U.S. and weighted average normal values in the comparison market are calculated on a model-specific basis for the entire period of investigation; (3) the weighted average normal value of each model is compared to the weighted average U.S. price for that same model; (4) in order to calculate the dumping margin for an exporter, the amount of dumping for each model is summed and then divided by the aggregated U.S. price for all models; and (5) before summing the total amount of dumping for all models, all negative margins on individual models are set to zero.[30]

7.15 Ecuador claims that the USDOC's use of zeroing in the investigation at issue was "similar" or "identical" to the use of zeroing that was found to be inconsistent with Article 2.4.2. of the the *Anti-Dumping Agreement* in the Panel and Appellate Body Reports in *US – Softwood Lumber V* and *US – Zeroing (EC)*.[31]

(b) Similarities with the measures at issue in *US – Softwood Lumber V*

7.16 Concerning the similarities between its claims in the present dispute and the ruling of the Appellate Body in *US – Softwood Lumber V*, Ecuador indicates that the material facts applicable to the use of zeroing in the present dispute are the same or very similar to those examined by the Appellate Body in *US – Softwood Lumber V* and that it has raised a challenge identical to that which the Appellate Body considered in *US – Softwood Lumber V*, namely, that "the use of zeroing in

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[27] 69 Fed. Reg. 76913, attached to the written submission of Ecuador as Exhibit Ecu-2.

[28] 70 Fed. Reg. 5156, attached to the written submission of Ecuador as Exhibit Ecu-3.

[29] See answers of Ecuador to questions from the Panel (6 November 2006), Annex A-3 (answer to question 1).

[30] Written submission of Ecuador, Annex A-1, para. 2; see also para. 20.

[31] *Ibid.* para. 11.

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calculating margins in an original investigation using the weighted average to weighted average method of model specific comparisons is inconsistent with the first sentence of Article 2.4.2 of the Antidumping Agreement".[32] Ecuador notes, in this respect, that its own challenge in the present dispute is, like Canada's challenge in *US – Softwood Lumber V,* limited to an "as applied" challenge to the consistency of zeroing when used in calculating margins of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of "all comparable export transactions".[33] Ecuador also notes that its challenge is limited to the consistency of the USDOC's methodology under the first sentence of Article 2.4.2, the same issue which the Appellate Body considered in *US – Softwood Lumber V*, and that the description of zeroing (as applied by the USDOC) provided by the Appellate Body is substantially similar to that provided by Ecuador in its first submission.[34] Ecuador finally notes that the United States has not contested its assertion that the USDOC's use of zeroing in the measures at issue "appears to be similar or identical to the use of zeroing" in *US – Softwood Lumber V*.[35]

7.17 Ecuador has submitted a number of exhibits to the Panel in support of its claim that the methodology used by the USDOC in the calculation of the dumping margins at issue in this dispute is similar to the one the USDOC used in *US – Softwood Lumber V*. According to Ecuador, these exhibits demonstrate that the USDOC expressly acknowledged that, in the calculation of the dumping margins for Exporklore and Promarisco, it (1) used the weighted average-to-weighted average comparison methodology under Article 2.4.2; (2) made multiple comparisons on a model specific basis; and (3) ignored negative margins when calculating the weighted average margin for the product under investigation as a whole.[36] Ecuador has, *inter alia*, referred us to the USDOC's final determination "Issues and Decision Memorandum"[37] in which the USDOC comments on the methodology it used in calculating the margins of dumping for the Ecuadorian respondents. The USDOC indicates that it followed its "standard methodology of not using non-dumped sales comparisons to offset or reduce the dumping found on other sales comparisons".[38] Moreover, the USDOC notes that, in calculating the dumping margins, it had:

> made model-specific comparisons of weighted-average EPs with weighted average NVs of comparable merchandise ... [It] then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin.[39]

7.18 In addition, Ecuador has provided the Panel with exhibits documenting how the USDOC calculated the margins of dumping for Exporklore, Promarisco, and "all others", including a copy of the "margin calculation program" used by the USDOC. According to Ecuador, this "margin

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[32] See answers of Ecuador to questions from the Panel (6 November 2006) Annex A-3 (answer to question 2).

[33] *Ibid*.

[34] *Ibid.*

[35] *Ibid.*

[36] *Ibid.* (answer to question 1).

[37] "Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Ecuador", 23 December 2004, Exhibit Ecu-4 to the written submission of Ecuador.

[38] *Ibid.*, p. 8, quoted in the answers of Ecuador to questions from the Panel (6 November 2006) Annex A-3 (answer to question 1).

[39] *Ibid*. The Panel notes that the USDOC makes these comments in the section of its Memorandum addressing a request from respondents in the investigation that it change its methodology in light of the Appellate Body Report in *Softwood Lumber V* (which the USDOC refuses to do). See the Memorandum, *ibid.,* "Comment 1 - Offsets for Non-Dumped Sales", p. 8 *ff*.

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calculation program" includes the computer programming instructions that the USDOC used to employ its zeroing methodology.[40]

7.19 Finally, Ecuador has provided the Panel with what it identifies as the USDOC's worksheets for the calculation of the "all others" rate for the final determination[41] and for the amended final determination.[42] These worksheets indicate that the USDOC calculated the "all others" rate on the basis of a weighted average of the respective dumping margins of Exporklore, Promarisco, and (for the original final determination) Expalsa in the corresponding determinations.[43]

(c) Legal arguments

7.20 With respect to the alleged inconsistency of the "zeroing" methodology used by the USDOC to calculate Exporklore, Promarisco, and the "all others" margins of dumping, Ecuador initially indicated (in its first written submission) that, given the fact that the United States agrees not to contest Ecuador's claims, Ecuador considered it "unnecessary" to recite [in its submission] in detail the factual aspects of the DOC's application of zeroing in the challenged measures or the arguments as to why zeroing, as used in those measures, was inconsistent with Article 2.4.2, first sentence."[44] Ecuador did, however, indicate that the calculation performed by the USDOC was the same as the one described in *US – Softwood Lumber V* and that it considered this calculation to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement on the grounds set forth in paragraphs 62-117 of the Appellate Body Report in *US – Softwood Lumber V*.[45]

7.21 At the meeting with the parties, the Panel asked Ecuador to further elaborate on the legal reasoning underlying its claim of inconsistency. Ecuador indicated that the basic rationale of the Appellate Body's conclusions in *US – Softwood Lumber V* was that margins of dumping calculated

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[40] See answers of Ecuador to questions from the Panel (13 November 2006), Annex A-4 (answer to question 2):

> "the DOC memoranda in Exhibits Ecu-2, Ecu-3, Ecu-7, Ecu-8, Ecu-11, and Ecu-12 contain the margin calculation programs for Exporklore and Promarisco. In these exhibits, Ecuador has included only Part 10-E of each DOC margin calculation program, which includes the following computer programming instructions that DOC used to employ its zeroing methodology:

```
PROC MEANS NOPRINT DATA=MARGIN;
    WHERE EMARGIN GT 0;
    VAR EMARGIN MUSQTY USVALUE;
    OUTPUT OUT = ALLPUDD (DROP = _FREQ_ _TYPE_)
        SUM = TOTPUDD MARGQTY MARGVAL;
```

> Through these instructions, the DOC included only those weighted average to weighted average comparisons of EP to NV that had positive dumping margins, i.e., where the margin of dumping (or "EMARGIN") was greater than zero. In doing so, the DOC's computer language effectively set those margins that were less than zero to zero when calculating the weighted average dumping margins for the product." (emphasis original)

[41] Answers of Ecuador to questions from the Panel (13 November 2006), Annex A-4 (answer to question 3) and Exhibit Ecu-18 thereto, USDOC Memo to the File, "Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Ecuador" All Others' Rate Calculation for Ecuador", 17 December 2004, Attachment 1.

[42] *Ibid.*

[43] The Panel notes that, as mentioned above, in the amended final determination, the USDOC calculated a *de minimis* margin of dumping for Expalsa.

[44] Written submission of Ecuador, para. 19.

[45] *Ibid.*, para. 20.

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under the first methodology set out in the first sentence of Article 2.4.2, must be calculated for the "product as a whole".[46]

7.22 In its written response to the same Panel question,[47] Ecuador indicates that the legal reasoning that underlies its claim that the three measures at issue are inconsistent with Article 2.4.2 is identical to the reasoning of the Appellate Body in *US – Softwood Lumber V*, and is essentially as follows: The term "margins of dumping" in Article 2.4.2, when interpreted in an integrated manner with the term "all comparable export transactions," does not refer to margins of dumping that are determined for individual product types; rather, the calculation for an individual product type reflects only an intermediate calculation made by an investigating authority in the context of establishing margins of dumping for the product under investigation; as a result, dumping cannot be found to exist only for a type, model or category of that product. It is only on the basis of aggregating all of the intermediate values for all product types that an investigating authority can establish the margin of dumping for the product under investigation. [48]

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[46] In response to a question from the Panel at the meeting with the parties, the representative of Ecuador provided the following explanation of the Appellate Body's rationale in *Softwood Lumber V*:

> "...The essence [of the Appellate Body's rationale in *Softwood Lumber V*] was the AB's analysis of Art. 2.4.2 from a textual standpoint as well as in context. The most essential element of the finding was that anti-dumping margins must be determined for the product as a whole, meaning the product under investigation. Here, the product under investigation was certain frozen warmwater shrimp exported from Ecuador, defined more specifically by the Commerce Department in its measures. The inconsistency that arises in the methodology used in the Shrimp case was that margins were not determined, under the Appellate Body's analysis, for the product as a whole, rather margins were determined on a model-specific basis. And those margins which were negative margins were set to zero. And our position, as the Appellate Body found, is simply that it is inconsistent, that margins must be determined for the product as a whole."

[47] Question 1 from the Panel:

> "Bearing in mind that adopted Appellate Body reports, including the Appellate Body Report in *Softwood Lumber V* are not, *stricto sensu*, binding (expect with respect to resolving the particular dispute between the parties to that dispute), could Ecuador please explain why, in its view, the US measures at issue are inconsistent with the US' obligations under Article 2.4.2 of the Anti-Dumping Agreement (i.e. what is the legal reasoning underlying Ecuador's claim of inconsistency)?"

[48] Answers of Ecuador to questions from the Panel (13 November 2006), Annex A-4 (answer to question 1). The relevant parts of Ecuador's answer read as follows:

> "(1) The DOC used 'multiple averaging' in *Softwood Lumber*, just as it did in *Frozen Warmwater Shrimp*;
>
> (2) The DOC set to zero any margin that it found to be less than zero after making each of its weighted average to weighted average comparisons of export price to normal value;
>
> (3) The DOC calculated the antidumping margin for an exporter or producer by summing the results of each of the comparisons in which normal value exceeded the export price, and then divided by the aggregated US price for all models;
>
> (4) The term 'margins of dumping' in Article 2.4.2, when interpreted in an integrated manner with the term 'all comparable export transactions,' does not refer to margins of dumping that are determined for individual product types;
>
> (5) Rather, the calculation for an individual product type reflects only an intermediate calculation made by an investigating authority in the context of establishing margins of dumping for the product under investigation;
>
> (6) As a result, dumping cannot be found to exist only for a type, model or category of that product. It is only on the basis of aggregating all of the intermediate values for all product types (including those intermediate values where normal value exceeded export price) that an investigating authority can establish the margin of dumping for the product under investigation;

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7.23 Thus, Ecuador concludes, "dumping could not be determined by only considering the positive intermediate values for certain types or models of frozen warmwater shrimp, which is how the DOC calculated the weighted-average dumping margin for Promarisco S.A. and Exporklore S.A. in the contested measures. All intermediate values had to be included."[49]

7.24 Ecuador submits that, although the Appellate Body's decision is not binding on the Panel, the Appellate Body's analysis in *US – Softwood Lumber V* is persuasive, especially in light of the fact that the zeroing used by the USDOC in the measures at issue is identical to that which it used in its original investigation in *US – Softwood Lumber V*. Ecuador further notes that the United States has expressly agreed not to contest Ecuador's claim that the three measures are inconsistent with Article 2.4.2 on the grounds stated by the Appellate Body in *US – Softwood Lumber V*.

2. The United States' arguments

7.25 As mentioned above, the United States has, before us, not sought to refute Ecuador's claims. The United States has indicated that it "acknowledges the accuracy of Ecuador's description of Commerce's use of 'zeroing' in calculating the dumping margins for Promarisco S.A., Exporklore S.A., and the 'all others' rate in this investigation" and, moreover, that it "recognizes that a measure using a similar calculation was the subject of the *US – Softwood Lumber V* report, and that the DSB ruled that the measure was inconsistent with Article 2.4.2, first sentence because of that calculation."[50]

3. Arguments of the third parties

7.26 Most of the third parties, either in their third party submissions or oral statements, have expressed support for Ecuador's claims and provided general comments on the impermissibility of "zeroing", whether generally or in the context of the so-called weighted average-to-weighted average methodology, and have referred to various Panel or Appellate Body reports that have addressed the issue.[51]

7.27 Some of the third parties also have indicated expressly their view that Ecuador has met its burden to make a *prima facie* case before the Panel,[52] or have stated that the model zeroing methodology at issue in this dispute was identical to the measure that was found, in *US – Softwood Lumber V*, to be inconsistent with the United States' obligations under the *Anti-Dumping Agreement*.[53]

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(7) Here, the product was frozen warmwater shrimp from Ecuador;
(8) Thus, dumping could not be determined by only considering the positive intermediate values for certain types or models of frozen warmwater shrimp, which is how the DOC calculated the weighted-average dumping margin for Promarisco S.A. and Exporklore S.A. in the contested measures. All intermediate values had to be included."

[49] *Ibid.*

[50] Written submission of the United States, Annex B-1, para. 5. The United States cites, in this context, Appellate Body Report, *Final Dumping Determination on Softwood Lumber from Canada,* WT/DS264/AB/R, adopted 31 August 2004, paras. 62-117.

[51] See the oral statement of Brazil, Annex C-1; third party submission of Chile, Annex C-3; third party submission of the European Communities, Annex C-7; oral statement of India, Annex C-9; oral statement of Japan, Annex C-11; third party submission of Mexico (containing a detailed discussion of the panel and Appellate Body jurisprudence on the issue), Annex C-13 and Mexico's oral statement, Annex C-14; oral statement of Thailand, Annex C-16.

[52] See the oral statement of Brazil, Annex C-1, para. 9.

[53] See the third party submission of Mexico, Annex C-13, para. 4.

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4. Analysis by the Panel

7.28 We must first determine whether Ecuador has established that the USDOC did, in fact, "zero" in the three measures identified by Ecuador in its panel request. Assuming that Ecuador has established this fact, we will then proceed to our legal analysis of the measures challenged by Ecuador. Because Ecuador relies on the Appellate Body Report in *US – Softwood Lumber V* as the basis for its legal reasoning that the measures at issue are inconsistent with Article 2.4.2, the first step of this legal analysis will be to determine whether Ecuador has demonstrated that the measures it challenges (and in particular the zeroing methodology used by the USDOC to calculate the dumping margins challenged by Ecuador in the measures at issue) are the same in all relevant respects to those which the Appellate Body, in *US – Softwood Lumber V*, ruled were inconsistent with the first sentence of Article 2.4.2. Should we find this to be the case, we will need to consider whether to apply the same reasoning as appears in the Appellate Body Report, i.e. whether to follow the precedent in that case.

(a) Whether Ecuador has established that the USDOC "zeroed" in the three measures at issue

7.29 Concerning the facts of the case, we have reviewed the evidence and explanations provided by Ecuador. We are satisfied that Ecuador has provided evidence that establishes that the USDOC "zeroed" in calculating the margins of dumping for Exporklore and for Promarisco, and that the dumping margin for "all others" was calculated as the weighted average of these two companies' individual margins. In particular, Ecuador has, in our view, demonstrated that, for Exporklore and Promarisco, the USDOC performed a weighted average-to-weighted average comparison (first methodology under the first sentence of Article 2.4.2) for each of the different product models or sub-products, and that the USDOC "zeroed" negative margins of dumping when the results of the comparisons at these levels were aggregated to calculate each company's margin of dumping for the product as a whole; and that these results were then weight-averaged to arrive at the margin for "all others". Indeed, the United States does not deny the accuracy of Ecuador's description of the three measures at issue, including the fact that the USDOC zeroed in the manner described above.

(b) Whether Ecuador has established that the methodology used by the USDOC is similar to the methodology the USDOC used in *Lumber V*

7.30 Our next task is to determine whether the "zeroing" methodology used by the USDOC to calculate the dumping margins at issue here was, as alleged by Ecuador, similar or identical to the one the Appellate Body, in *US – Softwood Lumber V*, found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

7.31 We note in this respect that, in *US – Softwood Lumber V*, Canada's challenge was limited to an "as applied" challenge of the consistency of "zeroing" when used in calculating margins of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions (the so-called "weighted average-to-weighted average methodology") in the context of an original investigation under Article 2.4.2 of the Anti-Dumping Agreement.[54]

7.32 The Appellate Body in *US – Softwood Lumber V*, described "zeroing" as applied by the USDOC in that investigation as follows:

> First, USDOC divided the product under investigation (that is, softwood lumber from Canada) into sub-groups of identical, or broadly similar, product types. Within each sub-group, USDOC made certain adjustments to ensure price comparability of the

[54] Appellate Body Report, *US – Softwood Lumber V*, para. 63.

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> transactions and, thereafter, calculated a weighted average normal value and a weighted average export price per unit of the product type. When the weighted average normal value per unit exceeded the weighted average export price per unit for a sub-group, the difference was regarded as the "dumping margin" for that comparison. When the weighted average normal value per unit was equal to or less than the weighted average export price per unit for a sub-group, USDOC took the view that there was no "dumping margin" for that comparison. USDOC aggregated the results of those sub-group comparisons in which the weighted average normal value exceeded the weighted average export price—those where the USDOC considered there was a "dumping margin"—after multiplying the difference per unit by the volume of export transactions in that sub-group. The results for the sub-groups in which the weighted average normal value was equal to or less than the weighted average export price were treated as zero for purposes of this aggregation, because there was, according to USDOC, no "dumping margin" for those sub-groups. Finally, USDOC divided the result of this aggregation by the value of all export transactions of the product under investigation (*including the value of export transactions in the sub-groups that were not included in the aggregation*). In this way, USDOC obtained an "overall margin of dumping", for each exporter or producer, for the product under investigation (that is, softwood lumber from Canada).[55]

7.33 The Appellate Body also added that:

> Thus, as we understand it, by zeroing, the investigating authority treats as zero the difference between the weighted average normal value and the weighted average export price in the case of those sub-groups where the weighted average normal value is less than the weighted average export price. Zeroing occurs only at the stage of aggregation of the results of the sub-groups in order to establish an overall margin of dumping for the product under investigation as a whole.[56]

7.34 Having examined the description of the methodology employed by the USDOC in the three measures challenged by Ecuador, as described in its submission to the Panel,[57] and having considered the additional evidence submitted by Ecuador, we are satisfied that Ecuador has demonstrated – at least *prima facie* – that the methodology applied by the USDOC in calculating the margins of dumping for Exporklore and Promarisco, which the "all others" rate necessarily incorporated, was the same methodology which was found by the Appellate Body in *US – Softwood Lumber V* to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Furthermore, we once again note that the United States has not sought to refute Ecuador's claims.[58] In our view, the United States' "acknowledgement" and "recognition" lend further support to our conclusion that Ecuador has met its burden to make a *prima facie* case.

(c) Ecuador's claim of inconsistency under Article 2.4.2 of the *Anti-Dumping Agreement*

7.35 We now turn to the legal analysis of Ecuador's claims, i.e. whether the measures it challenges are inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Article 2.4.2 provides as follows:

[55] *Ibid.*, para. 64 (emphasis original; footnote omitted).
[56] *Ibid.*, para. 65.
[57] See para. 7.14, *supra*.
[58] See para. 7.25, *supra.*

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Article 2

Determination of Dumping

...

> 2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

7.36 Ecuador has relied on the Appellate Body Report in *US – Softwood Lumber V* in support of its claim of inconsistency with Article 2.4.2 and, in particular, on the Appellate Body's finding that margins of dumping may only be calculated for a product as a whole under the weighted average-to-weighted average methodology provided for in the first sentence of Article 2.4.2.

7.37 While we are not, strictly speaking, bound by the Appellate Body's reasoning in *US – Softwood Lumber V*, we are reminded that adopted Appellate Body Reports create legitimate expectations among WTO Members,[59] and that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".[60]

7.38 Our understanding of the Appellate Body's reasoning in *US – Softwood Lumber V* is as follows. The Appellate Body began its analysis with the text of Article 2.4.2 and noted that the question before it was the proper interpretation of the terms "all comparable export transactions" and "margins of dumping" in Article 2.4.2. In examining the arguments of the parties with respect to these phrases, the Appellate Body concluded that the parties' disagreement centered on whether a Member could take into account "all" comparable export transactions only at the sub-group level, or whether such transactions also had to be taken into account when the results of the sub-group comparisons are aggregated. To examine that issue, the Appellate Body noted the definition of dumping in Article 2.1 of the *Anti-Dumping Agreement*. The Appellate Body found that "it [was] clear from the texts of [Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to a product as a whole as defined by the investigating authority".[61] The Appellate Body further considered that the definition of "dumping" contained in Article 2.1 applies to the entire *Agreement*, including Article 2.4.2, and that "'[d]umping', within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product."[62] Next, the Appellate Body relied on its Report in *EC - Bed Linen*, in which it stated that "[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can

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[59] See Appellate Body Report, *Japan Alcoholic Beverages II*, p. 14; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 108-109; Appellate Body Report, *US – Softwood Lumber V*, paras. 109-112.

[60] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paragraph 188.

[61] Appellate Body Report, *US – Softwood Lumber V*, para. 93.

[62] *Ibid.*

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only be, established for the *product* under investigation as a whole."[63] Thus, the Appellate Body noted that "[a]s with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product." The Appellate Body therefore rejected the United States' arguments in that case that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons at the sub-group level; for the Appellate Body, while an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation, the results of the multiple comparisons at the sub-group levels are not margins of dumping within the meaning of Article 2.4.2; they merely reflect intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. It is only on the basis of aggregating all such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole.[64] On this basis, the Appellate Body held that zeroing, as applied by the USDOC in *US – Softwood Lumber V*:

> mean[t], *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.[65]

7.39 The Appellate Body on this basis concluded that the treatment of comparisons for which the weighted average normal value is less than the weighted average export price as "non-dumped" comparisons was not in accordance with the requirements of Article 2.4.2 of the *Anti-Dumping Agreement*.[66] As a result, the Appellate Body upheld the Panel's finding that the United States had acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing.[67]

7.40 We further note that the Appellate Body Report in *US – Zeroing (EC)* also referred to its reasoning and findings in *US – Softwood Lumber V*. [68] Thus, in our view, there is now a consistent line of Appellate Body Reports, from *EC – Bed Linen* to *US – Zeroing (EC)* that holds that "zeroing" in the context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2.

7.41 We have, as is our duty, carefully considered the Appellate Body's reasoning in *US – Softwood Lumber V* and taken into consideration the consistent line of Appellate Body Reports as mentioned in the previous paragraph. We find the Appellate Body's reasoning persuasive and adopt it as our own. Given that the issues raised by Ecuador's claims are identical in all material respects to those addressed by the Appellate Body in the *Lumber V* case, we are satisfied that Ecuador has made a *prima facie* case that the use of zeroing by the USDOC in the calculation of the margins of dumping for Exporklore and Promarisco, from which were calculated the "all others" margins in the three

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[63] Appellate Body Report, *EC – Bed Linen*, para. 53 (emphasis original), quoted in Appellate Body Report, *US – Softwood Lumber V*, para. 96.

[64] Appellate Body Report, *US – Softwood Lumber V*, paras. 97-98.

[65] *Ibid.*, para. 101 (footnote omitted).

[66] *Ibid*, para. 102.

[67] *Ibid.*, para. 117.

[68] Appellate Body Report, *US – Zeroing (EC)*, para. 126. The Appellate Body in that case was not, however, considering the permissibility under Article 2.4.2 *Anti-Dumping Agreement* of zeroing under the weighted average to weighted average methodology in original investigations, the only issue that is before us in this dispute. Nevertheless, in our view, the Appellate Body's findings in *US – Zeroing (EC)* provide support to the conclusion that zeroing, as applied by the USDOC in *US – Softwood Lumber V* and in the calculation of the margins of dumping that are challenged by Ecuador, is inconsistent with Article 2.4.2.

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measures identified in its request for the establishment of a panel, is inconsistent with the United States' obligations under Article 2.4.2 of the *Anti-Dumping Agreement* because the USDOC did not calculate these dumping margins on the basis of the "product as a whole" as it failed to take into account all comparable export transactions in calculating the margins of dumping.

7.42 As a final point, we note that neither the Panel nor the Appellate Body Report in *US – Softwood Lumber V* addressed explicitly the issue of the inconsistency of the "all others" rate as calculated by the USDOC. In this regard, we consider that our finding that Ecuador has established that the calculation of the margins of dumping for Exporklore and Promarisco was inconsistent with Article 2.4.2 means that the calculation of the "all others" rate as the weighted average of the individual rates necessarily incorporates this inconsistent methodology.[69] The parties agree.[70]

7.43 Given that we have concluded that Ecuador has made a *prima facie* case of violation in respect of the final determination, the amended final determination and the anti-dumping order, we are required, as a matter of law, and in the absence of arguments from the responding party to the contrary, to rule in favour of Ecuador. We therefore determine that the USDOC, by using "zeroing" as described above in calculating the margins of dumping in the three measures challenged by Ecuador, has acted inconsistently with the United States' obligations under Article 2.4.2 of the *Anti-Dumping Agreement*.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In light of the above findings, we conclude that the USDOC acted inconsistently with Article 2.4.2 in its final and amended final affirmative determinations of sales at less than fair value (dumping) with respect to certain frozen warmwater shrimp from Ecuador, and in its final anti-dumping duty order.

8.2 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the *Anti-Dumping Agreement*, it has nullified or impaired benefits accruing to Ecuador under that Agreement. We therefore recommend that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the *Anti-Dumping Agreement*.

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[69] Although this has no bearing on our conclusion, we note that the dumping margin for "all others" in the (original) final determination was also calculated on the basis of Expalsa's dumping margin.

[70] See Ecuador's answers to questions from the Panel (13 November 2006), Annex A-4 (answer to question 3); United States' answers to questions from the Panel (13 November 2006), Annex B-3 (answer to question 4).

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ATTACHMENT 1 – REQUEST FOR ESTABLISHMENT OF A PANEL (DS335/6)

WORLD TRADE ORGANIZATION

WT/DS335/6
9 June 2006

(06-2790)

Original: English

UNITED STATES – ANTI-DUMPING MEASURE ON SHRIMP FROM ECUADOR

Request for the Establishment of a Panel by Ecuador

The following communication, dated 8 June 2006, from the delegation of Ecuador to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Upon the instruction of my authorities, I hereby convey the request of the Government of Ecuador for the establishment of a panel under Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") regarding certain measures imposed by the United States, as further described below.

A. Consultations

On 17 November 2005, the Government of Ecuador requested consultations with the Government of the United States under Article 4 of the DSU, Article XXII of the GATT 1994, and Article 17 of the Anti-Dumping Agreement concerning anti-dumping measures involving Certain Frozen Warmwater Shrimp from Ecuador, Inv. no. A-331-802. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Ecuador, 69 Fed. Reg. 76913, 23 December 2004, and Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Ecuador, 70 Fed. Reg. 5156, 1 February 2005.

Consultations were held on 31 January 2006 and on several occasions thereafter. These consultations provided helpful clarifications, but have not completely resolved the dispute.

B. Summary of the Facts

The United States initiated its anti-dumping investigation against certain frozen warmwater shrimp from Ecuador on 27 January 2004. See 69 Fed. Reg. 3876. The DOC conducted its investigation of the extent of dumping under the statutory authority provided by the Tariff Act of 1930, as amended, 19 U.S.C. § 1673, et seq., and under the regulatory authority provided in 19 C.F.R.

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Part 351. As noted above, the DOC published its final margin determination on 23 December 2004. Following a final affirmative determination of material injury by the US International Trade Commission (70 Fed. Reg. 3943, 27 January 2005), the DOC published its amended final margin determination and anti-dumping duty order on 1 February 2005. The DOC's final margin determination and amended final margin determination, as well as its anti-dumping duty order, reflected and contained anti-dumping margins that were calculated by using "zeroing."

The DOC's "zeroing" of negative anti-dumping margins in anti-dumping investigations more specifically means the following: (1) different "models," i.e., types, of products are identified using "control numbers" that specify the most relevant product characteristics; (2) weighted average prices in the US and weighted average normal values in the comparison market are calculated on a model-specific basis for the entire period of investigation; (3) the weighted average normal value of each model is compared to the weighted average US price for that same model; (4) to calculate the dumping margin for an exporter, the amount of dumping for each model is summed and then divided by the aggregated US price for all models; (5) before summing the total amount of dumping for all models, all negative margins on individual models are set to zero. Through this method, the DOC calculates margins of dumping and collects anti-dumping duties in amounts that exceed the actual extent of dumping by the investigated companies.

The DOC used zeroing in determining the final anti-dumping margins for the two Ecuadorian exporters for which anti-dumping margins above the 2 per cent *de minimis* level were calculated in both the final and the amended final affirmative determination of sales at less than fair value in the investigation of Certain Frozen Warmwater Shrimp from Ecuador cited above, as well as for "all other" Ecuadorian exporters that were not separately investigated. The DOC's unpublished Issues and Decision Memorandum, dated 23 December 2004, as well as other documents contained in the administrative record of the investigation, including computer programs, describe in more detail the DOC's use of zeroing in the Ecuadorian shrimp investigation.

The DOC's use of zeroing in the Ecuadorian shrimp investigation appears to be similar or identical to the investigation method that was held to be inconsistent with the Anti-Dumping Agreement in *United States – Final Dumping Determination on Softwood Lumber from Canada* (Panel Report, WT/DS264/R, and Appellate Body Report, WT/DS264/AB/R, adopted 31 August 2004), and in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (Panel Report, WT/DS294/R, and Appellate Body Report, WT/DS294/AB/R, adopted 9 May 2006).

C. Measures and Claims

The DOC's Final Determination, the DOC's Amended Final Determination, and the DOC's anti-dumping duty order applied zeroing in its investigation of Certain Frozen Warmwater Shrimp from Ecuador (referred to collectively below as the "measures"). The use of zeroing in each of these measures to calculate the margins of dumping for the two exporters with margins above *de minimis* and "all other" exporters is inconsistent with the obligations of the United States under the Anti-Dumping Agreement. Specifically, Ecuador considers that the measures are inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

The foregoing paragraph is provided without prejudice to any arguments that the Government of Ecuador may develop and present to the panel regarding the WTO-inconsistency of the measures at issue.

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D. Request

Ecuador requests, pursuant to Article 6 of the DSU and Article 17.4 of the Anti-Dumping Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference set out in Article 7.1 of the DSU. Ecuador asks that its request be placed on the agenda for the next meeting of the Dispute Settlement Body to be held on 19 June 2006.

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ATTACHMENT 2 – PROCEDURAL AGREEMENT BETWEEN ECUADOR AND THE UNITED STATES (DS335/8)

WORLD TRADE ORGANIZATION

WT/DS335/8
25 October 2006

(06-5137)

Original: English

UNITED STATES – ANTI-DUMPING MEASURE ON SHRIMP FROM ECUADOR

Agreement on Procedures between Ecuador and the United States

The following communication, dated 20 October 2006, from the delegation of Ecuador and the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated at the request of those delegations.

On 27 November 2005, the Government of Ecuador requested consultations with the United States (hereinafter "the Parties") under Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"), with respect to anti-dumping measures on shrimp from Ecuador. WT/DS335/1 (21 November 2005). Consultations were held on 31 January 2006 and on several occasions thereafter. These consultations have enabled the Parties to agree on the following procedures for purposes of this dispute:

1. Ecuador requested the establishment of a panel in this dispute by filing its request for the establishment of a panel on 8 June 2006 (WT/DS335/6). A copy of Ecuador's panel request is attached to this agreement.[71] The DSB established a panel on 19 July 2006.

2. The Parties will cooperate to enable the panel to circulate its report as quickly as possible in light of the requirements of the DSU. To that end, the Parties will work expeditiously to reach agreement on expedited working procedures that they will jointly ask the panel to adopt, and that will allow for the adoption of the panel report by the DSB no later than 31 October 2006. That agreement will include a request that the Parties file only one written submission each, and that the panel forego meetings with the Parties or, at most, have only one such meeting. The Parties also agree to share with each other drafts of their respective written submissions prior to submitting them to the panel and to take all reasonably available steps to expedite the proceeding.

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3. The United States will not contest Ecuador's claim that the measures identified in the attached request for the establishment of a panel are inconsistent with Article 2.4.2, first sentence, on the grounds stated in *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, Report of the Appellate Body adopted 31 August 2004.

4. Ecuador will not request that the panel suggest, pursuant to Article 19.1, second sentence, of the DSU, ways in which the United States could implement the panel's recommendations.

5. Provided that the panel's finding is limited to a finding that one or more of the challenged measures is inconsistent with Article 2.4.2, first sentence, of the Anti-Dumping Agreement, the Parties agree that, pursuant to Article 21.3(b) of the DSU, the reasonable period of time for bringing each such measure into conformity with the Anti-Dumping Agreement will be six months, beginning on the date on which the DSB adopts the panel report.

6. Subject to the consultation requirements of section 129(b) of the Uruguay Round Agreements Act ("URAA"), 19 U.S.C. § 3538(b), the United States will use section 129(b) to recalculate margins of dumping (subject to the exclusion of Exportadora de Alimentos S.A. in paragraph 8, below) and to issue a new determination in order to render the anti-dumping measures on shrimp from Ecuador not inconsistent with the findings of the panel. If any such recalculation that is performed under section 129(b) results in a change in a cash deposit rate for the anti-dumping measures on shrimp from Ecuador, the new cash deposit rate will have prospective effect only, taking effect no sooner than the date on which the United States Trade Representative directs the United States Secretary of Commerce to implement its recalculation of the margins and new determination, as set forth in section 129(c)(1) of the URAA, 19 U.S.C. § 3538(c)(1).

7. The Parties also mutually understand that the scope of Ecuador's request for the establishment of a panel does not include any claim regarding the margin of dumping calculated for Exportadora de Alimentos S.A. The Parties agree that they will inform the panel in their written submissions, whether made jointly or separately, that they are seeking findings consistent with this understanding. Accordingly, implementation would not involve a recalculation of the margin of dumping for Exportadora de Alimentos S.A., to the extent that the findings of the panel are consistent with the Parties' understanding.

For Ecuador	For the United States
(signed) Eva Garcia Fabre Ambassador	(signed) Peter F. Allgeier Ambassador

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ANNEX A

SUBMISSIONS OF ECUADOR

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ANNEX A-1

WRITTEN SUBMISSION OF ECUADOR

19 October 2006

I. INTRODUCTION

1. In this dispute, the Government of Ecuador contends that the final determination, amended final determination, and anti-dumping duty order of the United States Department of Commerce ("DOC") are inconsistent with US obligations under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement because the DOC, in using the average-to-average calculation in this investigation, engaged in "zeroing."

2. As noted in Ecuador's panel request, "zeroing" for purposes of this dispute means the following: (1) different "models," i.e., types, of products are identified using "control numbers" that specify the most relevant product characteristics; (2) weighted average prices in the US and weighted average normal values in the comparison market are calculated on a model-specific basis for the entire period of investigation; (3) the weighted average normal value of each model is compared to the weighted average US price for that same model; (4) in order to calculate the dumping margin for an exporter, the amount of dumping for each model is summed and then divided by the aggregated US price for all models; and (5) before summing the total amount of dumping for all models, all negative margins on individual models are set to zero.

3. The United States and Ecuador agreed to expedited procedures in an agreement dated 24 July 2006 ("Agreement on Procedures").[1] Ecuador's claim is limited to the calculation of margins for Promarisco S.A. and Exporklore S.A. and the "all others" rate.

4. The United States has agreed not to contest Ecuador's claim. Therefore, Ecuador requests that the Panel find that the DOC acted inconsistently with the requirements of Article 2.4.2, first sentence, when it calculated the anti-dumping margins in its anti-dumping investigation of *Certain Frozen Warmwater Shrimp from Ecuador*. The parties further agree that, should the Panel make this finding, and only this finding, with respect to one or more of the challenged measures, then the United States will bring its measure into conformity within six months from the date on which the Dispute Settlement Body ("DSB") adopts the Panel report.

5. Since time is of the essence, Ecuador asks the Panel to act expeditiously to issue its final report.

II. FACTUAL BACKGROUND

6. In calculating the anti-dumping margins for the two Ecuadorian exporters identified in the two Notices as having above *de minimis* margins, the DOC "zeroed" as described above. These two Notices are the measures that Ecuador here challenges, although Ecuador's claim is limited to the margins calculated for Promarisco S.A. and Exporklore S.A. and the "all others" rate.

7. The DOC initiated its anti-dumping investigation against certain frozen warmwater shrimp from Ecuador on 27 January 2004 (69 Fed. Reg. 3876).

[1] The agreement is submitted as Exhibit Ecu-1.

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8. The DOC published its final margin determination on 23 December 2004 (69 Fed. Reg. 76913).[2] The DOC published an amended final margin determination and anti-dumping duty order on 1 February 2005 (70 Fed. Reg. 5156).[3] The DOC's final margin determination and amended final margin determination, as well as its anti-dumping duty order, reflected and contained anti-dumping margins that were calculated by using "zeroing."

9. The DOC used zeroing in determining the final anti-dumping margins for the two Ecuadorian exporters for which anti-dumping margins above the 2 per cent *de minimis* level were calculated in both the final and amended final affirmative determination of sales at less than fair value in the investigation of *Certain Frozen Warmwater Shrimp from Ecuador*, cited above, as well as for "all other" Ecuadorian exporters that were not separately investigated.

10. The DOC's unpublished Issues and Decision Memorandum, dated 23 December 2004, as well as other documents contained in the administrative record of the investigation, including computer programmes, describe in more detail the DOC's use of zeroing in the Ecuadorian shrimp investigation.[4]

11. The DOC's use of zeroing in the Ecuadorian shrimp investigation appears to be similar or identical to the use of zeroing that was found to be inconsistent with the Article 2.4.2 of the Anti-Dumping Agreement in United States - Final Dumping Determination on Softwood Lumber from Canada (Panel Report, WT/DS264/R, and Appellate Body Report, WT/DS264/AB/R, adopted 31 August 2004), and in United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (Panel Report, WT/DS294/R, and Appellate Body Report, WT/DS294/AB/R, adopted 9 May 2006).

III. PROCEDURAL BACKGROUND

12. On 17 November 2005, Ecuador requested consultations with the United States under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"); Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"); and Articles 17.2 and 17.3 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement") with regard to the use of zeroing in the determinations at issue.[5]

13. Consultations were held on 31 January 2006 and on several occasions thereafter. These consultations allowed a better understanding of the position of the parties but failed to achieve a mutually agreed solution of the dispute.

14. On 8 June 2006, Ecuador requested the establishment of a panel. At its meeting on 19 July 2006, the Dispute Settlement Body ("DSB") established a Panel pursuant to the request of Ecuador in accordance with Article 6 of the DSU.

15. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in light of the relevant provisions of the covered agreements cited by Ecuador in document WT/DS335/6, the matter referred to the DSB by Ecuador in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

[2] This document is submitted as Exhibit Ecu-2.
[3] This document is submitted as Exhibit Ecu-3.
[4] An excerpt from the Issues and Decision Memorandum is submitted as Exhibit Ecu-4.
[5] WT/DS335/1 of 21 November 2005.

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16. On 24 July 2006, the parties entered into the Agreement on Procedures, as referenced above and submitted as Exhibit Ecu-1.

IV. ARGUMENT

17. The use of zeroing in the two challenged measures to calculate the margins of dumping for the two exporters with margins above *de minimis*, which are Promarisco S.A. and Exporklore S.A., as well as for "all other" exporters, is inconsistent with the obligations of the United States under the Anti-Dumping Agreement. Specifically, Ecuador considers that the measures are inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

18. The parties have reached a procedural agreement, attached as Exhibit Ecu-1, providing that the DOC will issue a new anti-dumping margin determination under Section 129(b) of the Uruguay Round Agreements Act, 19 U.S.C. § 3538(b), provided the other terms of the procedural agreement are met.

19. As noted above, the United States has agreed not to contest Ecuador's claim in this dispute. As a result, it is unnecessary for Ecuador to recite here in detail the factual aspects of the DOC's application of zeroing in the challenged measures or the arguments as to why zeroing, as used in those measures, was inconsistent with Article 2.4.2, first sentence.

20. In brief, Ecuador contends that in calculating the dumping margin in the investigation in question, the DOC: (1) identified different "models," i.e., types, of products using "control numbers" that specify the most relevant product characteristics; (2) calculated weighted average prices in the US and weighted average normal values in the comparison market on a model-specific basis for the entire period of investigation; (3) compared the weighted average normal value of each model to the weighted average US price for that same model; (4) in order to calculate the dumping margin for an exporter, summed the amount of dumping for each model and then divided it by the aggregated US price for all models; and (5) before summing the total amount of dumping for all models, set all negative margins on individual models to zero. In this regard, the calculation is the same as the calculation described in the Softwood Lumber case. Ecuador considers this calculation to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement on the grounds set forth in paragraphs 62-117 of the Appellate Body report in the Softwood Lumber case.

21. As noted above, the United States has agreed not to contest Ecuador's claim.

V. CONCLUSION

22. Ecuador respectfully requests that the Panel find that the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement when, in the anti-dumping investigation of shrimp from Ecuador, the DOC "zeroed" in the calculation of the dumping margins for two of the Ecuadorian exporters and the "all others" rate.

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ANNEX A-2

ORAL STATEMENT OF ECUADOR

3 November 2006

1. On behalf of Ecuador's delegation, I would like to thank you for agreeing to serve on this Panel and for acting so quickly to issue the working procedures and timetable in response to the Parties' joint request.

2. As you know, Ecuador and the United States previously entered into an Agreement on Procedures. This Agreement recognizes that the Appellate Body considered in the Canadian Softwood Lumber case the identical issue that Ecuador has raised here. That issue is whether the United States Department of Commerce acted in accordance with the first sentence of Article 2.4.2 of the Antidumping Agreement when it "zeroed" negative margins in calculating the margins of dumping in its final determination in its investigation of Certain Frozen Warmwater Shrimp from Ecuador. The Appellate Body held in the Canadian Softwood Lumber case that zeroing was inconsistent with this provision, and the United States has not contested the application of the Appellate Body's prior finding to the facts in this case. Accordingly, we have asked the Panel in our written submission to issue a decision finding that, here again, the United States, has acted inconsistently with the first sentence of Article 2.4.2.

3. We do not intend today to offer a lengthy statement that goes into the very detailed analysis of the decision given by the Appellate Body. However, we are prepared to respond to the two questions that the Panel provided to us on Monday after the conclusion of the opening statements. We do want to make clear that the material facts in Ecuador's case are identical to the material facts in the Lumber case. The United States agrees on this point.

4. We want to express our hope that the third parties will not advance positions today that would interfere with the resolution of this proceeding in a manner consistent with that set forth in the Agreement on Procedures. We think that it is in the best interests of the third parties that the Panel issue its decision so that we can obtain an expedited recalculation of the dumping margins for Promarisco, Exporklore, and "all others" within the contemplated six month time frame after the DSB adopts the final Panel report.

5. We have reviewed the third party submission and non of them are inconsistent with Ecuador's view. For example, the EC stated in paragraph 7 of its submission that it "does not object to the manner of proceeding chosen by the Parties." We hope that other third parties will take this same position and thereby acknowledge that Ecuador has the right to choose the measures it will challenge and the basis upon which it will challenge them. Here, we have brought a narrow challenge, which is carefully crafted to mirror the Appellate Body holding in the Softwood Lumber case.

6. Finally, Mr. Chairman and members of the Panel, that concludes our opening statement. We would be pleased to respond to any questions that you may have.

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ANNEX A-3

ANSWERS OF ECUADOR TO QUESTIONS FROM THE PANEL

6 November 2006

Q1. Could Ecuador provide a more elaborate description of the measures at issue and, in particular, of the methodology employed by the US Department of Commerce in calculating the dumping margins for Promarisco S.A., Exporklore S.A. and for the "all others" rate?

Reply

There are three measures at issue – (1) the original final margin determination of the US Department of Commerce (DOC) in its investigation of Certain Frozen Warmwater Shrimp from Ecuador; (2) the revised final margin determination of the DOC; and (3) the antidumping order that implements the revised final margin determination. Thus, Ecuador's challenge is limited to the DOC's use of zeroing in an original investigation. It is not here challenging such use in an annual administrative review proceeding or in any other type of proceeding.

In the revised final determination and order, the DOC calculated an antidumping margin of 2.48 per cent for one Ecuadorian shrimp producer, called Exporklore S.A., and 4.42 per cent for another producer, called Promarisco, S.A. Each of these two margins was slightly changed from the initial final margin determination. The amended final weighted average of these two margins was 3.58 per cent, which applies to all non-investigated Ecuadorian producers that export to the United States.

In calculating the final margins and amended final margins of Exporklore and Promarisco, the DOC used zeroing. Ecuador described the DOC's zeroing procedure in paragraph no. 2 of its First Submission, and the United States has agreed in paragraph no. 5 of its own First Submission that Ecuador's description of what the DOC did is accurate.

As Exhibit Ecu-4 to its First Submission, Ecuador provided an excerpt from an official DOC document known as an Issues and Decision Memorandum that further describes the challenge to the DOC's use of zeroing that Promarisco and Exporklore raised in the original investigation. On page 8 of this Memorandum, in the first paragraph under the heading of "Comment 1," the DOC stated that it "followed our standard methodology of not using non-dumped sales comparisons to offset or reducing the dumping found on other sales comparisons." This is another way of saying that the DOC set negative antidumping margins at zero.

The DOC stated in this same document in the first paragraph under the heading of "Department's Position" that it had "made model-specific comparisons of weighted average EPs with weighted average NVs of comparable merchandise. . . . We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted averaged dumping margin."

Thus, in these statements, the DOC expressly acknowledged that: (1) it had used the weighted average to weighted average comparison methodology that is authorized by the first sentence of Article 2.4.2; (2) it had made multiple comparisons on a model specific basis; and (3) it had ignored negative margins when calculating the weighted average margin for the product under investigation as a whole.

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Q2. Could Ecuador elaborate on the similarities between its claims in the present dispute and the findings of the Appellate Body in previous cases, in particular *US – Softwood Lumber V* (WT/DS264/AB/R), and explain why the Appellate Body's findings in these cases are applicable to Ecuador's claims in the present dispute?"

Reply

As noted in the final paragraph of the preceding answer, the methodology that the DOC described in its Issues and Decision Memorandum in the case of Shrimp from Ecuador is identical to the methodology considered by the Appellate Body that the DOC used in Softwood Lumber from Canada.

First, the AB in Lumber noted in paragraph 63 that Canada's challenge to the methodology incorporating the practice of zeroing was limited to an "as applied" challenge. The same is true of Ecuador's challenge.

Second, the AB in Lumber also noted in paragraph 63 that Canada's challenge was "limited to the consistency of zeroing when used in calculating margins of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions." The same is true of Ecuador's challenge as noted in the DOC's description of the methodology that it applied in the shrimp investigation.

Third, Ecuador's challenge is limited to a challenge to the consistency of the DOC's methodology with the first sentence of Article 2.4.2, which is the same issue that the AB considered in Lumber.

Fourth, the AB in Lumber provided in paragraph 64 a "brief description of zeroing as applied by the United States Department of Commerce in this case." A comparison of that description to the description of zeroing in Ecuador's first submission reveals that they are substantially similar. Moreover, the US has not contested Ecuador's assertion in paragraph 11 of its First Submission that the DOC's implementation of zeroing in Shrimp from Ecuador "appears to be similar or identical to the use of zeroing" in Softwood Lumber from Canada.

In summary, the material facts applicable to the use of zeroing are the same or very similar between Softwood Lumber from Canada and Shrimp from Ecuador. Moreover, Ecuador has raised the identical challenge as the AB considered in Softwood Lumber, i.e., that the use of zeroing in calculating margins in an original investigation using the weighted average to weighted average method of model specific comparisons is inconsistent with the first sentence of Article 2.4.2 of the Antidumping Agreement. Thus, this Panel has the factual and legal basis to conclude that Ecuador has presented a *prima facie* case. Moreover, it has provided as sufficiently detailed description of the measures that it has challenged that incorporate and adopt the methodology of calculating antidumping margins that includes the practice of zeroing.

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ANNEX A-4

ANSWERS OF ECUADOR TO QUESTIONS FROM THE PANEL

13 November 2006

Q1. Bearing in mind that adopted Appellate Body reports, including the Appellate Body Report in *Softwood Lumber V* are not, *stricto sensu*, binding (expect with respect to resolving the particular dispute between the parties to that dispute), could Ecuador please explain why, in its view, the US measures at issue are inconsistent with the US' obligation under Article 2.4.2 of the *Anti-Dumping Agreement* (i.e. what is the legal reasoning underlying Ecuador's claim of inconsistency)?

Reply

The legal reasoning that underlies Ecuador's claim that the three measures at issue here are inconsistent with Article 2.4.2 due to the use of zeroing is identical to the reasoning that the Appellate Body (AB) used in its Report in *Softwood Lumber V*. Although the Appellate Body's decision is not binding on this Panel, Ecuador submits that the analysis that the AB used in *Softwood Lumber V* is persuasive, especially in light of the fact that the zeroing (as defined in this dispute) that the US Department of Commerce (DOC) used in its antidumping investigation of *Frozen Warmwater Shrimp from Ecuador* is identical to that which the DOC used in its original investigation in *Softwood Lumber from Canada*. Moreover, the United States has expressly agreed in paragraph no. 3 of the Agreement on Procedures with Ecuador not to contest Ecuador's claim that the three measures are inconsistent with Article 2.4.2 on the grounds that the AB stated in *Softwood Lumber V*.

The AB's rationale, which Ecuador urges this Panel to adopt here, is in summary as follows:

(1) The DOC used "multiple averaging" in *Softwood Lumber*, just as it did in *Frozen Warmwater Shrimp*;

(2) The DOC set to zero any margin that it found to be less than zero after making each of its weighted average to weighted average comparisons of export price to normal value;

(3) The DOC calculated the antidumping margin for an exporter or producer by summing the results of each of the comparisons in which normal value exceeded the export price, and then divided by the aggregated US price for all models;

(4) The term "margins of dumping" in Article 2.4.2, when interpreted in an integrated manner with the term "all comparable export transactions," does not refer to margins of dumping that are determined for individual product types;

(5) Rather, the calculation for an individual product type reflects only an intermediate calculation made by an investigating authority in the context of establishing margins of dumping for the product under investigation;

(6) As a result, dumping cannot be found to exist only for a type, model or category of that product. It is only on the basis of aggregating all of the intermediate values for all product types (including those intermediate values where normal value exceeded export price) that an investigating authority can establish the margin of dumping for the product under investigation;

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(7) Here, the product was frozen warmwater shrimp from Ecuador;

(8) Thus, dumping could not be determined by only considering the positive intermediate values for certain types or models of frozen warmwater shrimp, which is how the DOC calculated the weighted-average dumping margin for Promarisco S.A. and Exporklore S.A. in the contested measures. All intermediate values had to be included;

Thus, the United States breached Article 2.4.2 with respect to the measures in question by failing to take into account all comparable export transactions in calculating the weighted-average margins of dumping in the investigation.

Q2. Would Ecuador please provide the Panel with copies of the relevant documents explaining how the USDOC calculated the margins of dumping in the Preliminary Determination (Federal Register Notice and/or Issues and Decision Memoranda if any) and other relevant documents providing further explanations as to the methodology used by the USDOC in establishing the margins of dumping in the Final and Amended Final Determinations?

Reply

Ecuador is providing the following documents that explain how the USDOC calculated the margins of dumping in the Preliminary Determination and in the Final and Amended Final Determination:

Federal Register Notice: Preliminary Determination[1]

Exhibit Ecu-1: *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from Ecuador*, 69 Fed. Reg. 47091 (Dep't of Commerce 4 August 2004).

Calculation Memoranda: Preliminary Determination

Exhibit Ecu-2: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), "Exporklore S.A., Preliminary Determination Notes and Margin Calculation," dated 28 July 2004.

Exhibit Ecu-3: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), Memorandum to the File, "Promarisco S.A. Preliminary Determination Notes and Margin Calculation," dated 28 July 2004.

Exhibit Ecu-4: US Dep't of Commerce, Memorandum to Neal Halper, Director, Office of Accounting, Case No. A-331-802 (Investigation), "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination - Exporklore, S.A.," dated 28 July 2004.

Exhibit Ecu-5: US Dep't of Commerce, Memorandum to Neal M. Halper, Director, Office of Accounting, Case No. A-331-802 (Investigation), "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination - Promarisco S.A.," dated 28 July 2004.

[1] The Government of Ecuador's First Written Submission contained the DOC's *Federal Register* notice of Final Determination and Amended Final Determination, as well as excerpts from the Issues and Decision Memorandum that accompanied the notice of Final Determination.

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Exhibit Ecu-6: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), "Possible Error in Promarisco Preliminary Determination Calculation Program," dated 24 August 2004.

Calculation Memoranda: Final Determination

Exhibit Ecu-7: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), "Exporklore S.A., Final Determination Notes and Margin Calculation," dated 17 December 2004.

Exhibit Ecu-8: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), "Promarisco S.A., Final Determination Notes and Margin Calculation," dated 17 December 2004.

Exhibit Ecu-9: US Dep't of Commerce, Memorandum to Neal Halper, Director, Office of Accounting, Case No. A-331-802 (Investigation), "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Exporklore, S.A." dated 17 December 2004.

Exhibit Ecu-10: US Dep't of Commerce, Memorandum to Neal M. Halper, Director, Office of Accounting, Case No. A-331-802 (Investigation), "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Promarisco, S.A." dated 17 December 2004.

Calculation Memoranda: Amended Final Determination

Exhibit Ecu-11: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), "Exporklore S.A. Amended Final Determination Margin Calculation," dated 26 January 2005.

Exhibit Ecu-12: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), "Promarisco S.A. Amended Final Determination Margin Calculation," dated 26 January 2005.

Verification Reports

Exhibit Ecu-13: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), "Sales Verification in Guayaquil, Ecuador of Exporklore S.A.," dated 12 October 2004.

Exhibit Ecu-14: US Dep't of Commerce, Memorandum to the File, Case No. A-331-802 (Investigation), "Sales Verification in Guayaquil, Ecuador of Promarisco S.A.," dated 14 October 2004.

Exhibit Ecu-15: US Dep't of Commerce, Memorandum to Neal M. Halper, Director, Office of Accounting, Case No. A-331-802 (Investigation), "Verification Report on the Cost of Production and Constructed Value Data Submitted by Exporklore S.A.," dated 18 October 2004.

Exhibit Ecu-16: US Dep't of Commerce, Memorandum to Neal M. Halper, Director, Office of Accounting, Case No. A-331-802 (Investigation), "Verification Report on the Cost of Production and Constructed Value Data Submitted by Promarisco S.A.," dated 20 October 2004.

The DOC's calculation memoranda for the Preliminary Determination, Final Determination, and Amended Final Determination describe each of the adjustments that the DOC made to Exporklore's and Promarisco's submitted sales and cost data in order to calculate each company's weighted average dumping margin. Specifically, the Preliminary Determination memoranda

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(**Exhibits Ecu-2 through Ecu-5**) identify changes that the DOC made on its own based on its analysis of the companies' submitted data. The Final Determination memoranda (**Exhibits Ecu-7 through Ecu-10**) detail changes that the DOC made pursuant to its decisions on contested issues as set forth in the Issues and Decision Memorandum, as well as any corrections identified in each company's sales and cost verification reports (**Exhibits Ecu-13 through Ecu-16**). Finally, the Amended Final Determination (**Exhibits Ecu-11 and Ecu-12**) memoranda reflect revisions that DOC made to correct certain ministerial errors in the Final Determination calculation programmes.

Importantly, the DOC memoranda in **Exhibits Ecu-2, Ecu-3, Ecu-7, Ecu-8, Ecu-11, and Ecu-12** contain the margin calculation programmes for Exporklore and Promarisco. In these exhibits, Ecuador has included only Part 10-E of each DOC margin calculation program, which includes the following computer programming instructions that DOC used to employ its zeroing methodology:

```
PROC MEANS NOPRINT DATA=MARGIN;
        WHERE EMARGIN GT 0;
        VAR EMARGIN MUSQTY USVALUE;
        OUTPUT OUT = ALLPUDD (DROP = _FREQ_ _TYPE_)
                SUM = TOTPUDD MARGQTY MARGVAL;
```

Through these instructions, the DOC included only those weighted average to weighted average comparisons of EP to NV that had positive dumping margins, i.e., where the margin of dumping (or "EMARGIN") was greater than zero. In doing so, the DOC's computer language effectively set those margins that were less than zero to zero when calculating the weighted average dumping margins for the product.

Q3. In Ecuador's view, do the findings and reasoning of the Appellate Body in *Softwood Lumber V* apply to the determination of an "all others" rate pursuant to Article 9.4? Please explain why or why not? If not, what is the basis for and reasoning underlying Ecuador's claim that the "all others" rate in the United States' shrimp investigation is in breach of Article 2.4.2?

Reply

Ecuador's position is that the findings and reasoning of the AB in *Softwood Lumber V* did not address the issue of whether Article 9.4 applies to the determination of the "all others" rate for all Ecuadorian exporters that were not separately investigated. Moreover, Ecuador has not raised the issue of whether Article 9.4 applies in an investigation because Article 9, by its terms, applies to the "Imposition and Collection of Anti-Dumping Duties." The imposition and collection of anti-dumping duties is a distinct phase of an anti-dumping proceeding that is separate from the investigation phase, which is the phase at issue here.

In the investigation, the DOC calculated an amended final margin of 3.58 per cent for "all others." This margin was determined by calculating the weighted average of the amended final margins that the DOC calculated for Exporklore S.A. and Promarisco S.A. See **Exhibits Ecu-1 through Ecu-16**, which contain the DOC's calculation memoranda and other relevant documents that show how the DOC calculated the weighted average margins for Exporklore and Promarisco. Since there is no disagreement that the margins for Exporklore and Promarisco were determined using zeroing, the 3.58 per cent margin for "all others" directly incorporated the company-specific rates based on zeroing since the "all others" margin is an average of two individual company margins. In confirmation of this point, we have attached the memoranda that contain the DOC's calculation of the final and amended final "all others" rate as **Exhibits Ecu-17 and Ecu-18**. We do not understand the United States to contest Ecuador's claim that the "all others" margin was determined using individual company-specific margins based on zeroing.

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In *Softwood Lumber V*, both the Panel and the Appellate Body considered the issue of zeroing as reflected in the DOC's April 2, 2002 Notice of Final Determination of Sales at Less Than Fair Value and its May 22, 2002 Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order, which are both attached in **Exhibit Ecu-19**. See Appellate Body Report at par. 2, which references these two DOC Notices. The Panel will note that the latter Notice contains an amended "All Others" rate of 8.43 per cent. See 67 Fed. Reg. at 36069. Thus, when the Panel and then the Appellate Body made their respective findings that the DOC's use of zeroing was inconsistent with Article 2.4.2, Commerce understood that these findings necessarily affected the "all others" rate. When the United States implemented the DSB recommendations and rulings in *Softwood Lumber V*, the Department calculated both the individual company rates and the "all others" rate, without a separate claim having been made under Article 9.4.[2]

Questions to the Parties and Third Parties

Q5. What do the parties consider is the role of the Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement? Can the Panel limit itself to sanctioning the [mutual understanding] [agreement] of the parties, or must the Panel, on its own, determine whether the measure at issue is inconsistent with the cited provisions?

Ecuador considers that the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement, is nevertheless to make an objective assessment of the matter, as required by Article 11 of the DSU, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. The matter before this Panel is a narrow one – whether DOC's calculation of the weighted average to weighted average margins of dumping for the two separately investigated Ecuadorian exporters and for "all other" exporters breaches the first sentence of Article 2.4.2. Therefore, the Parties are not asking the Panel to "sanction" their Agreement, but rather, to consider that the Agreement facilitates the Panel's assessment of the facts of the case and the applicability and conformity of the measures with the covered agreements. Nevertheless, it is correct to say that they are seeking a decision that would allow the rest of the provisions of the Agreement to be implemented.

[2] Ecuador's reference to and reliance on the US implementation of the recommendations and rulings in *Softwood Lumber V* is without prejudice to Ecuador's position regarding the comparison used in that implementation proceeding.

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ANNEX B

SUBMISSIONS OF THE UNITED STATES

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ANNEX B-1

WRITTEN SUBMISSION OF THE UNITED STATES

23 October 2006

1. The United States notes that the parties to this dispute have reached an Agreement on Procedures to permit expeditious resolution of this dispute.[1] In its request for a panel in this dispute (WT/DS335), Ecuador claims that the United States has breached its obligations under Article 2.4.2, first sentence, of the *Agreement on Implementation of Article VI of the GATT 1994*. The basis of Ecuador's claim is the Department of Commerce's use of "zeroing" in calculating the dumping margins in the investigation *Certain Warmwater Shrimp from Ecuador*.[2]

2. Ecuador describes, both in its request for a panel, and in its First Written Submission, that zeroing means the following: (1) different "models," i.e., types, of products are identified using "control numbers" that specify the most relevant product characteristics; (2) weighted average prices in the US and weighted average normal values in the comparison market are calculated on a model-specific basis for the entire period of investigation; (3) the weighted average normal value of each model is compared to the weighted average US price for that same model; (4) to calculate the dumping margin for an exporter, the amount of dumping for each model is summed and then divided by the aggregated US price for all models; (5) before summing the total amount of dumping for all models, all negative margins on individual models are set to zero.[3]

3. Ecuador further states that its claim is limited to the use of "zeroing" in calculating the margins for Promarisco S.A., Exporklore S.A., and the "all others" rate.[4]

4. Ecuador describes the Department of Commerce's calculation of the dumping margins in the investigation, states that the calculation is the same as the calculation described in *Softwood Lumber*, and states that Ecuador considers the calculation to be inconsistent with Article 2.4.2 on the grounds set forth in paragraphs 62-117 of the *Softwood Lumber* AB report.[5]

5. The United States acknowledges the accuracy of Ecuador's description of Commerce's use of "zeroing" in calculating the dumping margins for Promarisco S.A., Exporklore S.A., and the "all others" rate in this investigation. The United States also recognizes that a measure using a similar calculation was the subject of the *Softwood Lumber* report, and that the DSB ruled that the measure was inconsistent with Article 2.4.2, first sentence because of that calculation.[6]

---

[1] *See* Exhibit ECU-1.

[2] WT/DS335/6 (9 June 2006), Section C.

[3] *See* Panel Request, Section B; *First Written Submission of Ecuador*, 19 October 2006, para. 2 (hereinafter "Ecuador First Submission.")

[4] Ecuador First Submission, para. 6.

[5] Ecuador First Submission, para. 20.

[6] *See* Appellate Body Report, *Final Dumping Determination on Softwood Lumber from Canada,*WT/DS264/AB/R, adopted 31 August 2004, paras. 62-117.

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ANNEX B-2

ORAL STATEMENT OF THE UNITED STATES

3 November 2006

On behalf of the United States delegation, I would like to thank you for agreeing to serve on this Panel. And, like Ecuador, I would like to thank you for acting so quickly in response to the Parties' joint request regarding working procedures and the timetable.

We will not offer a lengthy statement today. Because the United States and Ecuador do not disagree on the outcome, there is no need for such a statement. Instead, we, like Ecuador, stand ready to respond to the two questions you provided to us in advance of this meeting, as well as to any additional questions you may have.

We would like to say a few words, however, about the third party submissions. Third party submissions can be useful in helping a panel to fulfill the tasks assigned to it by the DSB. In this regard, the United States would like to thank Chile for its submission. While we do not agree with every word in Chile's submission, it nevertheless reflects a careful and thoughtful consideration of the issues.

However, third party submissions also can impede, rather than facilitate, a panel's work. Unfortunately, this is the case with the submission of the European Communities ("EC"), which raises matters that are extraneous to this Panel's work and which makes assertions that are false. For example, the EC refers to certain alleged "as such" measures of the United States[1], even though there are no "as such" claims within the Panel's terms of reference. In a similar vein, the EC asserts that the United States has recognized "that zeroing is inconsistent with the *Anti-Dumping Agreement*",[2] even though the EC knows full well that a panel recently agreed with the United States that "zeroing" is not always WTO-inconsistent.[3]

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[1] Third Party Written Submission by the European Communities, 30 October 2006, para. 10.

[2] Third Party Written Submission by the European Communities, 30 October 2006, para. 8.

[3] *See* Third Party Written Submission by the European Communities, 30 October 2006, note 6, referring to *United States – Measures Relating to Zeroing and Sunset Reviews*, in which the panel found, *inter alia*, that zeroing in administrative reviews is permissible. The panel report in that case is currently the subject of an appeal to the Appellate Body.

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ANNEX B-3

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM THE PANEL

13 November 2006

Q4. Does the United States concede that the Appellate Body's findings and reasoning in Softwood Lumber V extend to the calculation in the United States investigation on Shrimp of the "all others" rate in the sense of Article 9.4 Anti-Dumping Agreement (in addition to the dumping margins for individual exporters)?

1. The recommendations and rulings of the Dispute Settlement Body in *Softwood Lumber V* provided that the use of zeroing in connection with the calculation of the weighted-average dumping margins for the companies in that investigation was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. The US Department of Commerce ("Commerce") understood that these findings concerning the company-specific margins necessarily affected the "all others" rate. Therefore, when the United States implemented the DSB recommendations and rulings, Commerce recalculated both the individual company rates and the "all others" rate, without a separate claim having been made under Article 9.4.

Q5. What do the parties consider is the role of the Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement? Can the Panel limit itself to sanctioning the [mutual understanding] [agreement] of the parties, or must the Panel, on its own, determine whether the measure at issue is inconsistent with the cited provisions?

2. The United States considers that the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement, is nevertheless to make an objective assessment of the matter, as required by Article 11 of the DSU, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. The matter before this Panel is a narrow one – whether Commerce's calculation of the weighted average to weighted average margins of dumping for the two separately investigated Ecuadorian exporters and for "all other" exporters breaches the first sentence of Article 2.4.2. Therefore, the Parties are not asking the Panel to "sanction" their Agreement, but rather, to consider that the Agreement facilitates the Panel's assessment of the facts of the case and the applicability and conformity of the measures with the covered agreements. Nevertheless, it is correct to say that they are seeking a decision that would allow the rest of the provisions of the Agreement to be implemented.

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ANNEX C

SUBMISSIONS OF THIRD PARTIES

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ANNEX C-1

ORAL STATEMENT OF BRAZIL

3 November 2006

1. Brazil wishes to thank you for the opportunity to appear before you today to present our considerations about the present dispute. Our decision to join as third party derives from both a systemic and trade interest in the matter to be examined by you. "Zeroing" is an issue of great concern for Brazil, as well as for all but one Members of the WTO. In addition, Brazilian exports of shrimp to the US market are also affected by an anti-dumping measure resulting from the same investigation that Ecuador has decided to challenge.

2. Given the large and rich body of WTO decisions against "zeroing", Brazil could have opted to address a series of issues the parties to the dispute have chosen not to tackle, according to the *Agreement on Procedures*.[1] Nonetheless, and in order not to offer an excuse for the United States to depart from the bilateral commitment established therein, we will present only some general comments on "zeroing" in the context of the so-called "weighted average-to-weighted average" comparison at the original investigation stage.

3. In no way, though, Brazil's decision should be read as acquiescence to interpretations such as, for instance, that the prohibition on "zeroing" would result from, and be stifled by, a very narrow reading of Article 2.4.2 and the Anti-Dumping Agreement as a whole. We reaffirm that it is clear under the AD Agreement that "zeroing" is never permissible.

4. For Brazil, the issue at stake in this case is quite simple. In short, "zeroing inflates the margin of dumping for the product as a whole"[2], "may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing"[3] and, also in the words of the Appellate Body, that methodology encloses an "inherent bias"[4] that, according to Brazil, "taints", any investigation or review. "Zeroing" is, by definition, the denial of the parameters of objectivity and fairness that permeate the whole AD Agreement and are expressly referred to in Article 17.6. By resorting to "zeroing", an investigating authority's assessment of the facts cannot be "unbiased and objective", thus rendering the results of the investigation inconsistent with the WTO rules.

5. As mentioned before, there exists a strong body of WTO decisions condemning "zeroing". Not surprisingly, most of those decisions are directed at the United States, which remains the only WTO Member to systematically use "zeroing" in its anti-dumping investigations and reviews. For the moment, the Appellate Body has had three opportunities to reiterate the inherent illegality of "zeroing" as practiced by the United States. I refer the panel to the Appellate Body reports in *US – Softwood Lumber V* (DS 264, original and compliance proceedings) and *US – Zeroing* (DS 294, at the request of the EC). A fourth pronouncement by the Appellate Body – hopefully the last one – is expected to be handed out early January.

---

[1] Exhibit ECU-1 to Written Submission of Ecuador.

[2] *United States – Final Dumping Determination on Softwood Lumber from Canada,* WT/DS264/AB/R, adopted 31 August 2004.

[3] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted on 9 January 2004, at para.135.

[4] *Idem*, *ibidem.*

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6. Despite this, the United States insists to prolong litigation on a matter that should have been out of the multilateral agenda since long ago. Today's case is one more example of such tactics, but the list would still encompass at least other three recent disputes touching upon US "zeroing": *US – Continued Existence and Application of Zeroing Methodology* (DS 350), *US – Final Anti-Dumping Measures on Stainless Steel from Mexico* (DS 344), and *US – Measures relating to Shrimp from Thailand* (DS 343).

7. We are convinced that the option chosen by the United States will eventually reveal – as it is already doing – its absolute inadequacy to the objective pursued. We regret, however, that, at the same time, such an option may pose considerable risks to the credibility of the multilateral system for the resolution of disputes.

8. The fact that the United States has been able to sign the *Agreement on Procedures* with Ecuador is a clear signal that not even the United States believes "zeroing" is permissible under the AD Agreement. Why not end once and for all the application of "zeroing" in its AD procedures, instead of forcing other Members to engage in litigation, albeit in an apparently fastened and simplified procedure? Also, why insist, on appeal, on the maintenance of decisions in frontal opposition to previous reports of the Appellate Body, as illustrated by the compliance panel in *US – Softwood Lumber V* and the panel in the dispute brought by Japan against "zeroing"? The US decision to continue the disputes gives the strong impression that the United States may be comfortable with such a high rate of risk to the security and predictability the WTO dispute settlement system is supposed to provide.

Mr. Chairman, Members of the Panel,

9. Let me conclude by saying that, given that the parties to the dispute have not revoked Article 11 of the DSU, you are bound by the requirement of assessing objectively the facts of the case. We believe that you are fully equipped to find that the AD measure applied against Ecuador's shrimp exports to the United States constitutes a clear violation of the AD Agreement. Ecuador has made its *prima facie* case. The respondent has not contested the accuracy of Ecuador's claims. On top of that, the Appellate Body has undeniably made it clear that "zeroing" in the "weighted average-to-weighted average" comparison of normal value and export prices during original investigations is inconsistent with Article 2.4.2 of the AD Agreement. Simple as it may seem, your task is, in our view, of a significant relevance. Brazil is confident that this Panel will provide us with a new and strong nail in the US "zeroing"'s coffin.

Thank you, very much.

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ANNEX C-2

ANSWER OF BRAZIL TO QUESTION POSED BY THE PANEL

13 November 2006

Q1. What does your delegation consider is the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement? Can the Panel limit itself to sanctioning the mutual understanding of the parties, or must the Panel, on its own, determine whether the measure at issue is inconsistent with the cited provisions?

Reply

As Brazil pointed out in its Oral Statement of 3 November, the procedural agreement between Ecuador and the United States – the so-called 'Agreement on Procedures' (Exhibit ECU-1) – have not, and could not have, revoked Article 11 of the DSU.

In addition, solely from the text of that bilateral agreement, it does not appear to be possible to necessarily conclude that there is no substantive dispute or disagreement between the parties. The United States committed only to not contesting Ecuador's (limited) claims. The text of the bilateral agreement does not spell out any US assent on the righteousness of Ecuador's claims, although a decision not to contest the complainant's case would, in practice, seem very unlikely if the respondent truly believes its measure is WTO-consistent.

As an illustration of the US position, Brazil refers the Panel to the US Oral Statement, where it is said that '[…] the submission of the European Communities ("EC") […] makes assertions that are false. […] [T]he EC asserts that the United States has recognized 'that zeroing is inconsistent with the 'Anti-Dumping Agreement' [footnote omitted], even though the EC know full well that a panel recently agreed with the United States that 'zeroing' is not always WTO-inconsistent."[1]

Finally, the Panel's task derives from, and is limited by, the terms of reference established by the DSB in accordance with Article 7 of the DSU, which were not modified by the 'Agreement on Procedures'.

In light of the above, this Panel is, therefore, bound by the duty to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements'. In order to discharge its burden, the Panel may even resort to Article 13 of the DSU to seek relevant information, if it deems appropriate and necessary.

If, however, this Panel considers that the bilateral agreement reflects the absence of substantive disagreement between the parties to the dispute and constitutes a mutually agreed solution, it should follow Article 12.7 of the DSU, third sentence. Its report should, thus, be limited to 'a brief description of the case and to reporting that a solution has been reached'. For Brazil, echoing systemic concerns expressed by other third parties to this proceeding, panels are not intended to simply homologate bilateral agreements. In fact, by the very terms of Article 12.7, panels are not entitled to make findings and recommendations in case a bilateral solution for the dispute has been found by the parties.

[1] US Opening Statement, at para. 4.

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ANNEX C-3

WRITTEN SUBMISSION OF CHILE

30 October 2006

1. Chile thanks the panel for this opportunity to submit its point of views on this dispute. We reserved our third party rights in view of our systemic interest involved in the allegations made by Ecuador. However, considering the understanding reached by Ecuador and the United States, we will limit to express some general comments.

2. Chile regrets that the United States continues applying "zeroing" methodology despite that reiterated reports by Panels and the Appellate Body have concluded that the use of this methodology in determining anti-dumping margins is inconsistent with Article 2.4.2 of the Agreement on the Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement), even in cases against the United States. Furthermore, we regret that this situation, until now, has not been enough to amend its laws and administrative practices on the matter.

3. Chile expresses its satisfaction for the constructive manner through which both parties, but particularly the United States, have faced this dispute and the situation arising from the lack of legislative and administrative amendments to eliminate zeroing methodology. This bilateral agreement shows that the Dispute Settlement Understanding provides for the necessary flexibilities for parties in order to adjust the procedures in specific issues, bearing always in mind the main objective of the system, namely the prompt and satisfactory settlement of the matters raised under the mechanism. Thus, examples as this, of an efficient handling of DSU's flexibilities, should make us reflect carefully on some of the proposals presented during the DSU negotiations.

4. Notwithstanding the above, a bilateral solution such as the one reached in this case is constrained by its own scope and involves high costs for the parties and the system, for instance, to initiate a procedure knowing beforehand its outcome. Hence a definitive and multilateral solution (*erga omnes*) to the use of the zeroing methodology is required which implies, necessarily, the amendment of the relevant laws and administrative practices of the Unites States.

5. We would like to end pointing out that we are pleased that the Department of Commerce has initiated a public consultation process in order to eliminate such methodology and we expect that the conduct shown by the United States in this case reflects a signal of a deep change that benefits all WTO Members.

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ANNEX C-4

ORAL STATEMENT OF CHILE

3 November 2006

1. I should like to thank you, Mr Chairman, and the members of the Panel for giving my country the opportunity to express its views on this dispute. With regard to the understanding reached by Ecuador and United States I shall limit my comments to the following points.

2. Chile regrets the fact that the United States is continuing to apply the methodology of zeroing, despite the fact that a number of Panel and Appellate Body reports have concluded that the use of that methodology for the determination of anti-dumping margins is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. Furthermore, we deplore the fact that, despite such conclusions and the express recognition by the United States in its written submission that the methodology of zeroing is inconsistent with the Anti-Dumping Agreement, the United States has not amended its laws and administrative practices in this field.

3. Without prejudice to the merits contained in bilateral understandings such as that reached by Ecuador and United States, in general terms they are restricted by their own scope of application, i.e., their effects only apply to the parties to the agreement, while what is required in this particular case is a multilateral solution (*erga omnes*). The amendment by the United States of the relevant laws and administrative practices in such a way as to prohibit the use of the methodology of zeroing by the investigating authorities is the only definitive solution and the only means by which the United States will be able to bring its laws and regulations into conformity with its WTO obligations.

4. Thank you very much.

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ANNEX C-5

ANSWER OF CHILE TO QUESTION POSED BY THE PANEL

13 November 2006

Q1. What does your delegation consider is the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement? Can the Panel limit itself to sanctioning the mutual understanding of the parties, or must the Panel, on its own, determine whether the measure at issue is inconsistent with the cited provisions?

1. Article 11 of the Dispute Settlement Understanding (DSU) provides that panels should make an objective assessment of the matter before them, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

2. Pursuant to the aforementioned provision, the role of the Panel in the dispute in question, given the agreement reached by the Parties, is to make an objective assessment of the facts of the case on the basis of the submissions by Ecuador that are not contested by the United States. Subsequently, it must carry out an objective assessment of the applicability of the covered agreements on the basis of the submissions by Ecuador not contested by the United States (the law). Finally, it must objectively assess the conformity of the measure with those agreements, again on the basis of the submissions by Ecuador not contested by the United States.

3. In particular, the Panel should review the precedents in the matter (cited by Ecuador) which corroborate that country's submissions and which were likewise not contested by the United States.

4. On the basis of the above-mentioned steps, the Panel should conclude that the measure at issue is inconsistent, as claimed by Ecuador (without this being contested by the United States).

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ANNEX C-6

ORAL STATEMENT OF CHINA

3 November 2006

Firstly, China wishes to thank you for giving us this opportunity to appear before you today and make this statement.

Secondly, China wishes to make several comments on the procedural aspect of the present dispute. Although WTO members still have divergent views on accelerated process of the panel and appellate proceeding in the DSU negotiations concerning disputes related to measures previously found inconsistent, it is interesting to note the two parties have managed to put it into practice in this case.

Nevertheless, we believe that there are some important elements that the panel should not neglect when dealing with the present dispute.

Firstly, Article 12.7 of the DSU states: "Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached". According to Article 12.7, the panel should refrain itself from making a determination concerning the consistency of measures under review if disputing parties have reached a solution. In the present case, it seems that the two parties have reached agreement on how to settle the dispute. We also note neither party in this dispute referred in its first written submission to Articles 3.6, or 12.7 of the DSU. They choose not to settle the dispute directly. Instead, the complaining party requested the panel to conclude the measure in dispute was inconsistent with relevant WTO rules, and the defending party did not make any rebuttal. We have concerns in this regard since this practice certainly will have systemic implications to future disputes.

We are also concerned how the panel will discharge its obligation of making an objective assessment of the matter before it in accordance with Article 11 of the DSU. The parties are entitled to request a panel to suspend its work or produce a brief description of the case under circumstance of a mutually satisfactory solution in accordance with the DSU. However, can disputing parties ask a panel to make an automatic finding following their bilateral agreement, and, does this approach mean that understanding reached by both parties may be automatically translated into a finding of a panel and the recommendation of the DSB? Apparently the DSU does not provide clear answers. We believe the reflections of the panel will be helpful to all Members.

It leads to the conclusion of China's oral statement and I wish to thank you for your patience.

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ANNEX C-7

WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

30 October 2006

1. The Parties mutually agreed an "Agreement on Procedures"[1], 5 days after the Panel was established, by which they agree :

- to co-operate and expedite the Panel proceedings, allowing for the adoption of a final report by the DSB no later than 31 October 2006; that there should be working procedures that provide for one written submission and at most one meeting; and the exchange of draft submissions;
- the US will not contest Ecuador's claim that the measures identified in Ecuador's request for the establishment of the Panel are inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*, on the grounds stated in the Appellate Body Report in *US-Softwood Lumber V*;
- Ecuador will not request that the Panel suggest, pursuant to Article 19.1, second sentence, of the DSU, ways in which the US could implement the Panel's recommendations;
- a reasonable period of time within the meaning of Article 21.3(b) of the DSU of six months, beginning on the date on which the DSB adopts the Panel Report;
- the US will recalculate the relevant margins of dumping to render them consistent with the findings of the Panel, including the cash deposit rate, with prospective effect; and that
- certain matters will not be raised by Ecuador, such as consistency with other provisions of the *Anti-Dumping Agreement*; the position with respect to Exportadora de Alimentos S.A. and (by implication) the application in time of the implementation and (by implication) the method used for recalculation of the dumping margin.

2. The Agreement on Procedures thus contains paragraphs by which the Parties agree on the procedures that are to govern certain aspects of the Panel proceedings. It also contains paragraphs by which the Parties agree that the US will not contest the claim; Ecuador will not request the Panel to suggest, pursuant to Article 19.1 of the DSU, ways in which the US could implement the Panel's recommendations; and by which the manner and timing of implementation are agreed. Thus, in the opinion of the EC, the Agreement on Procedures not only resolves certain procedural issues, it also represents, at least in part, a resolution or solution of the dispute between the Parties.

3. Following the conclusion of the Agreement on Procedures, the Panel was composed and issued a timetable providing for the exchange of written and oral pleadings and the issuing of a Panel Report.

4. The Parties notified the Agreement on Procedures to the WTO on 25 October 2006.[2]

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[1] Agreement on Procedures between Ecuador and the United States in the dispute United States – Anti-Dumping Measure on Shrimp from Ecuador (WT/DS335), Exhibit Ecu-1 (the "Agreement on Procedures") to Written Submission of Ecuador.

[2] WT/DS335/8.

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5. Neither Party refers in its first written submission to Articles 3.6,[3] or 12.7[4] of the DSU.

6. It appears to the EC that what the Parties appear to have in mind is an innovative approach, rather in the nature of a court sanctioned agreement between the Parties. In the opinion of the EC, the ability of parties to a dispute to agree certain matters, and to then have such agreement translated into findings and recommendations of a panel and eventually the DSB, of equal weight in practice *vis a vis* other WTO Members as a "conventional" panel report, may not be unlimited. The EC believes that its concerns in this respect may be shared by other Members of the WTO. A panel has a basic obligation under Article 11 of the DSU to make an objective assessment of the matter before it, including an objective assessment of the facts of the case. Such assessment should include the facts, evidence and legal argument. In the opinion of the EC, where certain matters are put to the Panel as agreed between the parties, that might consequently have an effect on the precise terms of the findings that the panel can make, which findings are eventually to be adopted by the DSB. A panel should therefore exercise particular care in this respect, particularly where, as in this case, the dispute touches on matters that the complaining party does not pursue.

7. In the particular factual circumstances of the present case, the EC naturally welcomes the resolution of the dispute, and does not object to the manner of proceeding chosen by the Parties. However, the EC wishes to emphasise that the manner of proceeding chosen by the Parties evidently cannot affect the rights of WTO Members which are not parties to the Agreement on Procedures. Similarly, the EC wishes to emphasise that, on the substance of the matter, nothing in the Agreement on Procedures or the envisaged Panel Report can affect the rights of other WTO Members.

8. Finally, also on the substance of the matter, the EC welcomes the US recognition that zeroing is inconsistent with the *Anti-Dumping Agreement*. The EC hopes and trusts that the US will treat all WTO Members in the same way when it comes to the question of zeroing. Specifically, the EC recalls that all Members, including the US, have affirmed their adherence to the principles for the management of disputes; that the dispute settlement system is a central element in providing security and predictability to the multilateral trade system; that the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of the Members; that all Members have agreed to engage in DSU procedures in good faith in an effort to resolve disputes; and that all Members undertake to accord sympathetic consideration to representations made by any other Member.[5]

9. In the light of such considerations, the EC trusts that the US will also not contest similar zeroing claims with which it is currently confronted,[6] or with which it will be confronted in the future.

10. Furthermore, the EC trusts that the US will forthwith take the necessary steps to terminate the "as such" measures by which the US maintains its zeroing methodology.

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[3] "Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relevant thereto."

[4] "Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in the form of a written report to the DSB. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached."

[5] DSU, Articles 3.1, 3.2, 3.3, 3.10 and 4.2.

[6] Such as, for example, DS322 *United States – Measures Relating to Zeroing and Sunset Reviews* (on appeal); DS350 *United States – Continued Existence and Application of Zeroing Methodology*; DS344 *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*.

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ANNEX C-8

ANSWER OF THE EUROPEAN COMMUNITIES TO QUESTION POSED BY THE PANEL

13 November 2006

Q1. What does your delegation consider is the *role* of a Panel in a case like this one, where there is *no substantive disagreement between the Parties as to the inconsistency of a measure* with one or more cited provisions of a covered Agreement ? Can the Panel limit itself to *sanctioning the mutual understanding of the parties*, or must the Panel, *on its own*, determine whether the measure at issue is inconsistent with the cited provisions ? (emphasis added)

2. The European Communities thanks the Panel for its question, and respectfully responds as follows.

3. Article 11 of the DSU[1] is entitled "*Function of Panels*" (the term "function" having a similar meaning to the term "role" used in the question). It provides as follows :

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an ***objective assessment*** of the ***matter*** before it, including an objective assessment of the ***facts*** of the case and the ***applicability of*** and ***conformity with*** the relevant covered agreements, and make such other ***findings*** as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

4. Thus, Article 11 of the DSU does not expressly refer to a panel "sanctioning the mutual understanding of the parties". Rather it refers to a panel making an "objective assessment" and making "findings". Such an "objective assessment" and such "findings" are always made by a panel "on its own", in the sense that the panel takes sole responsibility for them, and is not *compelled* to follow the opinion of one or both Parties.

5. An "objective assessment" of the matter includes an assessment of the ***facts*** and ***evidence*** relating to the existence and precise content of the measure at issue; the ***interpretation of the relevant legal provisions***; and the ***consistency*** of the measure at issue with the relevant legal provisions. The precise "findings" to be made by a panel may depend on all the circumstances of the case, and particularly whether certain matters have been admitted by the Defending Party, or agreed between the Parties.

6. We comment first on the position with respect to ***facts***. There is a distinction between a panel directly and autonomously finding the relevant facts; and a panel finding that the Parties have *agreed* the relevant facts. In the *former* case, the factual and evidential record placed before a panel allows the panel to directly and autonomously find the facts, having regard to the burden of proof. The admission or agreement of the Defending Party may be part of the evidence taken into consideration by the panel. In the *latter* case, what a panel might objectively find is that the Complaining Party has asserted and the Defending Party admitted certain facts, or that *the Parties have agreed* certain facts. Whether the circumstances limit a panel's findings to the latter, or permit the former, depends on all the facts of the case. In the present case, the European Communities believes that the Panel probably

[1] EC third party written submission, para 6.

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has sufficient basis on which to objectively make, directly and autonomously, the necessary findings of fact.

7. We turn next to the question of evidence. A Complaining Party should normally adduce ***evidence*** to support its factual assertions as part of its *prima facie* case. The documented agreement of the Defending Party as to the facts may be relevant evidence. A panel should make clear on what evidence it bases whatever factual findings it makes. As indicated above, in the present case, the European Communities believes that the Panel probably has sufficient evidentiary basis on which to objectively make, directly and autonomously, the necessary findings of fact.

8. Next, we consider the question of the ***interpretation of the relevant legal provisions***. The European Communities believes that this is an area in which a panel needs to exercise particular care to ensure that an agreement between the parties is not automatically presented in a final panel report as an autonomous finding by the panel. Once again, the European Communities would distinguish between a panel directly and autonomously making the relevant findings; and a panel finding that the Parties have *agreed* the relevant legal interpretations. Whether the circumstances limit a panel's findings to the latter, or permit the former, depends on all the facts of the case. In the present case, the European Communities believes that the Panel probably has sufficient basis on which to objectively make, directly and autonomously, the necessary findings. However, the European Communities observes that the Agreement on Procedures is in certain respects obviously laconic, since it refers only to the Appellate Body Report in *US-Softwood Lumber V*, whereas, as is very well known, the zeroing issue has since been the subject of other Appellate Body case law. In these circumstances, the European Communities would expect any report drawn up by this Panel not to conflict with such case law, and indeed to faithfully reflect it, as Mexico explains in its third party written submission.[2]

9. Finally, we turn to the question of the *consistency* of the measure at issue with the relevant provisions of the covered agreements. The European Communities considers that this may also be delicate, although less so than the preceding issue. Once again, the European Communities would distinguish between a panel directly and autonomously making the relevant findings of inconsistency; and a panel finding that the Parties have *agreed* that the measure at issue is inconsistent with a provision of the covered agreements. Whether the circumstances limit a panel's findings to the latter, or permit the former, depends on all the facts of the case. In the present case, the European Communities believes that the Panel probably has sufficient basis on which to objectively make, directly and autonomously, the necessary findings. And *in either case*, the European Communities believes that such finding would translate into a recommendation to the US that it bring the measure at issue into conformity, thus effectively protecting Ecuador's rights under Article 21.5 of the DSU.

10. In summary, in the opinion of the European Communities, the role (or function) of a panel in a case like this one is to make an objective assessment of the matter placed before it, including an objective assessment of the facts, evidence, and consistency with the covered agreements, and to make such findings as the facts, evidence and argument permit it to make. It would not fulfil this function by simply "sanctioning the mutual understanding of the parties".

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[2] Mexico third party written submission, paras 8 to 15.

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ANNEX C-9

ORAL STATEMENT OF INDIA

3 November 2006

1. India thanks you for having provided us an opportunity to present our views as a third party in this dispute. The issue of zeroing is of extreme systemic importance to the multilateral trading system. It is regrettable that the United States continues to apply the "zeroing" methodology for determining anti-dumping margins despite the clear conclusion reached in several reports of Panels and the Appellate Body that use of this methodology is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. Not only is the US continuing to use this methodology but has not yet taken steps to amend its laws and administrative practices in the matter.

2. Mr. Chairman, we have noted that the US has agreed not to contest the claim of Ecuador in this case. We have also noted their stated intention to initiate a public consultation process in order to eliminate use of this methodology. We are, however, unaware as to how, whether and when this process will lead to an actual elimination of their use of the "zeroing" methodology. We are also uncertain of the impact of this specific decision not to contest the claim of Ecuador on their continued use of this methodology on a wide range of products exported to them from several other countries, whose trade flows into the US are unduly hampered. That the US continues to prefer the process of litigation on this issue is evident from three other recent disputes dealing with their use of "zeroing".

3. Mr. Chairman, we are convinced that the US will eventually be forced to realise the futility of pursuing the use of "zeroing". However, we remain deeply concerned at the impact of their prolonged use of this methodology on the credibility and predictability of the multilateral dispute settlement system. The time has come, in our opinion, to send out a clear and unified signal on the unacceptability of the use of "zeroing" by any WTO Member.

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ANNEX C-10

ANSWER OF INDIA TO QUESTION POSED BY THE PANEL

13 November 2006

Q.1 What does your delegation consider is the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement? Can the Panel limit itself to sanctioning the mutual understanding of the parties, or must the Panel, on its own, determine whether the measure at issue is inconsistent with the cited provisions?

Reply

India believes that the parties in this case have reached an agreement that is in substance comparable to a mutually agreed solution. However, the Agreement on Procedures is not a mutually agreed solution within the meaning of Article 3.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), such as was used, for example, in *Japan – Import Quotas on Dried Laver and Seasoned Laver* (DS323).

Accordingly, we consider that the panel must comply with its obligation under DSU Article 11 to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."

In this case, the panel's obligation under Article 11 of the DSU to examine and resolve the claim put forward by Ecuador is not affected by the fact that the United States has indicated that it will not contest Ecuador's claim. Even though the United States is not contesting the claim, the panel must still examine whether Ecuador has made a *prima facie* case that the use of zeroing in the measure at issue was inconsistent with Article 2.4.2 and make a finding on that issue.[1]

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[1]As the Appellate Body stated in the *EC - Hormones* dispute, at para. 104, "a *prima facie* case is one which in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party."

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ANNEX C-11

ORAL STATEMENT OF JAPAN

3 November 2006

I do not have any prepared oral statement today but I would like to touch upon a few words briefly.

First, I am very curious to know what the parties expect from the Panel proceedings under the circumstances of the almost mutually agreed solution, which is reflected in the document WT/DS335/8. It seems to me that both parties are already in a position to submit the MAS (mutually agreed) solution under 3.6 of the DSU.

In substance, in the field of zeroing, we accept the conclusion of the parties that the measures are inconsistent with Article 2.4.2, first sentence, on the grounds stated in the Softwood Lumber Appellate Body Report, which said "dumping" and "margins of dumping" can only be established for the product as a whole". This is in paragraph 99. In this context, I would also like to draw the attention of the Panel that the WTO dispute settlement has accumulated the important jurisprudence in the field of zeroing since this Lumber Appellate Body Report, such as Softwood Lumber 21.5 and EC-Zeroing. The Softwood Lumber 21.5 Appellate Body Report, paragraph 92, quoting the EC-Zeroing Appellate Body Report, paragraph 126, said: "The Appellate Body underscored that its previous finding concerning the inconsistency of zeroing under the w-to-w methodology 'was based not only on Article 2.4.2, first sentence, but also on the context found in Article 2.1 of the Anti-Dumping Agreement'." I expect that this Panel would take into account such jurisprudence for its analysis in an appropriate manner.

We welcome that the United States admitted the inconsistency of zeroing by w-to-w comparison in investigations but, of course, this does not prejudge Japan's position on legal interpretation about zeroing in a broader context at all.

Finally, the EC third party submission touched upon the importance of the implementation. Japan is of the same view as the EC on this point.

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ANNEX C-12

ANSWER OF KOREA TO QUESTION POSED BY THE PANEL

13 November 2006

Q1. What does your delegation consider to be the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement? Can the Panel limit itself to sanctioning the mutual understanding of the parties, or must the Panel, on its own, determine whether the measure at issue is inconsistent with the cited provisions?

1. Article 12.7 of the DSU makes a dichotomy of the situation where a panel shall submit its report. One is where the parties to the dispute have failed to develop a mutually satisfactory solution and the other one is where a settlement of the matter among the parties to the dispute has been found.

2. In the latter situation, mutually agreed solutions shall be notified to the DSB pursuant to Article 3.6 of the DSU and the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached, according to Article 12.7 of the DSU.

3. In the case at hand, the parties to the dispute have not yet notified mutually agreed solutions to the DSB. Therefore, even if there is no substantive disagreement between the parties as to the inconsistency of the measure at issue with cited provisions of a covered agreement, a settlement of the matter stipulated in Article 12.7 of the DSU has not yet been found among the parties to the dispute. The United States only agreed not to contest the Ecuador's claim, which does not necessarily mean that the US admitted the inconsistency of its measure with relevant provisions of the covered agreement in question. In its first written submission, the US only acknowledges that Ecuador's descriptions are accurate, and recognizes that the DSB ruled that the measure was inconsistent with the relevant provisions in other case[1]. Moreover, Ecuador still requests the panel to find that the US acted inconsistently with Article 2.4.2. of the Anti-Dumping Agreement[2]

4. Since there has been no notification of a mutually agreed solution and the complaining party continues to request the findings of the panel, the panel shall discharge its responsibilities in accordance with the panel's terms of reference. The function of the panel should be fulfilled as requested in the relevant provisions of the DSU.

5. If the panel limits itself to sanctioning the mutual understanding of the parties in a case like this one, the following problems may arise:

- Under Article 12.7 of the DSU, where the parties to the dispute have failed to develop a mutually satisfactory solution, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. If the panel limits itself to sanctioning the mutual understanding of the parties, it could not provide in its report the above mandatory elements, in particular, basic rationale of its findings, because a mere sanctioning could

[1] US first written submission para. 5.
[2] Ecuador's first written submission para. 22.

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not be accepted as a "rationale". A dictionary defines rationale as a "reasoned exposition, esp. one defining the fundamental reasons for a course of action and behaviour"[3].

- In accordance with Article 11 of the DSU, a panel should make an objective assessment of the matter before it including the applicability of and conformity with the relevant covered agreement. A mere sanctioning of the mutual understanding of the parties is far short of being objective assessment. The Appellate Body expressed that they fail to see how any panel could be expected to make an 'objective assessment of the matter', as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims[4]. It was further noted that a panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute[5].

- In accordance with Article 7.1 of the DSU, the panel shall examine the matter referred to the DSB in the light of relevant provisions. According to a dictionary, "examine" means "to look at, inspect, or scrutinize carefully or in detail"[6]. If the panel limits itself to sanctioning the mutual understanding of the parties, it is difficult to say that the matter in question has been "examined" by the panel.

- In accordance with Article 7.2 of the DSU, the panel shall address the relevant provisions cited by the parties to the dispute. Korea is of the view that "address" requires a certain level of analysis, reasoning and examination. It is questionable that mere sanctioning could reach the minimum threshold to become "address".

- Article 3.2 of the DSU stipulates that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. If a panel confines its role to sanctioning the mutual understanding of the parties, it would be difficult to maintain security and predictability to the multilateral trading system when the parties to the other future dispute mutually understand differently on the similar/identical measure. Furthermore, despite the mutual understanding of the parties which is in line with the mutual understanding made by other parties in the previous disputes, if a panel determines differently on its own, the security and predictability would be also difficult to be maintained.

6. Bearing in mind the above aspects, Korea believes that the panel must determine on its own whether the measure at issue is inconsistent with the cited provisions, as long as there has been no notification of a mutually agreed solution. Disputing parties' understanding has no legal effect of constraining the function of a panel until such understanding is converted into a mutually agreed solution and notified to the DSB accordingly.

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[3] Collins English Dictionary 21st century edition (5th edition 2000)
[4] Appellate Body Report on Argentina – Footwear (EC), para. 74.
[5] Panel Report on Australia – Automotive Leather II (Article 21.5 – US), para. 6.19
[6] Collins English Dictionary 21st century edition (5th edition 2000)

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ANNEX C-13

WRITTEN SUBMISSION OF MEXICO

30 October 2006

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US – Zeroing (EC I)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R

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I. INTRODUCTION

1. The Government of Mexico appreciates this opportunity to present its views in this proceeding. Mexico has entered this dispute as a Third Party because Mexican imports have been harmed by the United States' systematic application of the identical WTO-inconsistent zeroing methodology. This practice of the United States contravenes the United States obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). This case provides the opportunity to reaffirm these obligations and to compliance by the United States.

2. Mexico welcomes the agreement reached by Ecuador and the United States with respect to the course of this dispute. As Mexico understands it, pursuant to this agreement the United States will not contest Ecuador's claim before the Panel. In addition, the United States has stated that if certain findings are made by the Panel, it intends to revise its anti-dumping determination to be consistent with the Panel's ruling. Such redetermination by the United States' authorities will be conducted on an expedited basis pursuant to the domestic United States "Section 129" implementation procedures. Mexico commends this procedural action and considers that it should be followed in other disputes involving this practice.

3. Given the circumstances, the outcome of this dispute is beyond doubt. In this context, Mexico wishes to share several observations with the Panel that Mexico believes are important to the Panel's decision.

A. Model Zeroing is prohibited under Article 2.4.2

4. The model zeroing methodology at issue in Ecuador's claim is *identical* to the measure that was before the Appellate Body in *US-Softwood Lumber V* and *US – Zeroing (EC I)* and found to be inconsistent with the United States obligations under Article 2.4.2 of the AD Agreement.

5. The Appellate Body and dispute settlement panels have, on more than one occasion, thoroughly considered the consistency of the United States' methodology with Article 2.4.2 of the AD Agreement and have without exception found that it is inconsistent with the United States' obligations under that provision.

6. Given the existence of a series of prior Panel and Appellate Body reports that support the view that model zeroing is inconsistent with article 2.4.2, the value of such reports becomes a relevant issue here. In this regard, Mexico would like to recall that while previous decisions "are not binding, except with respect to resolving the particular dispute" those conclusions "create legitimate expectations among WTO Members"[1] Mexico agrees, in this case, with the Appellate Body's assertion to the effect that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same"[2] In sum, in order to maintain the security and predictability of the multilateral trading system, aside from the agreement reached between the United States and Ecuador, this Panel should likewise find that the United States' model zeroing methodology applied in the case of Ecuador is inconsistent with Article 2.4.2 of the AD Agreement.

7. By entering into such a procedural agreement, the United States effectively recognizes that its model zeroing methodology is not consistent with article 2.4.2 of the AD Agreement. Thus, as there is no valid defense under any of the covered agreements against such practice, the United States has chosen not to contest Ecuador's allegations in this sense.

[1] Appellate Body Report, *Japan – Alcoholic Beverages II*, page 15.
[2] Appellate Body Report, *US– OCTG (Argentina), para. 188.*

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B. This Panel should apply the correct legal reasoning set forth by the Appellate Body

8. Although there is unanimity in the rulings of prior panels and the Appellate Body with respect to the conclusion that model zeroing is inconsistent with Article 2.4.2, there have been some differences in the legal reasoning that has been employed by panels in reaching that conclusion.

9. The Appellate Body has consistently followed a coherent and textually-based interpretation of the agreements. In contrast, WTO panels (the panels in *US – Softwood Lumber V* (21.5) and *US – Zeroing (Japan)*) have applied an incorrect reasoning that fails, in Mexico's view, to consider the AD Agreement in its totality. This erroneous reasoning should be rejected by this panel in favour of the coherent textually-based interpretation of the AD Agreement set forth by the Appellate Body.

10. Mexico notes specifically that the panels in *US-Softwood Lumber (Article 21.5)* and, more recently, in *US – Zeroing (Japan)*, erroneously sought to explain the inconsistency of model zeroing with the terms of Article 2.4.2 as flowing solely from the unique textual reference that exists in the first sentence of Article 2.4.2 to "all comparable export transactions." According to these panel decisions, the requirement recognized by the Appellate Body to calculate a margin of dumping with reference to the "product as a whole" is derived solely and exclusively from the "all comparable export transactions" language of Article 2.4.2.[3]

11. The Appellate Body's ruling in *US-Softwood Lumber V* demonstrates why the reasoning utilized by these two Panels was not correct. The Appellate Body noted, and the United States agreed, that "multiple averaging" by models is permitted under Article 2.4.2 and was not a matter in contention.[4] What was under contention, however, was whether the results of such intermediate comparisons are properly considered "margins of dumping" within the meaning of the AD Agreement and for purposes of Article 2.4.2 in particular. The United States argued that such intermediate or "sub-group level" comparison results are "margins of dumping."

12. In this sense, the Appellate Body found that the interpretation of the United States lacks merit. The Appellate Body began its analysis with the text of Article VI:1 of GATT 1994, which defines "dumping" as occurring where "<u>products</u> of one country are introduced into the commerce of another country at less than the normal value of the <u>products</u>" (emphasis added). This definition is reiterated in Article 2.1 of the AD Agreement, which likewise speaks in terms of a "<u>product</u>" being dumped when the export price of the "<u>product</u>" is less than the comparable price, in the ordinary course of trade, for the like "<u>product</u>" when destined for consumption in the exporting country.

13. The Appellate Body also explained in *US-Softwood Lumber V* that its finding that "dumping" and "margins of dumping" can only be established for the product under investigation "as a whole" is "in consonance with the need for consistent treatment of a product in antidumping investigation."[5] In particular, the "product," as defined by the investigating authorities in the given case, must be treated "as whole" for determining the volume of imports, injury, causation, and calculation of the margin of dumping. Thus, it is impermissible under the AD Agreement to treat some export transactions as

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[3] *See*, *e.g.,* Panel Report, *US – Zeroing (Japan)(Panel)* para. 7.82; Panel Report, *US – Softwood Lumber (21.5)(Panel)* at para. 5.21

[4] Appellate Body Report, *US-Softwood Lumber V*, para. 80 ("We note that there is no disagreement among the participants in this dispute as to the permissibility of "multiple averaging" under Article 2.4.2. All participants agree that an investigating authority may choose to divide the product under investigation into product types or models for purposes of calculating a weighted average normal value and a weighted average export price for the transactions involving each product type or model or sub-group of "comparable" transactions.").

[5] *See id*, para. 99.

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"dumped" for certain purposes (such as injury determination) and not dumped for other purposes (such as calculating margins of dumping).

14. In sum, contrary to erroneous assertions in certain recent panel decisions,[6] the Appellate Body's reasoning with regard to the concept of the "product as a whole" in *US – Softwood Lumber V*, did not turn solely or principally, on the particular phrasing "all comparable export transactions" in the first sentence of Article 2.4.2. Rather, the Appellate Body correctly reasoned that "dumping" and "margins of dumping" are concepts that find meaning in the Agreement with reference to the product under investigation taken as a whole. This concept of "product as a whole" is itself fundamentally derived from the textual references to the "product" under investigation in Article VI:1 and VI:2 of GATT 1994, Article 2.1, and elsewhere in the Agreement (*e.g.*, Articles 9.2 and 6.10).[7]

15. Finally, the reasoning adopted by the Panel in *US-Softwood Lumber* V (21.5) was flatly rejected when the dispute reached the Appellate Body.[8] Mexico notes that the similar reasoning employed by the Panel in *US-Zeroing (Japan)* is currently before the Appellate Body and a rejection of this erroneous reasoning is again to be expected.

C. The United States' has not yet modified its WTO-inconsistent Zeroing Practice

16. Mexico would like to draw the attention of the Panel to the unwillingness of the United States to modify its WTO-inconsistent zeroing practice in response to the prior findings of the Appellate Body.

17. Following the WTO Panel decision in *US – Zeroing (EC I)*, the United States initiated a domestic legal process that purported to implement the panel's findings with respect to model zeroing applied in the original investigations.[9] However, to date, the United States continues to apply the invalidated model-zeroing methodology in new original investigations claiming that the implementation process "has not run its course."[10] As USDOC argued in a recent anti-dumping determination:

> "[I]t is premature to determine precisely how the United States will implement the panel recommendation. With respect to the recent Appellate Body Report in [*US – Zeroing (EC I)*], the United States has not yet gone through the statutorily mandated process of determining whether to implement the report. . . . As such, the WTO dispute settlement proceedings have no bearing on whether the Department's denial of offsets in this investigation is consistent with US law . . . Accordingly, the Department will continue in this investigation to deny offsets to dumping based on export transactions that exceed normal value."[11]

18. It is regrettable that Ecuador has also found it necessary to resolve this matter through the WTO dispute settlement procedures despite the Appellate Body's multiple decisions that this practice is WTO-inconsistent. Indeed, in view that there is no longer a defense against this practice, it seems coherent to us that the United States had agreed in this proceeding not to contest Ecuador's claims.

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[6] *See* para. 9 *supra*.

[7] *See*, *e.g.,* Appellate Body Report, *US-Softwood Lumber V* at para. 99.

[8] *See*, Appellate Body Report, *US-Softwood Lumber V (Article 21.5)* at paras. 92 (noting that "[t]he Appellate Body underscored that its previous finding concerning the inconsistency of zeroing under the weighted average-to-weighted average comparison methodology 'was based not only on Article 2.4.2, first sentence, but also on the context found in Article 2.1 of the *Antidumping Agreement*.'").

[9] *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11189 (Dep't Commerce)(March 6, 2006).

[10] *See Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29,303 (Dep't Commerce) (22 May 2006)(final determination of sales at less than fair value).

[11] *Ibid*.

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II. CONCLUSION

19. Mexico respectfully requests that the Panel be mindful of this communication and of the circumstances described above in formulating its recommendations at the conclusion of this dispute, and appreciates the opportunity to participate in this proceeding as a Third Party and to submit its views relating to United States' model zeroing methodology.

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ANNEX C-14

ORAL STATEMENT OF MEXICO

3 November 2006

Mexico is grateful for this opportunity to express its views on this dispute and, in order to take full advantage of the opportunity, we should like, first of all, to draw the Panel's attention to the content of our written submission presented on 30 October and, secondly, to make the following systemic comments on the nature and objectives of the WTO dispute settlement procedures.

1. We are in favour of the parties seeking creative alternatives so as to make efficient use of the mechanism. Thus, we recognize that the DSU gives the parties flexibility to settle disputes. This case is a clear example of that, which is why this factor should be taken into account alongside the following comments.

2. The written submission of the United States and its participation in the agreement reached with Ecuador represent in our opinion a positive move towards achieving the elimination of the practice of zeroing, but we are dismayed that this effort does not extend to stopping the United States from applying this practice in other circumstances. That would represent a significant saving in resources for all the WTO Members who, like us, have suffered the illegal application of this practice.

3. The European Communities draws attention in its third party submission to a Panel's obligation to "make an objective assessment of the matter before it" and we share the concern to which this could give rise in the way in which it is presented by the European Communities. However, we trust that by concentrating on the facts of this dispute, particularly the existence of an agreement between the parties on the content of their complaints and responses, this Panel will be able to carry out effectively its duties, without producing precedents that might limit or jeopardize the rights of other Members or the outcome of other decisions by other Panels.

4. From the agreement reached between Ecuador and the United States, Mexico infers that the fact that the United States does not contest Ecuador's allegation that the measures identified in these proceedings are inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement would mean, in the present case, that in principle there is no dispute *per se*. It is our understanding that this shared interpretation should not affect other proceedings or the interpretation of Members' rights, particularly in the case of the Anti-Dumping Agreement.

5. Given the nature of this dispute, we believe that a preferable course of action by which the parties might resolve their differences, would have been to act in accordance with Article 5 or Article 25 of the Dispute Settlement Understanding (DSU). Since that has not been done, this Panel should particularly bear in mind that an agreement between two parties on the interpretation of a specific rule cannot, by virtue of the rule of negative consensus, be a substitute for the authoritative interpretation which only the Members as a whole can adopt pursuant to Article IX of the WTO Agreement (Marrakesh Agreement Establishing the World Trade Organization).

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6. Finally, with regard to the working procedures adopted by the Panel, we understand that they were adopted in conformity with Article 12.1 of the DSU. We are concerned that the agreement between the parties, which is now public, could send the wrong signal that it is the parties in a dispute who determine the procedure that the Panel must follow. We would be grateful if that were clarified in your report.

With these comments we conclude our oral statement. Thank you very much.

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ANNEX C-15

ANSWER OF MEXICO TO QUESTION POSED BY THE PANEL

13 November 2006

Q1. **"What does your delegation consider is the role of a Panel in a case like this one, where there is no substantive disagreement between the Parties as to the inconsistency of a measure with one or more cited provisions of a covered Agreement? Can the Panel limit itself to sanctioning the mutual understanding of the parties, or must the Panel, on its own, determine whether the measure at issue is inconsistent with the cited provisions?"**

By way of response to this question, Mexico would refer the Panel to the text of our oral submission of 3 November last and welcomes the opportunity to make the following additional comments:

1. The idea of sanctioning the mutual understanding of the parties is a practice followed in private commercial arbitration proceedings and other types of arbitration such as Investor-State proceedings[1], under which an agreed settlement between the parties may be treated as equivalent to an arbitral award. However, the effects of panel decisions may be very different from those obtained in the sphere of private commercial law, mainly because, in the case of WTO proceedings, an agreement between two parties on the interpretation of a specific rule cannot, by virtue of the rule of negative consensus, be a substitute for the authoritative interpretation which only the Members as a whole can adopt pursuant to Article IX of the WTO Agreement (Marrakesh Agreement Establishing the World Trade Organization). Otherwise, there is a risk that interpretations agreed bilaterally by two parties, with the approval of panels, might not be approved by the other Members. In view of the foregoing, and in addition to the views already expressed in our oral submission, Mexico considers that this Panel should not limit itself to sanctioning the mutual understanding of the parties.

[1] See for example Rule 43 (Settlement and Discontinuance) of the ICSID (International Centre for Settlement of Investment Disputes) Rules of Procedure for Arbitration Proceedings, and Article 26 (Award by Consent) of the ICC (International Chamber of Commerce) Arbitration Rules.

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ANNEX C-16

ORAL STATEMENT OF THAILAND

3 November 2006

1. Mr. Chairman and Members of the Panel: Thailand appreciates the opportunity to present its views on this matter to the Panel today.

2. We reserved our third party rights under Article 10.2 of the Dispute Settlement Understanding because imports of Thai shrimp into the United States are also subject to the US practice of zeroing described by Ecuador in its first written submission.[1] Thailand firmly believes that this practice is inconsistent with the WTO Anti-Dumping Agreement because it results in the imposition of an anti-dumping duty greater than the actual margin of dumping for the product concerned, and is currently contesting the US application of zeroing to Thai shrimp imports in another dispute.

3. Therefore, Thailand generally welcomes that the United States does not contest the inconsistency of its zeroing practice with Article 2.4.2 of the Anti-Dumping Agreement. We view this as a positive development, and urge the United States to abandon the use of zeroing in all instances in which it is applied as soon as possible.

4. Thailand also notes that the US Department of Commerce has recently declared its intention to abandon the use of zeroing with average-to-average comparisons in antidumping investigations. We would appreciate further details from the United States on the execution of that intention in light of this dispute.

5. Finally, Thailand will be happy to respond to any questions the Panel may have. Again, we thank you for the opportunity to present our views today.

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[1] First Written Submission of Ecuador, 19 October 2006.

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