

**UNITED STATES – ANTI-DUMPING MEASURE ON  
SHRIMP FROM ECUADOR**

*Report of the Panel*



TABLE OF CONTENTS

	<u>Page</u>
<b>I. INTRODUCTION .....</b>	<b>1</b>
A. COMPLAINT OF ECUADOR .....	1
<b>II. FACTUAL ASPECTS .....</b>	<b>1</b>
<b>III. PROCEDURAL ASPECTS .....</b>	<b>2</b>
<b>IV. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....</b>	<b>3</b>
A. ECUADOR .....	3
B. UNITED STATES.....	3
<b>V. ARGUMENTS OF THE PARTIES AND OF THE THIRD PARTIES .....</b>	<b>3</b>
<b>VI. INTERIM REVIEW .....</b>	<b>3</b>
<b>VII. FINDINGS.....</b>	<b>4</b>
A. GENERAL ISSUES .....	4
<b>1. Role of the Panel under Article 11 in disputes where the responding party does not object to the complaining party's claims .....</b>	<b>4</b>
<b>2. Burden of proof .....</b>	<b>6</b>
B. SUBSTANTIVE ISSUE - USE OF "ZEROING" BY THE USDOC IN THE MEASURES AT ISSUE .....	8
<b>1. Ecuador's arguments .....</b>	<b>8</b>
(a) Introduction.....	8
(b) Similarities with the measures at issue in <i>US – Softwood Lumber V</i> .....	8
(c) Legal arguments.....	10
<b>2. The United States' arguments.....</b>	<b>12</b>
<b>3. Arguments of the third parties .....</b>	<b>12</b>
<b>4. Analysis by the Panel.....</b>	<b>13</b>
(a) Whether Ecuador has established that the USDOC "zeroed" in the three measures at issue .....	13
(b) Whether Ecuador has established that the methodology used by the USDOC is similar to the methodology the USDOC used in <i>Lumber V</i> .....	13
(c) Ecuador's claim of inconsistency under Article 2.4.2 of the <i>Anti-Dumping Agreement</i> .....	14
<b>VIII. CONCLUSIONS AND RECOMMENDATIONS.....</b>	<b>17</b>
 <b>ATTACHMENT 1 – REQUEST FOR ESTABLISHMENT OF A PANEL (DS335/6)</b>	
 <b>ATTACHMENT 2 – PROCEDURAL AGREEMENT BETWEEN ECUADOR AND THE UNITED STATES (DS335/8)</b>	

**LIST OF ANNEXES****ANNEX A****SUBMISSIONS OF ECUADOR**

<b>Contents</b>		<b>Page</b>
Annex A-1	Written Submission of Ecuador (19 October 2006)	A-2
Annex A-2	Oral Statement of Ecuador (3 November 2006)	A-5
Annex A-3	Answers of Ecuador to Questions from the Panel (6 November 2006)	A-6
Annex A-4	Answers of Ecuador to Questions from the Panel (13 November 2006)	A-8

**ANNEX B****SUBMISSIONS OF THE UNITED STATES**

<b>Contents</b>		<b>Page</b>
Annex B-1	Written Submission of the United States (23 October 2006)	B-2
Annex B-2	Oral Statement of the United States (3 November 2006)	B-3
Annex B-3	Answers of the United States to Questions from the Panel (13 November 2006)	B-4

**ANNEX C****SUBMISSIONS OF THE THIRD PARTIES**

<b>Contents</b>		<b>Page</b>
Annex C-1	Oral Statement of Brazil	C-2
Annex C-2	Answer of Brazil to Question Posed by the Panel	C-4
Annex C-3	Written Submission of Chile	C-5
Annex C-4	Oral Statement of Chile	C-6
Annex C-5	Answer of Chile to Question Posed by the Panel	C-7
Annex C-6	Oral Statement of China	C-8
Annex C-7	Written Submission of the European Communities	C-9
Annex C-8	Answer of the European Communities to Question Posed by the Panel	C-11
Annex C-9	Oral Statement of India	C-13
Annex C-10	Answer of India to Question Posed by the Panel	C-14
Annex C-11	Oral Statement of Japan	C-15
Annex C-12	Answer of Korea to Question Posed by the Panel	C-16
Annex C-13	Written Submission of Mexico	C-18
Annex C-14	Oral Statement of Mexico	C-23
Annex C-15	Answer of Mexico to Question Posed by the Panel	C-25
Annex C-16	Oral Statement of Thailand	C-26

**TABLE OF CASES CITED IN THIS REPORT**

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049.
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135.
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97.
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005.
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004.
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481.
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V,1875
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323.
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006.



## 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.<sup>1</sup> 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*.<sup>2</sup>

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.<sup>3</sup> 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

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<sup>1</sup> WT/DS335/1.

<sup>2</sup> WT/DS335/6, appended to this Report as Attachment 1.

<sup>3</sup> WT/DS335/7.

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.<sup>4</sup>

2.3 On 23 December 2004, the USDOC's final dumping determination was published,<sup>5</sup> 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.<sup>6</sup> 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"<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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*.<sup>10</sup> The Agreement

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<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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).

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> Agreement on Procedures, para. 3.

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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

#### **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

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<sup>11</sup> *Ibid.*, para. 7

<sup>12</sup> *Ibid.*, para. 4.

<sup>13</sup> Written submission of Ecuador, Annex A-1, para. 22.

<sup>14</sup> Written submission of the United States, Annex B-1, para. 5.

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.<sup>15</sup> 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.<sup>16</sup> (emphasis added)

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<sup>15</sup> 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."

<sup>16</sup> 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

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"<sup>17</sup>), 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,<sup>18</sup> 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.<sup>19</sup>

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.<sup>20</sup>

7.6 India indicates that, in its view,

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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.

<sup>17</sup> Article 12.7 DSU.

<sup>18</sup> 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?"

<sup>19</sup> 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.

<sup>20</sup> Answer of the European Communities to question posed by the Panel, Annex C-8, para. 4.

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.<sup>21</sup>

## 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.<sup>22</sup> 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."<sup>23</sup>

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<sup>21</sup> 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 parties' 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.

<sup>22</sup> 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).

<sup>23</sup> *EC – Hormones*, para. 104, citing *US – Wool Shirts and Blouses*, p. 14.

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.<sup>24</sup>

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",<sup>25</sup> 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.<sup>26</sup>

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

<sup>25</sup> *US – Gambling*, para. 139.

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

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<sup>27</sup> and its amended final margin determination and anti-dumping order of 1 February 2005<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup>

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)*.<sup>31</sup>

(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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<sup>27</sup> 69 Fed. Reg. 76913, attached to the written submission of Ecuador as Exhibit Ecu-2.

<sup>28</sup> 70 Fed. Reg. 5156, attached to the written submission of Ecuador as Exhibit Ecu-3.

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

<sup>30</sup> Written submission of Ecuador, Annex A-1, para. 2; see also para. 20.

<sup>31</sup> *Ibid.* para. 11.

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".<sup>32</sup> 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".<sup>33</sup> 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.<sup>34</sup> 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*.<sup>35</sup>

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.<sup>36</sup> Ecuador has, *inter alia*, referred us to the USDOC's final determination "Issues and Decision Memorandum"<sup>37</sup> 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".<sup>38</sup> 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.<sup>39</sup>

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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<sup>32</sup> See answers of Ecuador to questions from the Panel (6 November 2006) Annex A-3 (answer to question 2).

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* (answer to question 1).

<sup>37</sup> "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.

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

<sup>39</sup> *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.*

calculation program" includes the computer programming instructions that the USDOC used to employ its zeroing methodology.<sup>40</sup>

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<sup>41</sup> and for the amended final determination.<sup>42</sup> 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.<sup>43</sup>

(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."<sup>44</sup> 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*.<sup>45</sup>

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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<sup>40</sup> 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)

<sup>41</sup> 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.

<sup>42</sup> *Ibid.*

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

<sup>44</sup> Written submission of Ecuador, para. 19.

<sup>45</sup> *Ibid.*, para. 20.

under the first methodology set out in the first sentence of Article 2.4.2, must be calculated for the "product as a whole".<sup>46</sup>

7.22 In its written response to the same Panel question,<sup>47</sup> 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.<sup>48</sup>

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<sup>46</sup> 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."

<sup>47</sup> 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 (except 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)?"

<sup>48</sup> 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;

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."<sup>49</sup>

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."<sup>50</sup>

## 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.<sup>51</sup>

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,<sup>52</sup> 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*.<sup>53</sup>

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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."

<sup>49</sup> *Ibid.*

<sup>50</sup> 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.

<sup>51</sup> 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.

<sup>52</sup> See the oral statement of Brazil, Annex C-1, para. 9.

<sup>53</sup> See the third party submission of Mexico, Annex C-13, para. 4.

#### 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.<sup>54</sup>

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

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<sup>54</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 63.

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).<sup>55</sup>

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.<sup>56</sup>

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,<sup>57</sup> 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.<sup>58</sup> 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:

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<sup>55</sup> *Ibid.*, para. 64 (emphasis original; footnote omitted).

<sup>56</sup> *Ibid.*, para. 65.

<sup>57</sup> See para. 7.14, *supra*.

<sup>58</sup> See para. 7.25, *supra*.

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,<sup>59</sup> 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".<sup>60</sup>

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".<sup>61</sup> 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."<sup>62</sup> 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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<sup>59</sup> 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.

<sup>60</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paragraph 188.

<sup>61</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 93.

<sup>62</sup> *Ibid.*

only be, established for the *product* under investigation as a whole.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

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*.<sup>66</sup> 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.<sup>67</sup>

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*.<sup>68</sup> 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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<sup>63</sup> Appellate Body Report, *EC – Bed Linen*, para. 53 (emphasis original), quoted in Appellate Body Report, *US – Softwood Lumber V*, para. 96.

<sup>64</sup> Appellate Body Report, *US – Softwood Lumber V*, paras. 97-98.

<sup>65</sup> *Ibid.*, para. 101 (footnote omitted).

<sup>66</sup> *Ibid.*, para. 102.

<sup>67</sup> *Ibid.*, para. 117.

<sup>68</sup> 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.

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.<sup>69</sup> The parties agree.<sup>70</sup>

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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<sup>69</sup> 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.

<sup>70</sup> 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).

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

**WORLD TRADE  
ORGANIZATION**

WT/DS335/6  
9 June 2006

(06-2790)

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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.

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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.

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.

**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.<sup>71</sup> 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.

<sup>71</sup> Not reproduced here.

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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