

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.

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.

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.

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 none 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.

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.

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.

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 (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' 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;

- (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.

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

(**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.

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.