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UNITED STATES – ANTI-DUMPING MEASURES ON POLYETHYLENE RETAIL CARRIER BAGS FROM THAILAND

Report of the Panel

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US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006

I. INTRODUCTION

1.1 On 26 November 2008, the Government of the Kingdom of Thailand ("Thailand") requested consultations pursuant to Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), and Articles 17.2, 17.3 and 17.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), concerning the United States' alleged application of the practice known as "zeroing" of negative dumping margins in the United States' determination of certain margins of dumping in its anti-dumping investigation of polyethylene retail carrier bags from Thailand.[1] Thailand and the United States held consultations in Geneva on 28 January 2009, but failed to resolve the dispute. At the Dispute Settlement Body (the "DSB") meeting held on 20 March 2009, Thailand requested the establishment of a panel pursuant to Article XXIII:1 of the GATT 1994, Articles 4 and 6 of the DSU, and Article 17.4 of the Anti-Dumping Agreement.[2] At that meeting, the DSB established a panel pursuant to the request of Thailand.

1.2 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Thailand in document WT/DS383/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.3 On 20 August 2009, the parties agreed to the following composition of the Panel:

Chairman: Mr. Alberto Juan Dumont

Members: Ms Deborah Milstein
Mr. Norman M. Harris

1.4 Argentina, the European Communities[3], Japan, Korea and Chinese Taipei reserved their rights to participate in the Panel proceedings as third parties.

1.5 After consulting with the parties, and with the accord of the third parties, the Panel decided not to hold any substantive meetings with the parties and/or third parties.[4]

II. FACTUAL ASPECTS

2.1 The measures at issue in this dispute are the anti-dumping order imposed by the United States on polyethylene retail carrier bags from Thailand (the "Order") and the Final Determination (the

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[1] WT/DS383/1.

[2] WT/DS383/2.

[3] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

[4] The parties submitted a joint procedural agreement providing, *inter alia*, that the parties should ask the Panel to accept only one written submission per party, that the parties should ask the Panel to forego meetings with the parties, that the United States would not contest Thailand's claim, that Thailand should not ask the Panel to suggest ways in which the United States might implement the Panel's recommendations pursuant to the second sentence of Article 19.1 of the *DSU*, and that the United States should implement the Panel's recommendations using specified provisions of US law (WT/DS383/4).

"Final Determination") by the United States Department of Commerce (the "USDOC"), as amended, leading to that Order.

2.2 The United States published its notice of initiation of its anti-dumping investigation of polyethylene retail carrier bags from Thailand on 16 July 2003. The Final Determination in this investigation was published on 18 June 2004, and an amended final determination was published by the USDOC on 15 July 2004.

2.3 Following a final determination of injury by the United States International Trade Commission, the United States issued an anti-dumping duty order on imports of polyethylene retail carrier bags from Thailand on 9 August 2004.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. THAILAND

3.1 Thailand claims that in its Final Determination, as amended, the USDOC used the "zeroing" methodology to determine the final dumping margins for individually investigated Thai exporters subject to the Order whose margins of dumping were not based on total facts available. In particular, Thailand claims that, in calculating the anti-dumping margins for the relevant exporters, the USDOC:

(i) identified different "models," *i.e.*, types, of products based on the most relevant product characteristics;

(ii) calculated weighted average prices in the United States and weighted average normal values in the comparison market on a model-specific basis, for the entire period of investigation;

(iii) compared the weighted average normal value of each model to the weighted average United States price for that same model;

(iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and

(v) set to zero all negative margins on individual models before summing the total amount of dumping for all models.

3.2 Thailand submits that through this method, the USDOC calculated margins of dumping and collected anti-dumping duties in amounts that exceeded the actual extent of dumping, if any, by the investigated companies, contrary to the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement*.

B. THE UNITED STATES

3.3 The United States acknowledges the accuracy of Thailand's description of the USDOC's use of "zeroing" in calculating the dumping margins for the individually investigated exporters whose margins of dumping were not based on total facts available. The United States recognizes that, in *US – Softwood Lumber V*, the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in the

first sentence of Article 2.4.2, in an integrated manner.[5] The United States also acknowledges that this reasoning is equally applicable with respect to Thailand's claim in the present case.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions to the Panel. Thailand made further arguments in its response to a question from the Panel. The parties' written submissions, and Thailand's response to the Panel's question are attached to this report as annexes (see List of Annexes, page ii).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 Argentina, the European Communities, Japan, Korea and Chinese Taipei have reserved their rights to participate in the Panel proceedings as third parties. The arguments of Argentina, the European Communities and Japan are set out in their written submissions. Korea and Chinese Taipei did not provide written submissions. The third parties' written submissions or their executive summaries thereof are attached to this report as annexes (see List of Annexes, page ii).

VI. INTERIM REVIEW

6.1 The Panel issued its Interim Report to the parties on 11 December 2009. On 18 December 2009, both parties submitted written requests for the review of precise aspects of the Interim Report. Neither party exercised its right to submit written comments on the other party's written request, or to request an interim review meeting. In accordance with Article 15.3 of the *DSU*, this section of the Panel's Report sets out the arguments made at the interim review stage.

A. THAILAND

6.2 Thailand requested the Panel to delete a reference to a prior WTO dispute settlement case from para. 6.2 of the Interim Report, on the ground that such case did not address the precise matter at issue in this case. We have deleted the relevant reference from para. 7.2 of our Report.

6.3 Thailand requested that we insert the words "some of" into footnote 13 of the Interim Report, to clarify that Thailand also relied on evidence other than the USDOC's preliminary determination, in particular the USDOC computer programme. We have amended footnote 14 of the Report accordingly. We have also included a new para. 7.16 in the Report, addressing the relevant parts of the USDOC computer programme.

6.4 Thailand requested that we modify para. 6.17 of the Interim Report to ensure consistency with the scope of our conclusion in para. 7.1 of the Interim Report, and with the arguments set forth in Thailand's written submission. We have amended para. 7.18 of our Report accordingly.

B. THE UNITED STATES

6.5 The United States requested the inclusion of a reference to consultations in para. 1.1 of the Interim Report. We have amended para. 1.1 of the Report accordingly.

6.6 The United States requested a clarification in para. 6.9 of the Interim Report. We have introduced the clarification sought by the United States into para. 7.9 of the Report.

[5] Appellate Body Report, *US – Softwood Lumber V*, paras. 62-117.

6.7 Regarding paras. 6.13 and 6.15, and footnote 13, of the Interim Report, the United States requested the inclusion of a reference to Thailand's reliance on evidence regarding the USDOC's computer programme. We have amended para. 7.13 and footnote 14 of the Report, and included a new para. 7.16 in the Report regarding the relevant parts of the USDOC computer programme.

6.8 The United States requested a change in para. 6.16 of the Interim Report, to ensure consistency with Thailand's written submission and para. 3.1 of the Interim Report. We have amended para. 7.17 of the Report accordingly.

6.9 The United States requested that we modify para. 6.17 of the Interim Report to ensure consistency with the scope of our conclusion in para. 7.1 of the Interim Report. We have amended para. 7.18 of our Report accordingly.

6.10 The United States requested linguistic changes to para. 6.23 of the Interim Report. We have modified para. 7.24 of our Report accordingly.

VII. FINDINGS

7.1 Thailand claims that the United States acted inconsistently with Article 2.4.2, first sentence, of the *Anti-Dumping Agreement* by using "zeroing" in the Final Determination, as amended, and the Order to determine the dumping margins for individually investigated Thai exporters whose margins of dumping were not based on total facts available. The United States does not contest Thailand's claim.

7.2 The issues raised in this case are very similar to those addressed first by the panel in *US – Shrimp (Ecuador)*, and subsequently by the panel in *US – Shrimp (Thailand)*. Like the latter panel, we agree with the approach adopted by the *US – Shrimp (Ecuador)* panel, and are guided by it.

7.3 We begin by considering, in light of the fact that the United States does not contest Thailand's claim, our role under Article 11 of the *DSU*, and the burden of proof to be discharged by Thailand. We then consider whether Thailand has established that the USDOC "zeroed" in the measure at issue, and whether Thailand has established that the methodology used by the USDOC is the same in all legally relevant respects as the methodology reviewed by the Appellate Body in *US – Softwood Lumber V*. Thereafter, we consider whether Thailand has established that the methodology applied by the USDOC is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

(a) The role of the Panel under Article 11 of the *DSU*

7.4 Article 11 of the *DSU* 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."[6] (emphasis added)

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

7.5 Notwithstanding the United States' decision not to contest Thailand's claim, we consider that we are still bound by Article 11 of the *DSU* 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".

(b) Burden of proof

7.6 The panel in *US – Shrimp (Ecuador)* made the following findings in respect of burden of proof:

> "Because of its singularity, this dispute raises in a particularly acute fashion the issue of the burden of proof.
>
> The burden of proof lies, in WTO dispute settlement proceedings, with the party that asserts the affirmative of a particular claim or defence. 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'.
>
> 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.'
>
> 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", and noted that:

United States does not contest Thailand's claim, it is not necessary for us to consider the application of this provision in detail.

> '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.'
>
> 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] (footnotes omitted)

7.7 We agree with this reasoning of the panel in *US – Shrimp (Ecuador)*, and adopt it as our own. Accordingly, notwithstanding the fact that the United States is not seeking to refute Thailand's claim, we must satisfy ourselves that Thailand has established a prima facie case of violation of Article 2.4.2 of the *Anti-Dumping Agreement*.

(c) Has Thailand established that the USDOC "zeroed" in the measure at issue?

7.8 We now consider whether Thailand has established that the USDOC "zeroed" in the measure at issue.

7.9 In support of its factual assertion that the USDOC "zeroed" in the measure at issue, Thailand refers to a copy of the computer programme used by the USDOC to calculate dumping margins in the Final Determination, as amended, that was provided to some of the investigated exporters. We have studied the relevant computer programme, and find that it indicates the use of "zeroing" in the calculation of the dumping margins for the relevant Thai exporters. In particular, lines 2567-2570 provide that "IF EMARGIN LE 0 THEN EMARGIN = 0", i.e., that margins on individual models less than zero should be set to zero. In addition, lines 2633-2637 and 2693-2696 provide that the overall

[7] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.7 – 7.11.

margin of dumping shall only be calculated on the basis of comparisons "WHERE EMARGIN GT 0", i.e., where the margin for a particular model was greater than zero.[8]

7.10 Furthermore, we recall that "the United States acknowledges the accuracy of Thailand's description of the [USDOC]'s use of 'zeroing' in calculating the dumping margins for the individually investigated exporters whose margins of dumping were not based on total facts available".[9] In these circumstances, we are satisfied that Thailand has demonstrated that the USDOC "zeroed" in the measure at issue.

(d) Has Thailand established that the methodology used by the USDOC is the same in all legally relevant respects as the methodology reviewed by the Appellate Body in *US – Softwood Lumber V*?

7.11 We now determine whether the "zeroing" methodology used by the USDOC to calculate the dumping margins at issue here was, as alleged by Thailand, the same in all legally relevant respects as the one the Appellate Body, in *US – Softwood Lumber V*, found to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

7.12 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 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).[10]

7.13 In support of its claim that the methodology used by the USDOC is the same in all legally relevant respects as the methodology reviewed by the Appellate Body in *US – Softwood Lumber V*, Thailand relies on the description of the methodology set forth in the USDOC's notice of preliminary determination of sales at less than fair value in the investigation at issue, as well as the computer

[8] Exhibit THA-4.
[9] United States' Written Submission, para. 5.
[10] Appellate Body Report, *US – Softwood Lumber V*, para. 64 (emphasis original; footnote omitted).

programme used to determine the dumping margins. In its notice of preliminary determination, the USDOC stated that:

> "To determine whether sales of PRCBs to the United States by Thai Plastic Bags and Universal in this investigation were made at less than fair value, we compare EP [export price] or constructed export price (CEP) to normal value, as described in the 'US Price' and 'Normal Value' sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs and CEPs.
>
> In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance ..."[11]

7.14 The USDOC further explained that:

> We compared U.S. sales with sales of the foreign like product in the home market on the basis of the physical characteristics described under Fair Value Comparisons above. Wherever we were unable to match a U.S. model to identical merchandise sold in the home market, we selected the most similar model of subject merchandise in the home market as the foreign like product.[12]

7.15 Thereafter, the USDOC explained that the weighted-average dumping margin was "equal to the weighted-average amount by which the normal value exceeds the EP or CEP".[13]

7.16 In addition, the abovementioned USDOC computer programme shows that the USDOC determined weighted-average U.S. prices by model (lines 1976-2005); determined weighted-average normal values by model (lines 985-1037); matched home market and U.S. sales by model (lines 2007-2179); and made model-by-model calculations (lines 2417-2555), including the subtraction of U.S. price from normal value (lines 2541-2543).

7.17 In our view, this evidence is sufficient to establish that the USDOC (i) identified different "models," *i.e.*, types, of products based on the most relevant product characteristics, (ii) calculated weighted average prices in the United States and weighted average normal values in the comparison market on a model-specific basis, for the entire period of investigation, (iii) compared the weighted average normal value of each model to the weighted average United States price for that same model, and (iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated U.S. price for all models.[14] We recall that we have already found that Thailand has established that (v) the USDOC set to zero all negative margins on individual models before summing the total amount of dumping for all models.

7.18 In light of these considerations, and in the absence of any denial by the United States, we are satisfied that Thailand has demonstrated that the methodology applied by the USDOC in calculating the margins of dumping that were not based on total facts available in the Order imposing anti-dumping duties on certain polyethylene retail carrier bags from Thailand, and the Final Determination (as amended) leading to that Order, was the same in all legally relevant respects as the methodology

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[11] *Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 3552, 3554 (26 January 2004), Exhibit THA-9.

[12] *Ibid.*, at 3555.

[13] *Ibid.*, at 3557.

[14] Although some of this evidence pertains to the USDOC's preliminary determination, the United States has not argued that the USDOC amended its methodology when making the Final Determination, or any amendment thereto.

that was found by the Appellate Body in *US – Softwood Lumber V* to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

(e) Has Thailand established that the methodology applied by the USDOC is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*?

7.19 We now turn to the legal analysis of Thailand's claim, i.e., whether the measure it challenges is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*. Article 2.4.2 provides as follows:

> *"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."

7.20 Thailand relies on the Appellate Body Report in *US – Softwood Lumber* V in support of its claim of inconsistency with Article 2.4.2. In particular, Thailand relies[15] on the Appellate Body's finding that the terms "margins of dumping" and "all comparable export transactions" in Article 2.4.2 must be interpreted in an "integrated manner"[16], such that where "an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[17]

7.21 While we are not bound by the reasoning in prior Appellate Body and/or panel reports, adopted Reports create legitimate expectations among WTO Members[18], and "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".[19]

7.22 The panel in *US – Shrimp (Ecuador)* explained its understanding of the Appellate Body's reasoning in *US – Softwood Lumber V* 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

[15] Thailand's Written Submission, para. 13.
[16] Appellate Body Report, *US – Softwood Lumber V*, paras. 86-103.
[17] *Ibid*., para. 98.
[18] 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.
[19] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

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'. 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." 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 only be, established for the *product* under investigation as a whole'. 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 <u>all</u> such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole. 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.

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*. 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."[20]

7.23 The panel in *US – Shrimp (Ecuador)* further found that "there is now a consistent line of Appellate Body Reports, from *EC – Bed Linen* to *US – Zeroing (EC)* that holds that 'zeroing' in the

[20] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.38 and 7.39 (footnotes omitted).

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".[21]

7.24 We have carefully considered the Appellate Body's reasoning in *US – Softwood Lumber V* and taken into consideration the finding of the panel in *US – Shrimp (Ecuador)* that there is a consistent line of Appellate Body Reports finding that "zeroing" in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2, first sentence. Given that the issues raised by Thailand's claim are identical in all material respects to those addressed by the Appellate Body in *Softwood Lumber V*, we are satisfied that Thailand has established a prima facie case that the use of zeroing by the USDOC in the calculation of the margins of dumping in respect of the measures at issue 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", taking into account all comparable export transactions in calculating the margins of dumping. We note also that the United States "acknowledges" that the reasoning of the Appellate Body in *US – Softwood Lumber* V "is equally applicable with respect to Thailand's claim regarding the individually investigated exporters whose margins of dumping were not based on total facts available in the investigation at issue".[22]

7.25 In light of our finding that Thailand has made a prima facie case of violation in respect of the measure at issue, and in the absence of arguments from the United States to the contrary, we rule in favour of Thailand. We therefore conclude that the USDOC, by using "zeroing" in the manner described above, has acted inconsistently with the United States' obligations under Article 2.4.2 of the *Anti-Dumping Agreement*.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of the above findings, we conclude that the United States acted inconsistently with Article 2.4.2, first sentence, of the *Anti-Dumping Agreement* by using "zeroing" in the Final Determination, as amended, and the Order to determine the dumping margins for individually investigated Thai exporters whose margins of dumping were not based on total facts available.

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 Thailand 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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[21] Panel Report, *US – Shrimp (Ecuador)*, para. 7.40.
[22] United States' Written Submission, para. 5.