ANNEX B

SUBMISSIONS OF THE UNITED STATES

ANNEX B-1

WRITTEN SUBMISSION OF THE UNITED STATES

23 October 2006

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

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

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

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

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

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[1] *See* Exhibit ECU-1.

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

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

[4] Ecuador First Submission, para. 6.

[5] Ecuador First Submission, para. 20.

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

ANNEX B-2

ORAL STATEMENT OF THE UNITED STATES

3 November 2006

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

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

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

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

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

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

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

ANNEX B-3

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM THE PANEL

13 November 2006

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

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

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

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