ANNEX C

SUBMISSIONS OF THIRD PARTIES

ANNEX C-1

ORAL STATEMENT OF BRAZIL

3 November 2006

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

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

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

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

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

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

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

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

[4] *Idem, ibidem.*

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

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

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

Mr. Chairman, Members of the Panel,

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

Thank you, very much.

ANNEX C-2

ANSWER OF BRAZIL TO QUESTION POSED BY THE PANEL

13 November 2006

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

Reply

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

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

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

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

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

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

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

ANNEX C-3

WRITTEN SUBMISSION OF CHILE

30 October 2006

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

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

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

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

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

ANNEX C-4

ORAL STATEMENT OF CHILE

3 November 2006

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

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

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

4. Thank you very much.

ANNEX C-5

ANSWER OF CHILE TO QUESTION POSED BY THE PANEL

13 November 2006

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

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

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

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

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

ANNEX C-6

ORAL STATEMENT OF CHINA

3 November 2006

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

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

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

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

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

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

ANNEX C-7

WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

30 October 2006

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

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

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

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

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

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

[2] WT/DS335/8.

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

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

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

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

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

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

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

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

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

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

ANNEX C-8

ANSWER OF THE EUROPEAN COMMUNITIES TO QUESTION POSED BY THE PANEL

13 November 2006

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-9

ORAL STATEMENT OF INDIA

3 November 2006

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

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

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

ANNEX C-10

ANSWER OF INDIA TO QUESTION POSED BY THE PANEL

13 November 2006

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

Reply

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

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

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

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

ANNEX C-11

ORAL STATEMENT OF JAPAN

3 November 2006

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

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

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

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

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

ANNEX C-12

ANSWER OF KOREA TO QUESTION POSED BY THE PANEL

13 November 2006

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX C-13

WRITTEN SUBMISSION OF MEXICO

30 October 2006

TABLE OF CASES

Short Title	Full Case Title and Citation
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
Japan– Alcoholic Beverages II	Appellate Body Report, *Japan– Taxes on Alcoholic Beverages*, WT/DS8/AB/R, adopted 1 November 1996, DSR 1996:I, 97.
US– OCTG (Argentina)	Appellate Body Report, United States – *Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R, adopted 17 December 2004.*
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 – Softwood Lumber V (Article 21.5)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW, adopted 1 September 2006, as modified by Appellate Body Report, WT/DS264/AB/RW
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, 20 September 2006 (currently before Appellate Body)
US – Zeroing (EC I)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by the Appellate Body Report, WT/DS294/AB/R

I. INTRODUCTION

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

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

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

A. Model Zeroing is prohibited under Article 2.4.2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] *Ibid*.

II. CONCLUSION

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

ANNEX C-14

ORAL STATEMENT OF MEXICO

3 November 2006

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

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

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

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

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

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

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

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

ANNEX C-15

ANSWER OF MEXICO TO QUESTION POSED BY THE PANEL

13 November 2006

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

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

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

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

ANNEX C-16

ORAL STATEMENT OF THAILAND

3 November 2006

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

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

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

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

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

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