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UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN SHRIMP AND DIAMOND SAWBLADES FROM CHINA

Report of the Panel

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Short Title	Full Case Title and Citation
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
US – Anti-Dumping Measures on PET Bags	Panel Report, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R, adopted 18 February 2010
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, 425
US – Shrimp (Thailand)	Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, 2539
US – Shrimp (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted 2 September 2011
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 – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (Korea)	Panel Report, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R, adopted 24 February 2011

LIST OF ABBREVIATIONS

Abbreviation	Full Reference
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CIT	United States Court of International Trade
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
PRC	People's Republic of China
USDOC	United States Department of Commerce
USITC	United States International Trade Commission

I. INTRODUCTION

1.1 On 28 February and on 22 July 2011, China requested consultations with the United States concerning an alleged "zeroing" practice by the United States Department of Commerce (USDOC) in its anti-dumping measures on two products from China: (i) certain frozen warmwater shrimp (hereafter "Shrimp"), and (ii) diamond sawblades and parts thereof (hereafter "Diamond Sawblades")[1].

1.2 On 13 October 2011, China requested the establishment of a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU and Article 17.4 of the Anti-Dumping Agreement[2].

1.3 At its 25 October 2011 meeting, the Dispute Settlement Body (DSB) established this Panel pursuant to the request of China in document WT/DS422/3, in accordance with Article 6 of the DSU.

1.4 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 China in document WT/DS422/3 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.5 Following the agreement of the parties, the Panel was composed on 21 December 2011 as follows:

Chairman: Mr Alberto Juan Dumont

Members: Mr Ernesto Fernández
Ms Stephanie Sin Far Lee

1.6 The European Union, Honduras, Japan, Korea, Thailand and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.

1.7 After consulting with the parties and seeking the views of the third parties, and in view of a joint "Agreement on Procedures" submitted by the parties[3], the Panel decided not to hold any substantive meetings with the parties and/or third parties.

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[1] WT/DS422/1 and WT/DS422/1/Add.1.

[2] WT/DS422/3.

[3] Agreement on Procedures between China and the United States, WT/DS422/4, Exhibit CHN-1. The Agreement is attached to this Report as Annex D-1. The Agreement provides, *inter alia*, that the parties would, in the event China requests the establishment of a panel, work to reach agreement on working procedures aimed to expedite the panel proceedings. In this context, the parties would agree to request that they file only one written submission each, and that the Panel forego meetings with the parties, or, at most, have only one such meeting. The Agreement further provides that the United States would not contest China's claims that the measures identified in China's panel request are inconsistent with Article 2.4.2, first sentence, of the Anti-Dumping Agreement on the grounds stated in *US – Softwood Lumber V*. The Agreement further indicates that the scope of China's panel request does not include any claim regarding the margin of dumping calculated for Zhanjiang Guolian in the Shrimp investigation or "the margin of dumping determined solely on the basis of adverse facts available" in either the Shrimp or Diamond Sawblades investigation. Finally, the Agreement provides that China should not ask that the Panel suggest ways in which the United States could 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 by recalculating relevant margins of dumping and issuing a new determination in order to render the measures at issue consistent with the DSB's recommendations and rulings

1.8 The Panel submitted its Interim Report to the parties on 5 April 2012 and submitted its Final Report to the parties on 3 May 2012.

II. FACTUAL ASPECTS

A. USDOC DETERMINATIONS IN THE SHRIMP AND DIAMOND SAWBLADES INVESTIGATIONS

2.1 This dispute concerns the alleged use by the USDOC of zeroing in the calculation of margins of dumping in its original investigations in the Shrimp and Diamond Sawblades anti-dumping proceedings.

2.2 The United States initiated the Shrimp investigation on 27 January 2004[4]. The USDOC issued its final determination in this investigation on 8 December 2004[5]. The final determination indicates that the USDOC calculated the following margins of dumping for the four exporters/producers selected for individual examination: Allied, 84.93 per cent; Yelin, 82.27 per cent; Red Garden, 27.89 per cent; Zhanjiang Guolian, 0.07 per cent (i.e. *de minimis*). In addition, the USDOC applied a "separate rate" of 55.23 per cent, corresponding to the weighted-average of the margins of dumping calculated for Allied, Yelin, and Red Garden, to 35 exporters/producers who were not selected for individual examination but had established their independence from the government[6]. Finally, the USDOC applied a "PRC-wide rate" of 112.81 per cent to exporters/producers not selected for individual examination who did not establish their independence from the government or who failed to respond to the USDOC's questionnaires. On 1 February 2005, the USDOC issued an amended final determination and an anti-dumping duty order.

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and the Anti-Dumping Agreement. At the organizational meeting, the parties confirmed their request that the Panel not hold any meeting with the parties and third parties.

[4] *Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3876 (27 January 2004), Exhibit CHN-2.

[5] *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70997 (8 December 2004), Exhibit CHN-3.

[6] In proceedings involving imports from "non-market economies", including China, the USDOC applies a rebuttable presumption that all companies within the country are essentially operating units of a single government-wide entity and, thus, should receive a single anti-dumping duty rate, the "country-wide rate" ("PRC-wide rate" in the investigations at issue). Exporters wishing to rebut this presumption must demonstrate the absence of government control, both *de jure* and *de facto*, over their export activities, pursuant to a set of criteria established by the USDOC. Respondents who satisfy these criteria are eligible to receive a margin separate from the country-wide rate. Where, as was the case in the Shrimp and Diamond Sawblades investigations, the USDOC has limited its examination, the respondents found eligible for a separate rate either receive an individual margin, if selected for individual examination, or the "separate rate", if not selected for individual examination. This "separate rate" normally corresponds to the weighted-average of the margins of exporters/producers selected for individual examination, excluding zero and *de minimis* margins and margins calculated entirely on the basis of facts available. (China's first written submission, para. 7; Declaration of Valerie Owenby, (hereafter VO Statement), Exhibit CHN-18, para. 78; United States' first written submission, footnote 6; *Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 42654 (16 July 2004), Exhibit CHN-4, pp. 42660-42661; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70997 (8 December 2004), Exhibit CHN-3, p. 71002; *Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Preliminary Partial Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 70 Fed. Reg. 77121 (29 December 2005), Exhibit CHN-21, pp. 77124-77128; and *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (22 May 2006), Exhibit CHN-13, pp. 29307-29308).

In the amended final determination, the USDOC recalculated the margin of dumping for Allied at 80.19 per cent to correct a ministerial error. As a consequence of this change, the USDOC also recalculated the separate rate, to 53.68 per cent, corresponding to the weighted-average of the dumping margin for Allied, as revised, and of the dumping margins for Yelin and of Red Garden, as calculated in the final determination[7]. On 17 August 2006, the USDOC issued a second amended final determination, in which it applied the separate rate to an additional 11 Chinese exporters/producers who had previously been subject to the PRC-wide rate[8].

2.3 The USDOC subsequently issued a remand determination on 2 September 2010, which revised the scope of the investigation to include dusted shrimp pursuant to a decision of the United States Court of International Trade (CIT)[9]. This was followed by an amendment of the anti-dumping duty order on 26 April 2011[10]. On 29 April 2011, following positive sunset review determinations by the USDOC and the United States International Trade Commission (USITC), the USDOC published a notice of continuation of the anti-dumping order[11]. Finally, the USDOC further issued a second remand determination on 24 May 2011 in which, following another decision of the CIT, it recalculated the margins of dumping for Allied (to 5.07 per cent) and Yelin (to 8.45 per cent)[12].

2.4 The USDOC initiated an anti-dumping investigation on Diamond Sawblades from, *inter alia*, China on 21 June 2005[13]. The USDOC's final determination was issued on 22 May 2006. In this final determination, the USDOC calculated the following margins of dumping: (i) individual margins of 2.50 per cent for AT&M, 34.19 per cent for Bosun and 48.50 per cent for Hebei Jikai; (ii) a separate rate of 20.72 per cent; (iii) a PRC-wide rate of 164.09 per cent[14]. On 22 June 2006, the USDOC issued an amended final determination to correct ministerial errors in the final determination, and revising AT&M's dumping margins to 2.82 per cent, Bosun's dumping margin to 35.51 per cent, and

[7] *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 Fed. Reg. 5149 (1 February 2005), Exhibit CHN-5. The amended final determination and order also excluded canned shrimp from the scope of the investigation.

[8] *Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Second Amended Final Determination of Sales at Less Than Fair Value*, 71 Fed. Reg. 47484 (17 August 2006), Exhibit CHN-6.

[9] *Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Notice of Amended Final Determinations of Sales at Less Than Fair Value Pursuant to Court Decision*, 75 Fed. Reg. 53947 (2 September 2010), Exhibit CHN-7.

[10] *Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision*, 76 Fed. Reg. 23277 (26 April 2011), Exhibit CHN-8.

[11] *Certain Frozen Warmwater Shrimp From Brazil, India, the People's Republic of China, Thailand, and the Socialist Republic of Vietnam: Continuation of Antidumping Duty Orders*, 76 Fed. Reg. 23972 (29 April 2011), Exhibit CHN-11.

[12] *Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Amended Final Determination of Sales at Less Than Fair Value Pursuant to Court Decision*, 76 Fed. Reg. 30100 (24 May 2011), Exhibit CHN-9. We note that the USDOC did not recalculate the separate rate as a result of the second remand determination. (China's first written submission, para. 11; China's response to Panel question No. 2; United States' response to Panel question No. 2).

[13] *Initiation of Antidumping Duty Investigations: Diamond Sawblades and Parts Thereof from the People's Republic of China and the Republic of Korea*, 70 Fed. Reg. 35625 (21 June 2005), Exhibit CHN-12.

[14] *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 29303 (22 May 2006), Exhibit CHN-13.

the separate rate to 21.43 per cent[15]. The USDOC issued the anti-dumping order on 4 November 2009[16].

B. MEASURES AT ISSUE

2.5 With respect to the Shrimp investigation, China challenges the anti-dumping order, as amended and extended, and the USDOC's final determinations, as amended, leading to this order[17]. The specific aspects of these measures challenged by China are: (i) the use by the USDOC of the zeroing methodology in determining Allied, Yelin and Red Garden's dumping margins; and (ii) the USDOC's reliance on individual dumping margins calculated with zeroing in calculating the separate rate, as amended[18].

2.6 With respect to the Diamond Sawblades investigation, China challenges the final determination, amended final determination and anti-dumping order[19]. The specific aspect of these measures challenged by China is the use by the USDOC of the zeroing methodology in determining AT&M's dumping margin, as amended[20].

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 China requests that the Panel find that[21]:

(a) in the calculation of the dumping margins for Allied, Yelin and Red Garden in the Shrimp investigation, by the use of the zeroing methodology, the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement;

(b) in the calculation of the separate rate in the Shrimp investigation, by relying on company-specific dumping margins that were calculated with the use of the zeroing methodology, the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement; and,

(c) in the calculation of the dumping margin for AT&M in the Diamond Sawblades investigation, by the use of the zeroing methodology, the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement.

3.2 The United States does not oppose China's requests for the above findings[22].

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[15] *Notice of Amended Final Determination of Sales at Less Than Fair Value: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 Fed. Reg. 35864 (22 June 2006), Exhibit CHN-14.

[16] *Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57145 (4 November 2009), Exhibit CHN-15. The USITC had originally issued a negative injury determination, which was successfully challenged by the US petitioners before the CIT. As a result of the CIT decision, the USITC changed its determination to one of threat of injury. This explains why the order was issued more than two years after the amended final determination.

[17] China indicates that this includes the determinations, orders, and continuation of the order discussed above. (China's first written submission, para. 19 and footnote 29).

[18] China's first written submission, para. 20. Thus, China does not challenge the *de minimis* rate calculated for Zhanjiang Guolian or the PRC-wide rate. (China's first written submission, para. 7).

[19] China's first written submission, para. 21. Thus, China does not challenge the dumping margins calculated for other individually-examined exporters/producers, the separate rate, or the PRC-wide rate. (China's first written submission, footnote 36).

[20] China's first written submission, para. 22.

[21] China's first written submission, para. 68.

[22] United States' first written submission, para. 8.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set out in their written submissions to the Panel and their answers to the Panel's questions. The parties' submissions (or executive summaries thereof) are attached to this Report as Annexes A-1 and A-2 (see List of Annexes, page ii).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the European Union, Japan and Thailand are set out in their respective third-party submissions to the Panel and are attached to this Report as Annexes B-1 to B-3 (see List of Annexes, page ii). While Honduras, Korea and Viet Nam also reserved their right to participate in the Panel proceedings as third parties, they did not submit a third-party submission.

VI. INTERIM REVIEW

A. INTRODUCTION

6.1 On 5 April 2012, the Panel submitted its Interim Report to the parties. On 16 April 2012, the parties submitted written requests for review of precise aspects of the Interim Report. On 20 April 2012, the parties submitted written comments on each other's requests for interim review.

6.2 As explained below, the Panel has made a number of minor adjustments to the Report in light of the parties' comments. The numbering of paragraphs and footnotes in the Final Report remains unchanged from the Interim Report.

B. CHINA'S REQUESTS FOR REVIEW OF PRECISE ASPECTS OF THE INTERIM REPORT

6.3 China requests that we make a number of changes to correct inaccuracies in the Panel's citations to certain USDOC determinations submitted by China as exhibits in footnotes 16 and 24. The United States agrees with the changes proposed by China. China further requests that we correct a typographical error in paragraph 7.2, and that we modify the paragraphs of China's first written submission which are referenced in footnote 43. The United States did not comment on these requests. We have made the changes requested by China.

6.4 China requests that we amend paragraph 7.4 and footnote 27 to clarify that only the third sentence of Article 12.7 of the DSU, and not the entirety of this provision, applies where a mutually agreed solution is reached. We have amended paragraph 7.4 and footnote 27 as suggested by China.

C. UNITED STATES' REQUESTS FOR REVIEW OF PRECISE ASPECTS OF THE INTERIM REPORT

6.5 The United States requests that we make certain changes to footnote 6 to make it clear that the separate rate assigned to an individual respondent who qualifies for such a rate is not based on an individual investigation of that respondent. We have made certain changes to footnote 6 in order to address the United States' concerns. We have, however, not implemented the United States' suggestion to use the term "separate rate average". Rather, consistent with the terminology used in the remainder of the Report and the terminology used by the parties in their submissions to the Panel, we consider it appropriate to refer to the rate at issue as the "separate rate", but explain that it corresponds to the weighted-average of the individual rates determined for individually-examined respondents.

6.6 The United States requests that we replace the term "extended" with "revised" in the first sentence of paragraph 2.3. The United States considers that the latter more accurately reflects the nature of the change to the scope of the Shrimp investigation to include dusted shrimp in the

2 September 2010 remand determination. We have made the change suggested by the United States. For the same reason, the United States requests that we delete the term "extended" in paragraph 2.5. China objects to this second request, and we decline to make the modification suggested by the United States. The term "extended" in paragraph 2.5 refers to the continuation of the anti-dumping order following the USDOC and USITC's sunset review determinations, and not to the modification of the product scope of the Shrimp investigation. Moreover, paragraph 2.5 describes the measures challenged by China, and our use of the term "extended" in this paragraph mirrors China's use of the same term in its first written submission.

6.7 The United States considers that the quotations to two Appellate Body Reports contained in paragraph 7.29 do not adequately reflect the role that each panel plays in the dispute settlement process. The United States submits that the rights and obligations of WTO Members flow, not from panel or Appellate Body reports, but from the text of the covered agreements. The United States adds that while prior reports have an important place in the dispute settlement process, Article 11 of the DSU defines a panel's responsibility to carry out its own objective examination of the matter before it, including the "applicability of and conformity with the covered agreements". Further, Article 3.2 of the DSU directs a panel to make that examination through an interpretation of the relevant treaty provisions in accordance with the customary rules of interpretation of public international law. The United States considers that a concern over consistency with a prior report adopted by the DSB should not and cannot override these provisions, which do not direct a panel to apply or defer to previously adopted reports. The United States adds that paragraph 7.29 is, in any event, not essential to the Panel's analysis. The United States therefore requests that we delete paragraph 7.29. China does not comment on this request for review. The United States has not convinced us that the reference to the two Appellate Body statements at issue in paragraph 7.29 is inappropriate or that the Appellate Body has erred in making these statements. In consequence, we decline the United States' request and have not deleted paragraph 7.29.

VII. FINDINGS

A. INTRODUCTION AND ROLE OF A PANEL EXAMINING CLAIMS THAT ARE UNOPPOSED BY THE RESPONDING PARTY

7.1 China claims that the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement by using zeroing to calculate margins of dumping in its final determinations and orders, as amended and extended, in the Shrimp and Diamond Sawblades original investigations, and in relying on margins of dumping calculated with zeroing in establishing the separate rate applied in the Shrimp investigation. China contends that the USDOC's use of zeroing affected the determination of the dumping margins and has led the USDOC to find dumping where none would have otherwise been found, or has led the USDOC to calculate inflated dumping margins[23].

7.2 China submits that in the two investigations at issue, the USDOC used a five-step approach (which China terms the "Five Components") in calculating the dumping margins for the exporters/producers which the USDOC selected for individual examination[24]. According to China, the USDOC:

[23] China's first written submission, para. 59.

[24] China notes that, on 27 December 2006 the USDOC modified its dumping margin procedure in original investigations to eliminate zeroing where the average-to-average comparison methodology was used, but that this modification was only applied in pending and future investigations as of the effective date of the USDOC's notice of modification (22 February 2007). Since the Shrimp and Diamond Sawblades investigations were finished in 2005 and 2006 respectively, this modification was not applied in any of the determinations at

i. identified different "models" (i.e., types) of products using "control numbers" (CONNUM) that specify the most relevant product characteristics;

ii. calculated weighted-average US prices and weighted-average normal values 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 US price for that same model;

iv. in order to calculate the dumping margin for an exporter, summed the amount of "dumping" for each model and then divided it by the aggregate US price for all models; and

v. before summing the total amount of dumping for all models, effectively set all negative margins on individual models to zero[25].

7.3 China submits that the zeroing methodology applied by the USDOC in the investigations at issue is the same as the one which the Appellate Body found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *US – Softwood Lumber V*[26].

7.4 The United States does not contest China's claims. The parties have not, however, characterized their shared view of the substantive aspects of the dispute as a "mutually agreed solution", and thus the third sentence of Article 12.7 of the DSU does not apply[27]. We therefore start by considering whether the lack of substantive disagreement between the parties affects our responsibilities as a panel.

7.5 We note that the panels in *US – Shrimp (Ecuador)* and, subsequently, *US – Shrimp (Thailand)*, *US – Anti-Dumping Measures on PET Bags*, and *US – Zeroing (Korea)* were presented with a similar situation. Indeed each of these panels examined claims, unopposed by the United States, that were virtually identical to China's legal claims in the dispute before us.

7.6 Each of these panels considered that notwithstanding the fact that the claims before them were unopposed, they were still bound by Article 11 of the DSU[28] to make an "objective assessment

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issue in this dispute. (China's first written submission, footnote 31, referring to *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (27 December, 2006), Exhibit CHN-16; and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (26 January 2007), Exhibit CHN-17).

[25] China's first written submission, paras. 23-24.

[26] China's first written submission, paras. 63-64.

[27] When a mutually agreed solution is reached, the third sentence of Article 12.7 of the DSU provides that a panel's Report shall be "confined to a brief description of the case and to reporting that a solution has been reached".

[28] Article 11 reads, in relevant part:

> 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.

Further, we note that Article 17.6 of the Anti-Dumping Agreement is also relevant to a panel's factual and legal assessment of an anti-dumping determination by an investigating authority. However, the United States does not contest China's claims, and we need not consider the application of this provision in detail.

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"[29]. We agree with this approach and apply it in our consideration of China's claims.

B. BURDEN OF PROOF AND ORDER OF THE PANEL'S ANALYSIS

7.7 The general principles regarding the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement by another Member assert and prove its claim. Generally, therefore, China, as the complaining party, has to make a *prima facie* case of violation of the relevant provisions of the WTO agreements it invokes, before the burden shifts to the responding party, the United States, to rebut China's arguments.

7.8 The *US – Shrimp (Ecuador)* panel recalled that the Appellate Body has held that a "panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case"[30]. On this basis, the panel considered that the fact that a claim is uncontested is not a sufficient basis to conclude in favour of the complainant. Rather, the panel concluded, the complaining party must make a *prima facie* case of violation of a WTO agreement before any burden shifts to the respondent:

> [N]otwithstanding 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"[31].

7.9 This approach was later followed by the panels in *US – Shrimp (Thailand)*, *US – Anti-Dumping Measures on PET Bags*, and *US – Zeroing (Korea)*[32]. We agree with the reasoning of these panels and adopt a similar approach to the issue of the burden of proof in our assessment of China's claims. Accordingly, notwithstanding the fact that the United States does not contest China's claims, we can only find in favour of China if we are satisfied that China has at least established a *prima facie* case of violation under the provision it invokes.

7.10 Our evaluation of China's claims follows the order of analysis adopted by these prior panels. We examine, in turn, whether China has established that: (i) the USDOC applied zeroing in the determinations at issue; (ii) the methodology used by USDOC in the measures at issue is similar to the one reviewed by the Appellate Body in *US – Softwood Lumber V*; and (iii) the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement, on the basis of the reasoning of the Appellate Body in *US – Softwood Lumber V*.

7.11 We examine China's claim with respect to the separate rate applied by the USDOC in the Shrimp investigation in a distinct section at the end of our findings.

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[29] Panel Reports in *US* – Shrimp *(Ecuador)*, para. 7.3; *US – Shrimp (Thailand)*, para. 7.19, *US – Anti-Dumping Measures on PET Bags*, para. 7.5; and *US – Zeroing (Korea)*, paras. 7.16-17.

[30] See Panel Report, *US – Shrimp (Ecuador)*, para. 7.10 (citing Appellate Body Report, *US – Gambling*, para. 139). 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". (Appellate Body Report, *EC – Hormones*, para. 104, citing Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14).

[31] Panel Report, *US – Shrimp (Ecuador)*, para. 7.11.

[32] Panel Reports in *US – Shrimp (Thailand)*, para. 7.21; *US – Anti-Dumping Measures on PET Bags*, para. 7.7; and *US – Zeroing (Korea)*, para. 7.20.

C. WHETHER CHINA HAS ESTABLISHED THAT THE USDOC APPLIED ZEROING IN THE DETERMINATIONS AT ISSUE

7.12 In support of its factual assertion that the USDOC applied zeroing in its dumping margin calculations in the Shrimp and the Diamond Sawblades investigations, China submits as evidence the Issues and Decision Memoranda accompanying the USDOC's final determination in each investigation, as well as an expert statement from Ms Valerie Owenby (hereafter "VO Statement"). The VO Statement reviews the methodology employed by the USDOC in the calculation of the dumping margins and attaches a number of exhibits, including computer programming logs and outputs as well as analysis memoranda generated by the USDOC during the investigations and provided to Ms Owenby by the exporter/producer concerned[33].

7.13 We note the following in respect of this evidence submitted by China.

7.14 First, the computer programming logs emanating from the USDOC submitted by China and attached to the VO Statement each contain a line with the following instruction "WHERE EMARGIN GT 0". This programming line, which we hereafter refer to as the "zeroing line", instructs the programme to include only those comparison results that are positive (i.e. greater than zero) in the calculation of the total amount of dumping and therefore causes the programme to ignore negative results[34]. China submits such computer programming logs, containing the zeroing line, for each exporter/producer (Allied, Yelin and Red Garden in the Shrimp investigation and AT&M in the Diamond Sawblades investigation) and in each case, for at least the most recent dumping margin calculation for each exporter/producer[35].

7.15 Second, the Issues and Decision Memorandum accompanying the final determination in the Shrimp investigation contains a statement in which the USDOC acknowledges that it used model zeroing in calculating margins of dumping in that determination. The USDOC states that it:

> … made model-specific comparisons of weighted-average export prices with weighted-average normal values of comparable merchandise [and] then combined the dumping margins found based upon these comparisons, *without permitting non-*

[33] The VO Statement explains that where a USDOC computer programme is executed, a log is generated which repeats the programming statements in the computer programme, and provides notes on the execution and operation of the computer programme. Further, the programming software used by the USDOC provides the ability to print out data while the programming code is processing; these printouts are the "outputs". The VO Statement adds that the USDOC typically releases a hard copy of the log and output of the computer programme used to generated the dumping margin calculation to the respondent. VO Statement, Exhibit CHN-18, para. 46. The VO Statement also explains that, with the exception of Allied in respect of the Shrimp amended final determination, each of the investigated companies provided Ms Owenby with electronic versions of the USDOC's final computer programmes released to them, and copies of the databases that the USDOC used to generate its margin calculations. (VO Statement, Exhibit CHN-18, para. 47 and footnote 27).

[34] China's first written submission, para. 57 and VO Statement, Exhibit CHN-18, para. 38.

[35] China does not provide the USDOC's computer programming log for Allied in the final determination and amended final determination and for AT&M in the final determination but provides them for each of the other relevant determinations and exporters/producers. Concerning the Shrimp investigation, Yelin's dumping margin was most recently calculated in the second remand determination; the zeroing line is found at p. 23 of Attachment II to Exhibit CHN-18-VO-8, which contains the printout of the USDOC's programming log. Allied's dumping margin was most recently calculated in the second remand determination; the zeroing line is found at p. 26 of Attachment II to Exhibit CHN-18-VO-17. Red Garden's dumping margin was only calculated in the final determination; the zeroing line is found at p. 81 of Exhibit CHN-18-VO-20. AT&M's dumping margin was most recently calculated in the Diamond Sawblades amended final determination; the zeroing line is found at p. 61 of Attachment II to Exhibit VO-26. The USDOC acknowledges that each of these logs, as well as each of the other logs submitted by China, originates from the USDOC. (United States' first written submission, para. 4 and footnote 5 and United States' response to Panel question No. 5).

> *dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise*, in order to calculate the weighted-average dumping margin[36]. (emphasis added)

7.16 Likewise, the Issues and Decision Memorandum accompanying the final determination in Diamond Sawblades states that:

> The Department interprets [the statutory definition of dumping] to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department *will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales*"[37]. (emphasis added)

7.17 This language effectively acknowledges the USDOC's use of zeroing to calculate margins of dumping in its final determination in each of the two investigations.

7.18 Third, the VO Statement generally establishes that the USDOC applied zeroing in calculating the dumping margin in each of the successive determinations in each investigation, with respect to each individually-examined exporter/producer. The VO Statement applies a four-step analysis in examining each calculation[38], by which it: (i) duplicates the USDOC's dumping margin calculations; (ii) identifies where each of the "Five Components" occurs in each calculation, and cross-references the duplicate results with other record evidence to confirm the USDOC's application of zeroing; (iii) modifies the duplicate calculations to eliminate zeroing by turning off the zeroing line (to demonstrate the impact of zeroing); and (iv) compares the results of each set of calculations to quantify the impact of zeroing[39].

7.19 Fourth, the United States acknowledges the accuracy of China's description of the USDOC's use of zeroing in its calculation of the dumping margins challenged by China[40].

7.20 On the basis of this evidence, we are satisfied that China has established that the USDOC applied zeroing when calculating the dumping margins for Yelin, Allied and Red Garden in its final determinations and orders, as amended and extended, in the Shrimp investigation, and in calculating the dumping margin for AT&M in its final and amended final determinations and order in the Diamond Sawblades investigation.

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[36] *Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China* (29 November 2004), Exhibit CHN-19, p. 23.

[37] *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Diamond Sawblades and Parts Thereof from the People's Republic of China* (15 May 2006), Exhibit CHN-22, p. 25.

[38] With the exception that the VO Statement only reviews the calculation of AT&M's dumping margin in the Diamond Sawblades amended final determination, and not in the final determination. Further, because Ms Owenby was not provided with the USDOC's log for Allied in the amended final determination, she had to recreate the USDOC's calculations for Allied's margins in this determination.

[39] VO Statement, Exhibit CHN-18, para. 43 *ff*. Exhibit CHN-18-VO-2 provides a table identifying the specific line and page number where each "component" occurs in each margin calculation.

[40] United States' first written submission, para. 2.

D. WHETHER CHINA HAS ESTABLISHED THAT THE METHODOLOGY USED BY THE USDOC IS THE SAME AS THE METHODOLOGY REVIEWED BY THE APPELLATE BODY IN *US – SOFTWOOD LUMBER V*

7.21 The Appellate Body described zeroing as applied by the USDOC in the *Softwood Lumber* 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). … Thus, as we understand it, by zeroing, the investigating authority treats as zero the difference between the weighted average normal value and the weighted average export price in the case of those sub-groups where the weighted average normal value is less than the weighted average export price. Zeroing occurs only at the stage of aggregation of the results of the sub-groups in order to establish an overall margin of dumping for the product under investigation as a whole[41]. (emphasis original, footnote omitted).

7.22 China contends that the "Five Components" methodology applied by the USDOC in the Shrimp and Diamond Sawblades investigations matches this description of the methodology employed by the USDOC in the investigation at issue in *US – Softwood Lumber V*. China explains that they are "substantially identical in all legally relevant respects"[42].

7.23 The evidence provided by China, which we have reviewed in the previous section of our findings, including the extensive discussion and identification of each of the "Five Components" in the VO Statement, satisfies us that in the determinations at issue the USDOC did, in fact, follow the methodology described by China[43]. Thus, China has established that in the original investigations at

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[41] Appellate Body Report, *US – Softwood Lumber V*, paras. 64-65.

[42] China's first written submission, para. 64.

[43] In addition, in relation to the first component, China cites to certain passages from the text of the preliminary determinations in the Shrimp and Diamond Sawblades investigations that demonstrate that the USDOC sought comments from interested parties on the relevant product characteristics criteria, i.e. to define the CONNUM. (China's first written submission, paras. 28 and 52, referring to *Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Preliminary Determination of Critical*

issue, the USDOC: (i) identified different models or types of products; (ii) calculated weighted-average US prices and weighted-average normal values 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 US price for that same model[44]; (iv) calculated the dumping margin for an exporter by summing up the results of those model-specific comparisons, and then dividing the resulting amount by the aggregate US price for all models; and; (v), as we have already found, when summing the total amount of dumping for all models, ignored the results of model-specific comparisons for which the weighted-average US price exceeded the weighted-average normal value. We agree with China that this methodology is identical to the one described by the Appellate Body in *US – Softwood Lumber V*.

7.24 Moreover, not only does the United States acknowledge that China's description of the methodology used by the USDOC in the determinations at issue is accurate[45], the United States also acknowledges that the reasoning of the Appellate Body in *US – Softwood Lumber V* is applicable with respect to China's claims in the present dispute[46].

7.25 In light of these considerations, we are satisfied that China has demonstrated that the methodology applied by the USDOC to calculate dumping margins in the investigations at issue is identical to the one that the USDOC used in *US – Softwood Lumber V*, which the Appellate Body found to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in that dispute.

E. WHETHER CHINA HAS ESTABLISHED THAT THE METHODOLOGY APPLIED BY THE USDOC IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

7.26 We now turn to the legal analysis of China's claims, i.e., whether the measures challenged by China are inconsistent with Article 2.4.2, first sentence, of the *Anti-Dumping Agreement*. This sentence reads as follows:

> 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.

7.27 We recall that China relies on the Appellate Body Report in *US – Softwood Lumber V* to argue that the United States acted inconsistently with this provision[47]. The panel in *US – Shrimp (Ecuador)* explained its understanding of the Appellate Body's reasoning in *US – Softwood Lumber V* as follows:

Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 Fed. Reg. (16 July 2004), Exhibit CHN-4, pp. 42654 and 42663; and *Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Preliminary Partial Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 70 Fed. Reg (29 December 2005), Exhibit CHN-21, pp. 77122 and 722130).

[44] The European Union correctly notes that China uses the terms "dumping" and "margins" when discussing the results of export price-normal value comparisons at the model level (European Union's third-party submission, para. 7). As the European Union observes, the Appellate Body has indicated that "dumping" can only exist for the product under investigation as a whole, and that consequently, intermediate comparisons between the normal value and the export price at the product level should not be referred to as "dumping margins".

[45] United States' first written submission, para. 2.

[46] United States' first written submission, para. 8.

[47] China's first written submission, para. 61 (citing Appellate Body Report, *US – Softwood Lumber V*, paras. 86-103 and 98).

The Appellate Body began its analysis with the text of Article 2.4.2 and noted that the question before it was the proper interpretation of the terms "all comparable export transactions" and "margins of dumping" in Article 2.4.2. In examining the arguments of the parties with respect to these phrases, the Appellate Body concluded that the parties' disagreement centered on whether a Member could take into account "all" comparable export transactions only at the sub-group level, or whether such transactions also had to be taken into account when the results of the sub-group comparisons are aggregated. To examine that issue, the Appellate Body noted the definition of dumping in Article 2.1 of the *Anti-Dumping Agreement*. The Appellate Body found that "it [was] clear from the texts of [Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to a product as a whole as defined by the investigating authority". 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 all 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[48]. (footnotes omitted)

7.28 We find this reasoning of the Appellate Body to be persuasive.

7.29 Moreover, while prior panel or Appellate Body reports are not, strictly speaking, binding upon panels, the Appellate Body has indicated that "[f]ollowing the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same" and that "[t]his is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system"[49]. In addition, the Appellate Body has in the past cautioned that the failure by a panel to follow previously adopted Appellate Body reports addressing the same issues undermined the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU[50].

7.30 In the words of the *US – Shrimp (Ecuador)* panel, "there is now a consistent line of Appellate Body Reports … that holds that 'zeroing' in the context of the weighted average-to-weighted average methodology in original investigations … is inconsistent with Article 2.4.2"[51]. We recall that the United States has advanced no argument to contradict the reasoning of the Appellate Body in *US – Softwood Lumber V* and in subsequent decisions that have found the use of zeroing in the context of the weighted average-to-weighted average methodology in original investigations inconsistent with Article 2.4.2. Moreover, the issues raised by China's claims are identical in all material respects to those addressed by the Appellate Body in *US – Softwood Lumber V* and the United States acknowledges that the reasoning of the Appellate Body in that dispute is equally applicable with respect to the dumping margins challenged by China in the present dispute[52].

7.31 We conclude, on this basis, that China has discharged its burden of establishing a *prima facie* case that the United States has acted inconsistently with Article 2.4.2, first sentence, by virtue of the USDOC's use of zeroing in the determinations at issue because the USDOC did not calculate the dumping margins challenged by China on the basis of the product as a whole and taking into account all comparable export transactions.

7.32 Given that the United States presents no argument to rebut the arguments and evidence submitted by China, we find that the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement due to the USDOC's use of zeroing in the calculation of the dumping margins for Allied, Yelin and Red Garden in the Shrimp investigation, and of the dumping margin for AT&M in the Diamond Sawblades investigation.

F. APPLICATION OF A SEPARATE RATE ESTABLISHED ON THE BASIS OF MARGINS OF DUMPING CALCULATED WITH THE USE OF ZEROING

7.33 China challenges not only the consistency with Article 2.4.2 of the Anti-Dumping Agreement of the USDOC's use of zeroing to calculate individual dumping margins, but also the consistency with the same provision of the USDOC's reliance on dumping margins calculated with zeroing for the purposes of establishing the separate rate applied in the Shrimp investigation.

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[48] Panel Report, *US – Shrimp (Ecuador)*, paras. 7.38-7.39.
[49] Appellate Body Report, *US – Continued Zeroing*, para. 362.
[50] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 161.
[51] Panel Report, *US – Shrimp (Ecuador)*, para. 7.40.
[52] United States' first written submission, para. 8.

7.34 China argues that since the calculation of the separate rate in the Shrimp investigation was based on a weighted-average of the dumping margins of mandatory respondents, the calculation of the separate rate in the Shrimp investigation "necessarily incorporates" the inconsistent zeroing methodology, and thus violates Article 2.4.2, first sentence, of the Anti-Dumping Agreement[53].

7.35 The evidence submitted by China indicates that the USDOC did, indeed, rely on margins of dumping calculated with zeroing to derive the separate rate, as amended, applied in the Shrimp investigation. In both the final determination and the amended final determination, the USDOC applied as separate rate the weighted-average of the margins calculated for the three individual respondents that had margins above zero or *de minimis*[54]. As we have found above, these margins had, in turn, been calculated with the use of zeroing[55].

7.36 We note that Article 2.4.2 of the Anti-Dumping Agreement imposes disciplines on the determination of dumping margins, and more specifically, on the manner in which the export price should be compared to the normal value in establishing these margins. On its face, Article 2.4.2 does not appear to address the question of the application of anti-dumping duties, including the duties which may be applied on imports from exporters/producers not selected for individual examination. China has not, in our view, satisfactorily explained how Article 2.4.2 could provide the legal basis for a finding of inconsistency with respect to the separate rate[56]. The fact that margins of dumping are

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[53] China's first written submission, para. 67 and China's response to Panel question No. 1 (both quoting Panel Report, *US – Shrimp (Ecuador)*, para. 7.42).

[54] As indicated above in footnote 12, the USDOC did not revise the separate rate in subsequent determinations.

[55] *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 Fed. Reg. 70997 (8 December 2004), Exhibit CHN-3, Exhibit CHN-3, p. 71003; *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp From the People's Republic of China*, 70 Fed. Reg. 5149 (1 February 2005), Exhibit CHN-5, p. 5150; and *Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China – Calculation of the Weighted Average Section A rate* (26 January 2005), Exhibit CHN-20, discussed in China's first written submission, paras. 47-49. In addition, China has established that at least two of these three margins were impacted by the use of zeroing. However, the evidence submitted by China indicates that the margin of dumping for Yelin in the final determination, which is the one that was used in the calculation of the separate rate in both the final and the amended final determinations, does not change when zeroing is eliminated. (China's response to Panel question No. 4 and VO Statement, Exhibit CHN-18, paras. 59-61).

[56] We asked the following question to China:

> … Please explain how and why, in your view, Article 2.4.2 provides a legal basis for a finding of violation with respect to the separate rate applied in the Shrimp investigation (as opposed to the margins calculated for exporters/producers selected for individual examination). In so doing, please refer to the text and context of Article 2.4.2 and to any prior panel or Appellate Body decision which you consider to support an interpretation of Article 2.4.2 as imposing disciplines with respect to a "separate rate" or, more generally, to a rate applied to exporters/producers not selected for individual investigation.
>
> China answered as follows:
>
> …Where, as here, the "margins of dumping" for individually investigated exporters are calculated inconsistently with Article 2.4.2, the Separate Rate calculated on that basis must necessarily violate Article 2.4.2. In other words, the source of the WTO-inconsistency of the Separate Rate is the application of "zeroing" in the calculation of "margins of dumping" for individually investigated exporters in violation of Article 2.4.2 and the reliance thereof.
>
> Support may be found in *US – Shrimp (Ecuador)*. The panel in that dispute correctly found that, in an identical situation, the calculation of the separate rate based on individual margins calculated with the use of zeroing "necessarily incorporates this inconsistent methodology [of zeroing] ". Also noted by the *US – Shrimp (Ecuador)* panel, the United States agreed to this view …. (China's response to Panel question No. 1) (footnotes omitted)

inconsistent with Article 2.4.2 does not necessarily mean that a separate rate calculated on the basis of such margins is also, itself, inconsistent with that same provision[57].

7.37 Furthermore, like the panel in *US – Shrimp (Ecuador)*, we note that neither the Panel nor the Appellate Body Report in *US – Softwood Lumber V* addressed explicitly the issue of the inconsistency of the "all others" rate as calculated by the USDOC in the *Softwood Lumber* investigation[58].

7.38 That said, we recall that in addressing Ecuador's claim with respect to the "all others" rate in that dispute, the *US – Shrimp (Ecuador)* panel observed as follows:

> [W]e consider that our finding that Ecuador has established that the calculation of the margins of dumping for [some of the individually-investigated exporters] was inconsistent with Article 2.4.2 *means that the calculation of the "all others" rate as the weighted average of the individual rates necessarily incorporates this inconsistent methodology*[59]. (emphasis added, footnote omitted)

7.39 We agree with this observation of the *US – Shrimp (Ecuador)* panel. We have found that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by using zeroing in the calculation of the margins of dumping for individually-examined exporters/producers. Following the reasoning of the *US – Shrimp (Ecuador)* panel, this means that the calculation of the separate rate on the basis of these margins necessarily incorporates the WTO-inconsistent zeroing methodology[60].

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of the above findings, we conclude that the USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by using zeroing in the calculation of dumping margins for Allied, Yelin and Red Garden in its final determination in the Shrimp investigation, as amended, and in the calculation of AT&M's dumping margin in its final determination in the Diamond Sawblades investigation, as amended, as well as in the corresponding anti-dumping duty orders, as amended and extended.

8.2 Under Article 3.8 of the DSU, in cases where there is 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 the United States has nullified or impaired benefits accruing to China under the Anti-Dumping Agreement. Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement as set out above, we recommend that the United States bring its measures into conformity with its obligations under this Agreement.

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[57] We note that in *US – Shrimp (Viet Nam)*, the panel found that the investigating authority's reliance on margins of dumping calculated with zeroing to establish the separate rate was inconsistent with Article 9.4 of the Anti-Dumping Agreement. The panel did not, however, pronounce itself on the question of the consistency of the separate rate applied in that case with other provisions, including Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement. (Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.212-227, 7.229).

[58] Panel Report, *US – Shrimp (Ecuador)*, para. 7.42.

[59] Panel Report, *US – Shrimp (Ecuador)*, para. 7.42.

[60] We note that the parties agree that the rationale of para. 7.42 of the Panel Report in *US – Shrimp (Ecuador)* should apply with regard to the separate rate in the Shrimp investigation. (United States' response to Panel question No. 2; China's first written submission, para. 67; China's response to Panel question No. 1).