

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

Report of the Panel

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<i>US – Shrimp (Ecuador)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted on 20 February 2007
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I. INTRODUCTION

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

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

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

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

Chairman: Mr. Alberto Juan Dumont

Members: Ms Deborah Milstein
Mr. Norman M. Harris

1.4 Argentina, the European Communities³, Japan, Korea and Chinese Taipei reserved their rights to participate in the Panel proceedings as third parties.

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

II. FACTUAL ASPECTS

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

¹ WT/DS383/1.

² WT/DS383/2.

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

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

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

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

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

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. THAILAND

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

- (i) identified different "models," *i.e.*, types, of products based on the most relevant product characteristics;
- (ii) calculated weighted average prices in the United States and weighted average normal values in the comparison market on a model-specific basis, for the entire period of investigation;
- (iii) compared the weighted average normal value of each model to the weighted average United States price for that same model;
- (iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and
- (v) set to zero all negative margins on individual models before summing the total amount of dumping for all models.

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

B. THE UNITED STATES

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

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

IV. ARGUMENTS OF THE PARTIES

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

V. ARGUMENTS OF THE THIRD PARTIES

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

VI. INTERIM REVIEW

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

A. THAILAND

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

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

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

B. THE UNITED STATES

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

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

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

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

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

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

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

VII. FINDINGS

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

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

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

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

7.4 Article 11 of the *DSU* provides:

"The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."⁶ (emphasis added)

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

7.5 Notwithstanding the United States' decision not to contest Thailand's claim, we consider that we are still bound by Article 11 of the *DSU* to make an "objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

(b) Burden of proof

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

"Because of its singularity, this dispute raises in a particularly acute fashion the issue of the burden of proof.

The burden of proof lies, in WTO dispute settlement proceedings, with the party that asserts the affirmative of a particular claim or defence. Ecuador, as the complaining party, must therefore make a *prima facie* case of violation of the relevant provisions of the relevant WTO agreements. The burden would then shift to the responding party (here the United States), to adduce evidence to rebut the presumption that Ecuador's assertions are true. In this context, we recall that 'a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case'.

In our view, the issue of the burden of proof is of particular importance in this case. This is because Ecuador has made factual and legal claims before the Panel which the United States does not contest. Yet, the fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favour of Ecuador if we are satisfied that Ecuador has made a *prima facie* case. We take note in this regard that the Appellate Body has cautioned panels against ruling on a claim before the party bearing the burden of proof has made a *prima facie* case. In *EC – Hormones*, the Appellate Body ruled that the Panel erred in law when it absolved the complaining parties from the necessity of establishing a *prima facie* case and shifted the burden of proof to the responding party:

'In accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim.'

More recently, in *US – Gambling*, the Appellate Body indicated that "[a] panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case", and noted that:

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

'A *prima facie* case must be based on "evidence *and* legal argument" put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.

In the context of the sufficiency of panel requests under Article 6.2 of the DSU, the Appellate Body has found that a panel request:

... must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits.

Given that such a requirement applies to panel requests at the outset of a panel proceeding, we are of the view that a *prima facie* case—made in the course of submissions to the panel—demands no less of the complaining party. The evidence and arguments underlying a *prima facie* case, therefore, must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.'

Thus, notwithstanding the fact that the United States is not seeking to refute Ecuador's claims, we must satisfy ourselves that Ecuador has established a *prima facie* case of violation, and notably that it has presented 'evidence and argument... sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.'⁷ (footnotes omitted)

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

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

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

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

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

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

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

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

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

7.12 The Appellate Body in *US – Softwood Lumber V*, described "zeroing" as applied by the USDOC in that investigation as follows:

First, USDOC divided the product under investigation (that is, softwood lumber from Canada) into sub-groups of identical, or broadly similar, product types. Within each sub-group, USDOC made certain adjustments to ensure price comparability of the transactions and, thereafter, calculated a weighted average normal value and a weighted average export price per unit of the product type. When the weighted average normal value per unit exceeded the weighted average export price per unit for a sub-group, the difference was regarded as the "dumping margin" for that comparison. When the weighted average normal value per unit was equal to or less than the weighted average export price per unit for a sub-group, USDOC took the view that there was no "dumping margin" for that comparison. USDOC aggregated the results of those sub-group comparisons in which the weighted average normal value exceeded the weighted average export price—those where the USDOC considered there was a "dumping margin"—after multiplying the difference per unit by the volume of export transactions in that sub-group. The results for the sub-groups in which the weighted average normal value was equal to or less than the weighted average export price were treated as zero for purposes of this aggregation, because there was, according to USDOC, no "dumping margin" for those sub-groups. Finally, USDOC divided the result of this aggregation by the value of all export transactions of the product under investigation (*including the value of export transactions in the sub-groups that were not included in the aggregation*). In this way, USDOC obtained an "overall margin of dumping", for each exporter or producer, for the product under investigation (that is, softwood lumber from Canada).¹⁰

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

⁸ Exhibit THA-4.

⁹ United States' Written Submission, para. 5.

¹⁰ Appellate Body Report, *US – Softwood Lumber V*, para. 64 (emphasis original; footnote omitted).

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

"To determine whether sales of PRCBs to the United States by Thai Plastic Bags and Universal in this investigation were made at less than fair value, we compare EP [export price] or constructed export price (CEP) to normal value, as described in the 'US Price' and 'Normal Value' sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs and CEPs.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance ..."¹¹

7.14 The USDOC further explained that:

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

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

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

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

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

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

¹² *Ibid.*, at 3555.

¹³ *Ibid.*, at 3557.

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

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

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

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

"Article 2

Determination of Dumping

...

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

7.20 Thailand relies on the Appellate Body Report in *US – Softwood Lumber V* in support of its claim of inconsistency with Article 2.4.2. In particular, Thailand relies¹⁵ on the Appellate Body's finding that the terms "margins of dumping" and "all comparable export transactions" in Article 2.4.2 must be interpreted in an "integrated manner"¹⁶, such that where "an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".¹⁷

7.21 While we are not bound by the reasoning in prior Appellate Body and/or panel reports, adopted Reports create legitimate expectations among WTO Members¹⁸, and "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same".¹⁹

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

"The Appellate Body began its analysis with the text of Article 2.4.2 and noted that the question before it was the proper interpretation of the terms 'all comparable export transactions' and 'margins of dumping' in Article 2.4.2. In examining the arguments of the parties with respect to these phrases, the Appellate Body concluded that the

¹⁵ Thailand's Written Submission, para. 13.

¹⁶ Appellate Body Report, *US – Softwood Lumber V*, paras. 86-103.

¹⁷ *Ibid.*, para. 98.

¹⁸ Appellate Body Report, *Japan Alcoholic Beverages II*, p. 14; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 108-109; Appellate Body Report, *US – Softwood Lumber V*, paras. 109-112.

¹⁹ Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

parties' disagreement centered on whether a Member could take into account 'all' comparable export transactions only at the sub-group level, or whether such transactions also had to be taken into account when the results of the sub-group comparisons are aggregated. To examine that issue, the Appellate Body noted the definition of dumping in Article 2.1 of the *Anti-Dumping Agreement*. The Appellate Body found that 'it [was] clear from the texts of [Article VI:1 of the *GATT 1994* and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to a product as a whole as defined by the investigating authority'. The Appellate Body further considered that the definition of 'dumping' contained in Article 2.1 applies to the entire *Agreement*, including Article 2.4.2, and that "[d]umping', within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product." Next, the Appellate Body relied on its Report in *EC – Bed Linen*, in which it stated that '[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole'. Thus, the Appellate Body noted that "[a]s with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product". The Appellate Body therefore rejected the United States' arguments in that case that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons at the sub-group level; for the Appellate Body, while an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation, the results of the multiple comparisons at the sub-group levels are not margins of dumping within the meaning of Article 2.4.2; they merely reflect intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. It is only on the basis of aggregating 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."²⁰

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

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

context of the weighted average-to-weighted average methodology in original investigations (first methodology in the first sentence of Article 2.4.2) is inconsistent with Article 2.4.2".²¹

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

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

VIII. CONCLUSIONS AND RECOMMENDATION

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

8.2 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent the United States has acted inconsistently with the provisions of the *Anti-Dumping Agreement*, it has nullified or impaired benefits accruing to Thailand under that Agreement. We therefore recommend that the Dispute Settlement Body request the United States to bring its measures into conformity with its obligations under the *Anti-Dumping Agreement*.

²¹ Panel Report, *US – Shrimp (Ecuador)*, para. 7.40.

²² United States' Written Submission, para. 5.

ANNEX A

WRITTEN SUBMISSIONS OF THE PARTIES

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ANNEX A-1

WRITTEN SUBMISSION OF THAILAND

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I. INTRODUCTION

A. COMPLAINT OF THAILAND

1. On 26 November 2008, the Government of the Kingdom of Thailand ("Thailand") requested consultations in accordance with Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Articles 17.2, 17.3 and 17.4 of the *Agreement on Implementation of Article VI of GATT 1994* (the "Anti-Dumping Agreement") with respect to the application by the United States of the practice known as "zeroing" of negative dumping margins in the United States' determination of the margins of dumping in its anti-dumping investigation of polyethylene retail carrier bags from Thailand (Inv. No. A-549-821).

2. Thailand and the United States held consultations in Geneva on 28 January 2009. While these consultations assisted in clarifying the issues before the parties, they failed to resolve the dispute.

3. At its meeting on 20 March 2009, the Dispute Settlement Body (the "DSB") established a Panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by Thailand in document WT/DS383/2.

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 Thailand in document WT/DS383/2, the matter referred to the DSB by Thailand in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

5. On 20 August 2009, the parties agreed to compose the Panel as follows:¹

Chairman: Mr. Alberto Juan Dumont
Members: Ms Deborah Milstein
Mr. Norman M. Harris

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

7. After its organizational meeting on 13 October 2009, the Panel established its working procedures and timetable for this dispute. The working procedures and timetable are consistent with a procedural agreement entered into by the parties and provided to the Panel regarding the appropriate procedures for this dispute.²

II. LEGAL ARGUMENT

A. THE MEASURES AT ISSUE IN THIS DISPUTE

8. The specific measures at issue in this dispute are the anti-dumping order imposed by the United States on polyethylene retail carrier bags from Thailand and the final determination by the United States Department of Commerce ("USDOC"), as amended, leading to that order.

¹ WT/DS383/3.

² See *Agreement on Procedures Between Thailand and the United States*, 20 March 2009, Exhibit THA-8.

The United States published its notice of initiation of its anti-dumping investigation of polyethylene retail carrier bags from Thailand on 16 July 2003.³ The final determination in this investigation was published on 18 June 2004⁴ (the "Final Determination") and an amended final determination was published by the USDOC on 15 July 2004.⁵ Following a final determination of injury by the United States International Trade Commission, the United States issued an anti-dumping duty order on imports of polyethylene retail carrier bags from Thailand on 9 August 2004 (the "Order").⁶ Thus, the Final Determination, as amended, and the Order comprise the measures at issue in this dispute.

9. In the Final Determination, as amended, the USDOC used the "zeroing" methodology to determine the final dumping margins for certain Thai exporters of polyethylene retail carrier bags subject to the Order. Accordingly, for certain Thai exporters, the Final Determination, as amended, as well as the Order, reflected and included anti-dumping margins that were calculated on the basis of "zeroing". The use of the "zeroing" methodology is evident from the USDOC'S published determinations cited above and the computer programmes used to calculate the margins of dumping in the Final Determination, as amended, on which the Order was based.

10. More specifically, in calculating the anti-dumping margins for certain exporters in the above determinations, the USDOC:

- (i) identified different "models," *i.e.*, types, of products based on the most relevant product characteristics;
- (ii) calculated weighted average prices in the United States and weighted average normal values in the comparison market on a model-specific basis, for the entire period of investigation;
- (iii) compared the weighted average normal value of each model to the weighted average United States price for that same model;
- (iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and
- (v) set to zero all negative margins on individual models before summing the total amount of dumping for all models.

11. Through this method, the USDOC calculates margins of dumping and collects anti-dumping duties in amounts that exceed the actual extent of dumping, if any, by the investigated companies.

12. As Thailand will demonstrate below, this measure is inconsistent with the obligations of the United States under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

³ See *Initiation of Antidumping Duty Investigations: Polyethylene Retail Carrier Bags from The People's Republic of China, Malaysia, and Thailand*, 68 Fed. Reg. 42002 (16 July 2003), Exhibit THA-1.

⁴ See *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 34122, 18 June 2004, Exhibit THA-3; *Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 34122, 18 June 2004, Exhibit THA-2.

⁵ See *Notice of Amended Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 42419, 15 July 2004, Exhibit THA-5.

⁶ See *Antidumping Duty Order: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 48204, 9 August 2004, Exhibit THA-6.

B. THE USE OF ZEROING BY THE UNITED STATES WAS CONTRARY TO ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

13. The use of zeroing in the challenged measures to calculate the margins of dumping for exporters is inconsistent with the obligations of the United States under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. In *United States – Final Dumping Determination on Softwood Lumber from Canada*, the Appellate Body interpreted the terms "margins of dumping" and "all comparable export transactions" in Article 2.4.2 in an "integrated manner"⁷, leading to its conclusion that, where "an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".⁸

14. This use of zeroing affected the determination of dumping margins for all of the investigated exporters whose margins of dumping were not based on total facts available. These exporters are listed in the Order as follows: Thai Plastic Bags Industries Co. Ltd., Winner's Pack Co. Ltd., APEC Film Ltd, Advance Polybag Inc., Alpine Plastics Inc., API Enterprises Inc., and Universal Polybag Co. Ltd.⁹

15. Thailand attaches as Exhibit THA-4 a copy of the programme used by the United States to calculate dumping margins in the Final Determination, as amended, that was provided to some of the investigated exporters. This programme indicates the use of "zeroing" in the calculation of the dumping margins for the Thai exporters.¹⁰ The same programme was used for all investigated Thai exporters for whom the USDOC calculated margins of dumping in the measures at issue (*i.e.*, the exporters whose margins were not based on total facts available). This is the same methodology that was found to be inconsistent with Article 2.4.2, first sentence, in *US – Softwood Lumber V*.¹¹ Thailand also notes that this is exactly the same methodology that was used by the USDOC to calculate dumping margins in its anti-dumping investigations of shrimp from Ecuador and Thailand.¹² As noted above, the WTO panels in the disputes arising out of those investigations found that, applying the rulings of the Appellate Body in *US – Softwood Lumber V*, this methodology was inconsistent with Article 2.4.2, first sentence, of the Anti-Dumping Agreement.¹³

16. For the same reasons as articulated by the Appellate Body in the dispute *US – Softwood Lumber V* and by the panels in the disputes *US – Shrimp (Ecuador)* and *US – Shrimp (Thailand)*, therefore, the use of this zeroing methodology by the USDOC in calculating the dumping margins of

⁷ Appellate Body Report, WT/DS264/AB/R, adopted 31 August 2004 ("Appellate Body Report, *US – Softwood Lumber V*"), paras. 86-103.

⁸ *Ibid.*, para. 122.

⁹ See *Antidumping Duty Order: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 48204, 9 August 2004, Exhibit THA-6, p. 2.

¹⁰ See Memorandum dated 08 July 2004 re *Amended Final Determination of Sales at Less Than Fair Value in the Antidumping Duty Investigation of Polyethylene Retail Carrier Bags from Thailand – Analysis Memorandum* and accompanying log and output for margin calculation programs at lines 2567-2570 (setting margins less than zero to zero ("IF EMARGIN LE 0 THEN EMARGIN = 0")), 2633-2637 ("WHERE EMARGIN GT 0")), and 2693-2696 (limiting calculation of overall margin to specific comparisons where the margin was greater than zero ("WHERE EMARGIN GT 0")), Exhibit THA-4.

¹¹ See footnote 7, *supra*.

¹² Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted 20 February 2007, ("Panel Report, *US – Shrimp (Ecuador)*"); Panel Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/R, adopted 1 August 2008 ("Panel Report, *US – Shrimp (Thailand)*").

¹³ See footnote 7 *supra*, Panel Report, *US – Shrimp (Ecuador)*, para. 7.41 and Panel Report, *US – Shrimp (Thailand)* paras. 7.28, 7.29 and 7.35.

certain exporters of plastic bags from Thailand was inconsistent with Article 2.4.2, first sentence, of the Anti-Dumping Agreement.

17. Furthermore, as noted above, the parties have reached an agreement on procedures applicable to the resolution of this dispute, attached as Exhibit THA-8, providing that the United States will not contest that the measures identified in the 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*.

18. For these same reasons, therefore, Thailand submits that the use of the zeroing methodology by the United States in calculating the dumping margins of certain of the exporters of plastic bags from Thailand in this dispute is inconsistent with Article 2.4.2, first sentence, of the Anti-Dumping Agreement.

III. RULINGS REQUESTED

19. Accordingly, Thailand requests that the Panel find that the United States acted inconsistently with Article 2.4.2, first sentence, of the Anti-Dumping Agreement in determining the dumping margins of certain Thai exporters in the Final Determination, as amended, and the Order.

ANNEX A-2

WRITTEN SUBMISSION OF THE UNITED STATES

1. The United States notes that the parties to this dispute have reached an Agreement on Procedures to permit expeditious resolution of this dispute.¹ In its request for a panel in this dispute, Thailand claims that the United States has breached its obligations under Article 2.4.2, first sentence, of the *Agreement on Implementation of Article VI of the GATT 1994*. The basis of Thailand's claim is the US Department of Commerce's use of "zeroing" when calculating the dumping margins for certain investigated exporters in the investigation of *Polyethylene Retail Carrier Bags from Thailand*.²

2. Thailand describes, both in its request for a panel, and in its first written submission, the Department of Commerce's use of "zeroing" in the calculation of the dumping margin for these exporters as follows: the Department of Commerce (1) identified different "models", i.e., types, of products are identified using "control numbers" that specify the most relevant product characteristics; (2) calculated weighted average prices in the US and weighted average normal values in the comparison market on a model-specific basis, for the entire period of investigation; (3) compared the weighted average normal value of each model to the weighted average US price for that same model; (4) calculated the dumping margin for an exporter by summing the amount of dumping for each model and then dividing it by the aggregated US price for all models; and (5) set to zero all negative margins on individual models before summing the total amount of dumping for all models.³

3. Thailand further states that its claim is limited to the use of "zeroing" when calculating the margins for "all of the investigated exporters whose margins of dumping were not based on total facts available". Thailand refers to the Order in this dispute which identifies these exporters as follows: Thai Plastic Bags Industries Co. Ltd., Winner's Pack Co. Ltd., APEC Film Ltd, Advance Polybag Inc., Alpine Plastics Inc., API Enterprises Inc., and Universal Polybag Co. Ltd.⁴

4. Thailand states that the zeroing methodology applied in the Department of Commerce's calculation of the dumping margins in the investigation of *Polyethylene Retail Carrier Bags from Thailand*, is the same as the methodology found by the Appellate Body to be inconsistent with Article 2.4.2, first sentence, in *US – Softwood Lumber Dumping*.⁵ Thailand further states that it considers the Department of Commerce's use of the "zeroing" methodology in calculating the dumping margins of certain exporters of plastic bags from Thailand to be inconsistent with Article 2.4.2, first sentence, on the grounds set forth in the *US – Softwood Lumber Dumping* Appellate Body report.⁶

¹ See Exhibit THA-8.

² WT/DS383/2 (10 March 2009), pp. 2-3.

³ See WT/DS383/2, p. 2; *First Written Submission of Thailand*, 16 October 2009, para. 10 (hereinafter "Thailand First Submission").

⁴ Thailand First Submission, para. 14.

⁵ Thailand First Submission, para. 15; Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004 (hereinafter "*US – Softwood Lumber Dumping*").

⁶ Thailand First Submission, para. 16.

5. The United States acknowledges the accuracy of Thailand's description of the Department of Commerce's use of "zeroing" in calculating the dumping margins for the individually investigated exporters whose margins of dumping were not based on total facts available. The United States recognizes that in *US – Softwood Lumber Dumping* the Appellate Body found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with Article 2.4.2, by interpreting the terms "margins of dumping" and "all comparable export transactions" as used in the first sentence of Article 2.4.2, in an integrated manner.⁷ The United States acknowledges that this reasoning is equally applicable with respect to Thailand's claim regarding the individually investigated exporters whose margins of dumping were not based on total facts available in the investigation at issue.

⁷ See *US – Softwood Lumber Dumping (AB)*, paras. 62-117.

ANNEX B

THIRD PARTIES WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

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ANNEX B-1

THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

1. The European Communities makes this third party written submission because of its systemic interest in the correct and consistent interpretation and application of, *inter alia*, the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") and the *Dispute Settlement Understanding* ("DSU").

2. At the outset, the European Communities observes that there are many similarities between the present dispute and the issue confronted by the panels in *US – Shrimp (Ecuador)* and *US – Shrimp (Thailand)*. In those disputes, the complaining party challenged the conformity of an anti-dumping order adopted by the United States on the basis that the methodology used to calculate the dumping margins of the exporters concerned ("model zeroing") infringed Article 2.4.2 of the *Anti-Dumping Agreement* for the reasons contained in the report of the Appellate Body in *US – Softwood Lumber V*. In those disputes, the United States refrained from contesting that legal claim and even agreed with the complaining party on the means and timing of the implementation of the adopted DSB report.

3. In the present dispute, the *Agreement on Procedures between Thailand and the United States*¹ 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 United States will not contest the claim; Thailand will not request the Panel to suggest, pursuant to Article 19.1 of the *DSU*, ways in which the United States could implement the Panel's recommendations; and by which the manner and timing of implementation are agreed.² Thus, in the EC view, 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. However, neither Party refers in its First Written Submission to Articles 3.6 or 12.7 of the *DSU*.

4. In the particular factual circumstances of the present case, the European Communities welcomes the prompt resolution of the dispute and does not object to the manner of proceeding chosen by the Parties. However, the European Communities considers that the ability of parties to a dispute to agree on certain matters and to then have such agreement translated into findings and recommendations of a panel which are eventually adopted by the DSB is not unlimited. The manner of proceeding chosen by the Parties cannot affect the rights of WTO Members which are not parties to

¹ Exhibit THA-8.

² The Parties have agreed that any change in the cash deposit rate or revocation of the anti-dumping order as a result of the recalculation of dumping margins pursuant to a Section 129 determination will take effect with respect to "entries made no sonner than the date [of implementation of the new determination]" (*Agreement on Procedures*, para. 6). In this respect, the European Communities observes that the US obligations resulting from the *Agreement on Procedures* would appear to be far more limited than the US obligations resulting from identical violations found in other disputes. Indeed, the Appellate Body has twice rejected the relevance of the "date of entry" for the purpose of assessing compliance with adopted DSB reports (Appellate Body Report, *US – Zeroing (Article 21.5 – EC)* para. 309, and Appellate Body Report, *US – Zeroing (Article 21.5 – Japan)*, para. 169). Thus, in the EC view, as all mutually agreed solutions shall be consistent with the covered agreements and shall not nullify or impair benefits accruing to any Member under those agreements (Article 3.5 of the *DSU*), any agreement between the Parties on implementation cannot alter the consequences of a recommendation pursuant to Article 19.1 of the *DSU*, *i.e.*, to bring the measure into *full* conformity with the covered agreements.

the *Agreement on Procedures*³; nor can the approach chosen by the Parties seek to obtain findings having equal weight in practice *vis-à-vis* other WTO Members as a "conventional" panel report.

5. Under these circumstances, Article 11 of the *DSU* gains special relevance. Notwithstanding the absence of disagreement between the parties, 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.⁴ Such assessment should include the facts, evidence and legal argument. 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. The Panel should particularly distinguish between finding that the Parties agree with respect to a particular fact, evidentiary matter or legal issue; and the Panel itself making such finding.

6. Taking into account the above consideration, the European Communities would like to make two remarks on the submissions of the Parties.

7. First, the European Communities observes that the description made by Thailand⁵ of the methodology applied by the United States in the present case contains terminology which is incorrect in view of the interpretation followed by the Appellate Body. In particular, Thailand states that the dumping margin for an exporter was calculated "by summing up the amount of *dumping* for each model" and that the USDOC "set to zero all negative *margins* on individual models" (*emphasis added*). However, the Appellate Body has already clarified that dumping can be found to exist 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" and that "the *results* of model-specific comparisons are not margins of dumping within the meaning of Article 2.4.2, but rather constitute intermediate calculations that need to be taken into consideration in the calculation of the margin of dumping for the product under consideration as a whole" (*emphasis added*).⁶ Consequently, the European Communities suggests that the Panel use the proper terminology as indicated by the Appellate Body.⁷

8. Second, the European Communities observes that panels and the Appellate Body have found the use of zeroing in *original investigations* to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* in many disputes so far.⁸ The European Communities notes that the Appellate Body Report in *US – Stainless Steel (Mexico)* addresses in general terms the relevance of previous panel and Appellate Body reports.⁹ In this respect, the final sentence of paragraph 160 refers to "an adjudicatory body" (in the singular), which seems to indicate that the phrase refers to the situation in

³ *DSU*, Article 3.2.

⁴ Panel Report, *Colombia – Indicative Prices*, para. 181; and Appellate Body Report, *US – Gambling*, para. 281 ("[W]hen a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the *DSU*").

⁵ Thailand's First Written Submission, para. 10 (confirmed by the US First Written Submission, para. 2).

⁶ Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada ("US – Softwood Lumber V")*, paras 81 – 90; see also Appellate Body Report, *US – Continued Zeroing*, para. 283, and Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 89.

⁷ See, e.g., Appellate Body Report, *US – Zeroing (Japan)*, footnote 13.

⁸ See Appellate Body Report, *EC – Bed Linen*, para. 66; Appellate Body Report, *US – Softwood Lumber V*, para. 117; Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 124; Appellate Body Report, *US – Zeroing (Japan)*, para. 138; and Appellate Body Report, *US – Zeroing (EC)*, para. 222. In addition, model zeroing in original investigations has been found to be inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement* by all panels that have examined that practice, including the panels in *EC – Bed Linen*, *EC – Tube or Pipe Fittings*, *US – Softwood Lumber V*, *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US – Shrimp (Ecuador)*, *US – Shrimp (Thailand)* and *US – Continued Zeroing*.

⁹ Appellate Body Report, *US – Stainless Steel (Mexico)*, paras 157 – 162.

which it is the same body in both the previous case and the case to be decided. That is, it refers to the situation in which a panel might be called upon to resolve the same legal issue that it has previously resolved; or the situation in which the Appellate Body might be called upon to resolve the same legal issue that it has already resolved. We note that the phrase refers to "cogent reasons" as the basis for a change in view. By contrast, the European Communities notes that paragraph 161 of the Appellate Body Report in *US – Stainless Steel (Mexico)* addresses the hierarchical relationship between panels and the Appellate Body. It concludes that the relevance of clarification provided by the Appellate Body on issues of legal interpretation is not limited to the application of a particular provision in a specific case. There is no express reference to "cogent reasons". Finally, in paragraph 162 of the Appellate Body Report in *US – Stainless Steel (Mexico)* the Appellate Body states that it was deeply concerned about the panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues.

9. In view of this, the European Communities requests the Panel to carry out an objective assessment of the matter before it, taking into account the well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues.

ANNEX B-2

THIRD PARTY WRITTEN SUBMISSION OF JAPAN

1. This dispute is one of the numerous disputes brought to the WTO dispute settlement procedure concerning "zeroing" used in the US anti-dumping procedures. Japan, as shown by its own recourse to the WTO dispute settlement procedure, has an interest in the issue of the WTO-consistency and implementation by the United States regarding "zeroing".

2. The basis of Thailand's claim is that the US Department of Commerce's use of "zeroing" when calculating the dumping margins for certain investigated exporters in the investigation of polyethylene retail carrier bags from Thailand is inconsistent with the United States' obligations under Article 2.4.2, first sentence, of the *Agreement of Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement)*.¹ Japan totally supports Thailand's claim. Japan shares the same recognition with both parties that in *United States – Final Dumping Determination on Softwood Lumber From Canada (US – Softwood Lumber Dumping)* the Appellate Body found that the use of "zeroing" in calculating margins of dumping on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions (the "weighted-average-to-weighted-average methodology") in investigations was inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.² In this regard, Japan notes that the United States does not contest that the measures identified in the panel request are inconsistent with Article 2.4.2, first sentence, of *Anti-Dumping Agreement* on the grounds stated in *US – Softwood Lumber Dumping*.³

3. In light of the foregoing, Japan, noting that the parties to this dispute have reached an Agreement on Procedures to permit expeditious resolution of this dispute⁴, agrees with both parties that a prompt resolution be brought to this dispute. Japan expects that the United States would take appropriate actions with respect to measures at issue so that "prompt settlement of situations", as stated in Article 3.3 of *Understanding on Rules and Procedures Governing the Settlement of Disputes*, will be achieved.

¹ WT/DS383/2 (10 March 2009), pp.2-3.

² Appellate Body Report, *US – Softwood Lumber Dumping*, paras. 62-117, Written submission of Thailand (Thailand FWS) para. 15, and First Written Submission of the United States (US FWS) para. 5.

³ Thailand FWS, para. 17 and US FWS, para. 5.

⁴ Thailand FWS, para. 7 and US FWS, para. 1.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF ARGENTINA

I. INTRODUCTION

1. Argentina does not intend to discuss zeroing as applied in the specific case brought by Thailand. Instead, it will focus on a more systemic aspect, that is, the inconsistency of zeroing as such.
2. The practice and methodology applied by the United States Department of Commerce (USDOC), commonly known as "zeroing", is inconsistent with the Anti-Dumping Agreement (hereinafter ADA). Article 1 of the ADA stipulates that "[a]n anti-dumping measure shall be applied only under circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement".
3. The zeroing methodology for calculating the margin of dumping during the investigation phase, by eliminating certain relevant transactions from the calculation, can lead to two situations: (a) artificial inflation of a margin of dumping; or, in the worst-case scenario, (b) creation of a margin of dumping where there is none, contrary to Article VI of the GATT 1994 and the ADA.

II. INCONSISTENCY WITH ARTICLE 2.4 OF THE ANTI-DUMPING AGREEMENT

4. Article 2.4 of the ADA establishes that calculation of the margin of dumping requires a "fair comparison" to be made between export price and normal value. It also specifies how such a comparison is to be done and that due allowance is to be made, in each individual case, for differences which affect "price comparability", providing alternatives for adjustment for the purposes of such comparison.
5. As shown above, this provision lays down as a standard that any investigating authority, when calculating margins of dumping in investigations, is required to do so on the basis of a fair comparison, regardless of the method it may decide to use under Article 2.4.2.
6. The ordinary meaning of the word "*equitativo*" (fair) in Spanish indicates that the comparison must be "*justa*", "*imparcial*" or "*ecuánime*" (*Diccionario de la Lengua Española*, Espasa Calpe, Madrid, 2005), i.e. just, impartial or unprejudiced. In other words, the comparison must not be distorted in such a way as to artificially increase the margin of dumping or to create positive margins where the result of the equation is negative. The principle of "fair comparison" hence ensures that, regardless of the method used, the result of the calculation of the margin of dumping is a genuine one, and this implies taking into account all variables that may affect the final result.
7. The practice of setting the negative margins to zero consists of disregarding export prices that are higher than the domestic market prices of the enterprise in question. Now, how can a fair comparison of normal value and export prices be made if some variables are omitted from the calculation of the margin of dumping, without justification of any kind?

8. By omitting from the calculation results in cases where the margin of dumping is negative, the zeroing methodology produces a result that does not reflect reality, with margins of dumping created artificially on the basis of a selection of variables showing positive results.

9. Although the ADA does indeed allow adjustments for the purpose of facilitating price comparability (where actual comparison is impossible) and makes no reference to zeroing, such adjustments cannot be made in the light of the zeroing methodology, for what is done in applying this method is to select some variables and dismiss other "comparable" ones, thus turning zeroing into a practice inconsistent with Article 2.4 of the ADA.

III. INCONSISTENCY WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

10. Both panels and the Appellate Body have in several instances found the practice of zeroing to be inconsistent with Article 2.4.2 of the ADA.

11. Article 2.4.2 refers to the various methods available to investigating authorities for calculating the margin of dumping. It specifies that "[s]ubject 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 [thus providing the possibility of applying a weighted average/transaction under exceptional circumstances method]".

12. The aforementioned provision explains how domestic authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there is dumping.

13. As can be inferred from this provision, comparison for the purposes of calculating the "margin of dumping" in an investigation, regardless of the method used, must be based on "all" comparable transactions and not on the selection of certain models or transactions.

14. Argentina hence concurs with the arguments in paragraph 13 of Thailand's written submission that the terms "margins of dumping" and "all comparable export transactions" must be interpreted in an "integrated manner"¹, which leads to the conclusion that, where "an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".²

15. Argentina therefore agrees with Thailand that the zeroing methodology is inconsistent with Article 2.4.2, because it fails to take into account "all" comparable transactions as prescribed by the provision in question. According to this methodology, the "margin of dumping" is calculated by selecting some transactions and disregarding (by setting them to zero) those in which case the result is negative.

¹ Appellate Body Report, WT/DS264/AB/R, adopted on 31 August 2004 ("Appellate Body Report, *US – Softwood Lumber V*"), paras. 86-103. (Original footnote.)

² *Ibid.*, para. 122. (Original footnote.)

IV. INCONSISTENCY WITH ARTICLE 9.3 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI:2 OF THE GATT 1994

16. Article 9.3 of the ADA, read in conjunction with Article VI:2 of the GATT 1994, provides that anti-dumping duties levied in order to offset the effects of dumping may not exceed the margin of dumping in respect of such product.

17. Article 9.3 stipulates that "*[t]he amount of the anti-dumping duty shall be established in accordance with the provisions of Article 2*".

18. The zeroing methodology, by not producing a result that takes into account all the variables to be taken into consideration in a margin-of-dumping determination, ultimately implies the levying of anti-dumping duties in excess of the margin of dumping, and is consequently inconsistent with Articles 9.3 of the ADA and VI:2 of the GATT 1994.

19. Nonetheless, Argentina wishes to make clear that the imposition and collection of duties cannot be confused with the calculation of the margin of dumping, which the implementing authority is required to make **prior** to the imposition phase.

V. CONCLUSION

20. In view of the foregoing, Argentina considers that the zeroing methodology for calculating margins of dumping during the investigation phase is inconsistent with Article 2.4.2 of the ADA.

21. Accordingly, Argentina respectfully requests the Panel that the United States be asked to bring its measures into conformity with WTO law.

ANNEX C

QUESTIONS AND ANSWERS

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ANNEX C-1

THAILAND'S RESPONSE TO THE PANEL'S QUESTION

1. Thailand hereby submits its response to the question provided by the Panel to Thailand on 10 November 2009.

Question to Thailand

At para. 10 of its written submission, Thailand asserts that the USDOC calculated the anti-dumping margins for the relevant Thai exporters using the following steps:

- (i) the USDOC identified different "models," *i.e.*, types, of products based on the most relevant product characteristics;
- (ii) the USDOC calculated weighted average prices in the United States and weighted average normal values in the comparison market on a model-specific basis, for the entire period of investigation;
- (iii) the USDOC compared the weighted average normal value of each model to the weighted average United States price for that same model;
- (iv) the USDOC calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and
- (v) the USDOC set to zero all negative margins on individual models before summing the total amount of dumping for all models.

At para. 15 of its written submission, Thailand refers to specific lines of the computer programme used by the United States to calculate dumping margins in the Final Determination as evidence of "the use of 'zeroing' in the calculation of the dumping margins for the Thai exporters". The Panel understands that Thailand refers to this evidence exclusively in support of its assertion that the USDOC undertook step (v) above (*i.e.*, the USDOC "set to zero all negative margins on individual models before summing the total amount of dumping for all models"). Please explain what evidence Thailand relies on to support its assertion that the USDOC also undertook each of steps (i) through (iv) outlined above.

2. In this dispute, Thailand does not challenge the United States' use of steps (i)-(iv) described in paragraph 10 of Thailand's submission. Instead, Thailand challenges only the practice known as zeroing described in step (v) of that paragraph. By this step, the USDOC "did not permit the results of averaging groups for which the weighted-average export price or constructed export price exceeds the weighted-average normal value to offset the results of averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value".¹ In other words, the USDOC "zeroed" any intermediate model-by-model comparisons described in steps (i)-(iii) that had a negative result.

3. That said, the comparison methodology discussed in steps (i)-(iv) is described in the USDOC's notice of preliminary determination of sales at less than fair value in its investigation of imports of polyethylene retail carrier bags ("PRCBs"), in which the USDOC stated that:

To determine whether sales of PRCBs to the United States by Thai Plastic Bags and Universal in this investigation were made at less than fair value, we compare

¹ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (27 December 2006), Exhibit THA-7.

EP [export price] or constructed export price (CEP) to normal value, as described in the 'US Price' and 'Normal Value' sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs and CEPs.

In making the product comparisons, we matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance ...²

4. The USDOC further explained that:

We compared U.S. sales with sales of the foreign like product in the home market on the basis of the physical characteristics described under Fair Value Comparisons above. Wherever we were unable to match a U.S. model to identical merchandise sold in the home market, we selected the most similar model of subject merchandise in the home market as the foreign like product.³

5. Finally, the USDOC explained that the weighted-average dumping margin was "equal to the weighted-average amount by which the normal value exceeds the EP or CEP".⁴

6. Thus, the USDOC explained that it (i) identified different models based on physical characteristics; (ii) calculated weighted-average prices by model; and (iii) based its margin calculations on the weighted-average amount by which the normal value exceeded the export price in the intermediate comparisons.⁵

7. In addition, Thailand notes that the USDOC's notice of 27 December 2006, in which the USDOC provided notice of its intent to discontinue the use of zeroing with weighted-average to weighted-average comparisons in anti-dumping investigations, describes this methodology in some detail as well.⁶ It is Thailand's understanding that it is not contested that the USDOC also used this methodology in the measures at issue in this dispute.

² See *Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 3552, 3554 (26 January 2004), Exhibit THA-9.

³ *Ibid.*, at 3555.

⁴ *Ibid.*, at 3557.

⁵ These steps can also be seen in the computer programme used to determine the dumping margins provided by Thailand in Exhibit THA-4. For example, part 5 of the programme (lines 1976-2005) determines weighted-average US prices by model; part 8 of the programme (lines 985-1037) determines weighted-average normal values by model; part 6 of the programme (lines 2007-2179) matches home market and US sales by model; while part 9 of the programme (lines 2417-2555) shows the model-by-model calculations, including, in lines 2541-2543, the subtraction of US price from normal value. The USDOC also provided output showing summaries of and the highest 10 and lowest 5 margins by model ("CONNUMU" or "CONNUMH") for various types of comparisons (identical or similar models, normal value based on home market price or constructed value, same level of trade or not, etc.) in pages 32-44 of the output provided by the USDOC with the programme included in Exhibit THA-4.

⁶ See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (27 December 2006), Exhibit THA-7. ("When the Department applies the average-to-average methodology during an investigation, the Department usually divides the export transactions into groups by model and level of trade ('averaging groups') 19 CFR 351.414(d)(2). The Department then compares an average of the export prices or constructed export price of the transactions within one averaging group to the weighted-average of normal values of such sales. 19 CFR 351.414(d)(1). Prior to this modification, when aggregating the results of the averaging groups in order to determine the weighted-average dumping margin, the Department did not permit the results of averaging groups for which the weighted-average export price or constructed export price is less than the weighted-average normal value").

8. Thailand hopes that the above clarifies the Panel's understanding of the comparison methodology used by the USDOC in the measure at issue. Thailand remains available to provide any further information that the Panel may require to assist it in resolving this dispute.

ANNEX D

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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ANNEX D-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THAILAND

WORLD TRADE ORGANIZATION

WT/DS383/2
10 March 2009

(09-1226)

Original: English

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

Request for the Establishment of a Panel by Thailand

The following communication, dated 9 March 2009, from the delegation of Thailand to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Upon instructions from my authorities, I wish to convey the request of the Government of the Kingdom of Thailand ("Thailand") to the Dispute Settlement Body (the "DSB") for the establishment of a panel pursuant to Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), Articles 4 and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and Article 17.4 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") with respect to certain anti-dumping measures imposed by the United States on imports of Polyethylene Retail Carrier Bags ("plastic carrier bags") from Thailand.

Prior Consultations

On 26 November 2008, Thailand requested consultations with the United States pursuant to Article 4 of the DSU, Article XXIII of the GATT 1994 and Article 17 of the Anti-Dumping Agreement.¹ These consultations were requested concerning anti-dumping measures imposed by the United States on imports of plastic carrier bags from Thailand. Consultations were held in Geneva on 28 January 2009. While these consultations assisted in clarifying the issues before the parties, they failed to resolve the dispute.

¹ See G/ADP/D76/1, G/L/873, WT/DS383/1.

The Measure at Issue

The specific measure at issue is the anti-dumping order imposed by the United States on plastic carrier bags from Thailand and the final determination by the United States Department of Commerce ("USDOC"), as amended, leading to that order. The United States initiated its anti-dumping investigation of plastic carrier bags from Thailand on 1 April 2002. The investigation was conducted by the USDOC. The final determination in this investigation was published on 18 June 2004² (the "Final Determination") and an amended final determination was published by the USDOC on 15 July 2004.³ Following a final determination of injury by the United States International Trade Commission, the United States issued an anti-dumping duty order on imports of Polyethylene Retail Carrier Bags from Thailand on 9 August 2004 (the "Order").⁴ The Final Determination, as amended, and the Order comprise the measure at issue in this dispute.

In the Final Determination, as amended, the USDOC used the "zeroing" methodology to determine the final dumping margins for certain Thai exporters subject to the order. Accordingly, for certain Thai exporters of plastic retail bags, the Final Determination, as amended, as well as the Order, reflected and included anti-dumping margins that were calculated on the basis of "zeroing". The use of the "zeroing" methodology is evident from the computer programs used to calculate the margins of dumping in the Final Determination, as amended, on which the anti-dumping duty order was based. More specifically, the methodology of "zeroing" negative anti-dumping margins in the above determination refers to the following:

- (1) different "models," i.e., types, of products are identified based on the most relevant product characteristics;
- (2) weighted average prices in the United States and weighted average normal values in the comparison market are calculated on a model-specific basis for the entire period of investigation;
- (3) the weighted average normal value of each model is compared to the weighted average United States price for that same model;
- (4) to calculate the dumping margin for an exporter, the amount of dumping for each model is summed and then divided by the aggregated United States price for all models;
- (5) before summing the total amount of dumping for all models, all negative margins on individual models are set to zero.

Through this method, the USDOC calculates margins of dumping and collects anti-dumping duties in amounts that exceed the actual extent of dumping, if any, by the investigated companies.

Thailand considers that this measure is inconsistent with the obligations of the United States under the provisions of the GATT 1994 and the Anti-Dumping Agreement described below.

² See *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 34122, 18 June 2004.

³ See *Notice of Amended Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 42419, 15 July 2004.

⁴ See *Antidumping Duty Order: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 48204, 9 August 2004.

The Legal Basis of the Complaint

Through the USDOC's methodology of "zeroing", the United States treats transactions with negative dumping margins as having margins equal to zero in determining weighted average anti-dumping margins in an anti-dumping investigation.

The use of "zeroing" led the United States to make a finding of dumping where none would have otherwise been made or to calculate inflated margins of dumping. Thailand considers that the USDOC's use of its methodology of "zeroing" (in the Final Determination, as amended, which was a basis for the Order) is inconsistent with the obligations of the United States under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

The "zeroing" methodology that the USDOC used in its anti-dumping investigation of plastic carrier bags from Thailand is identical to the methodology that was held to be inconsistent with the obligations of the United States under the Anti-Dumping Agreement in the following disputes: *United States – Final Dumping Determination on Softwood Lumber from Canada*⁵ and *United States – Anti-Dumping Measures on Shrimp from Ecuador*,⁶ and *United States – Measures Relating to Shrimp from Thailand*.⁷

Request for the Establishment of a Panel

Accordingly, Thailand requests that the DSB establish a panel pursuant to Article XXIII:1 of the GATT 1994, Articles 4 and 6 of the DSU, and Article 17.4 of the Anti-Dumping Agreement. Thailand requests that the establishment of a panel in this matter be placed on the agenda of the meeting of the DSB scheduled for 20 March 2009.

⁵ Panel Report, WT/DS264/R, and Appellate Body Report, WT/DS264/AB/R, adopted 31 August 2004.

⁶ Panel Report, WT/DS335/R, adopted 20 February 2007.

⁷ Panel Report, WT/DS343/R, and Appellate Body Report, WT/DS343/AB/R, adopted 1 August 2008.