

ANNEX A

WRITTEN SUBMISSIONS OF THE PARTIES

Contents		Page
Annex A-1	Written Submission of Thailand	A-2
Annex A-2	Written Submission of the United States	A-7

ANNEX A-1

WRITTEN SUBMISSION OF THAILAND

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	3
A. COMPLAINT OF THAILAND.....	3
II. LEGAL ARGUMENT.....	3
A. THE MEASURES AT ISSUE IN THIS DISPUTE	3
B. THE USE OF ZEROING BY THE UNITED STATES WAS CONTRARY TO ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT	5
III. RULINGS REQUESTED.....	6

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.