ANNEX B

THIRD PARTIES WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

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 Thailand[5] 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

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[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 dispute[4], 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.

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[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.