

## **ANNEX B**

### **THIRD PARTIES' WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF**

<b>Contents</b>		<b>Page</b>
Annex B-1	Third Party Written Submission of the European Union	B-2
Annex B-2	Third Party Written Submission of Japan	B-5

## ANNEX B-1

### THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. The European Union makes this third party written submission because of its systemic interest in the correct and consistent interpretation and application of 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. The European Union considers that there is no dispute before the parties as to the relevant facts of the case, the interpretation of the relevant law and its application to the facts. Indeed, as regards the facts of this case, according to the United States, "[it] does not contest the accuracy of Korea's description of the zeroing methodology set forth in paragraphs 4 and 17 of Korea's First Written Submission, as it relates to the investigations challenged in this dispute".<sup>1</sup> As regards the evidence submitted by Korea to prove its case, the United States notes that "[it] has reviewed the factual evidence submitted by Korea and does not contest that the submitted documentation, including the computer programs used to calculate the dumping margins, were generated by the Department of Commerce during its conduct of the three original investigations at issue".<sup>2</sup> Finally, with respect to the interpretation of the relevant provisions of the *Anti-Dumping Agreement* and its application to the facts of this case, the United States confirms that "[it] acknowledges that [the reasoning of the Appellate Body in *US – Softwood Lumber Dumping*, which found that the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with the first sentence of Article 2.4.2] is equally applicable to the margins at issue in this dispute".<sup>3</sup>

3. Under these circumstances, once the Panel has outlined the agreement of the parties on all those issues (i.e., the facts, the interpretation of the relevant law and the application of the law to the facts), the report of the Panel could be limited to making the finding that the parties agree that there is no dispute, and then recommend that the United States bring the measures at issue into conformity with its obligation under the covered agreements. In fact, in view of the circumstances of this case, where the United States has acknowledged that its measures are inconsistent with the *Anti-Dumping Agreement*, the European Union considers that the Panel could make use of the possibility of making suggestions under Article 19.1 of the *DSU*, and suggest that the United States should bring the measures at issue into conformity immediately.

4. This approach would be in accordance with Article 11 of the *DSU*. A panel has a basic obligation under Article 11 of the *DSU* to make an objective assessment of the matter before it. Such assessment should include the facts, evidence and legal argument. Indeed, the Panel would distinguish between a finding that the parties agree with respect to a particular fact, evidentiary matter or legal issue; and the panel itself making such finding or recommendation.

5. To the extent that there is no dispute between the parties, the European Union recalls that the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of the Members; that all Members have agreed to engage in *DSU* procedures in good faith in an effort to resolve disputes; and that all

---

<sup>1</sup> US First Written Submission, para. 5.

<sup>2</sup> US First Written Submission, para. 9.

<sup>3</sup> US First Written Submission, para. 10.

Members undertake to accord sympathetic consideration to representations made by any other Member.<sup>4</sup> In order to ensure a prompt settlement of the dispute, the European Union considers that the Panel could adapt its working procedures in view of the agreement by the parties and stop its proceedings once it has received the views of the third parties. In other words, the European Union considers that, in view of the US acknowledgment of the correctness of the facts, evidence, interpretation of the relevant law and its application to the facts of this case, there is no need for a hearing, questions from the Panel or subsequent submissions from the parties. This would also be in line with the requirement of making "the procedures more efficient" as contained in Article 12.8 of the *DSU*.

6. Finally, the European Union wants to comment on the US position with respect to prior panel and Appellate Body reports. The United States considers that the rights and obligations of WTO Members flow, not from panels or the Appellate Body, but from the text of the covered agreements, and requests that this Panel make an objective assessment of the matter before it.<sup>5</sup> The European Union 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.<sup>6</sup> The European Union notes that the Appellate Body Report in *US-Stainless Steel (Mexico)* addresses in general terms the relevance of previous panel and Appellate Body reports.<sup>7</sup> In particular, the Appellate Body clarified the role of its previous reports and indicated how panels should act in cases where the same legal issues arise.<sup>8</sup>

[T]he legal interpretation embodied in adopted panel and Appellate Body. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the *DSU*, implies that, *absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.*

In the hierarchical structure contemplated in the *DSU*, panels and the Appellate Body have distinct roles to play. In order to strengthen dispute settlement in the multilateral trading system, the Uruguay Round established the Appellate Body as a standing body. Pursuant to Article 17.6 of the *DSU*, the Appellate Body is vested with the authority to review "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, Article 17.13 provides that the Appellate Body may "uphold, modify or reverse" the legal findings and conclusions of panels. The creation of the Appellate Body by WTO Members to review legal interpretations developed by panels shows that Members recognized the importance of consistency and stability in the interpretation of their rights and obligations under the covered agreements. This is essential to promote "security and predictability" in the dispute settlement system, and to ensure the "prompt settlement" of disputes. *The Panel's failure to follow previously adopted Appellate Body reports addressing the same issues undermines the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements as contemplated under the DSU.* Clarification, as envisaged in

---

<sup>4</sup> *DSU*, Article 3.3, 3.10 and 4.2.

<sup>5</sup> US First Written Submission, para. 11.

<sup>6</sup> 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*.

<sup>7</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 157 – 162.

<sup>8</sup> Appellate Body Report, *US – Stainless Steel from Mexico*, paras. 160 – 162 (emphasis added).

Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, ***the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case.***

We are deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system, as explained above.

7. The European Union fully agrees with these statements without reservation. 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 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 Union 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.

8. In other words, WTO panels are obliged to correctly apply the law; in the context of this dispute this also means that the Panel should follow the rulings of the Appellate Body where the Appellate Body has previously interpreted the same legal questions. Otherwise, the security and predictability enshrined in Article 3.2 of the *DSU* would be put in serious danger.

9. In sum, the European Union considers that, to the extent that the Panel wants to make an independent finding about the interpretation of the relevant law and its application to the facts, the Panel should follow previous Appellate Body's reports on the same legal issue, and consequently find that the USDOC's use of zeroing in the original investigations challenged by Korea is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

## 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 United States' 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 claim by the Republic of Korea ("Korea") is that the United States Department of Commerce's use of "zeroing" when calculating the dumping margins for certain investigated exporters in the investigation of three products from Korea is inconsistent with the United States' obligations under Article 2.4.2 of the *Agreement of Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement)*.<sup>1</sup> Japan totally supports the Korea's claim. Japan shares the same recognition with both parties that in *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*.<sup>2</sup>
3. Japan notes that the United States does not contest that the submitted documentation by Korea, including the computer programs used to calculate the dumping margins, was generated by the United States Department of Commerce during its conduct of the three original investigations at issue.<sup>3</sup> In addition, it should be noted that the United States also acknowledged that the reasoning shown in *US – Softwood Lumber Dumping* was equally applicable to the Korea's claim in this case.<sup>4</sup>
4. In this regard, Japan recalls that the United States acknowledged that the reasoning shown in *US – Softwood Lumber Dumping* was equally applicable to *US – Shrimp (Ecuador)* and *US – AD Measures on PET Bags*. In these cases, the panels correctly concluded the measures of the use of "zeroing" in calculating margins of dumping on the basis of the "weighted-average-to-weighted-average methodology" were inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.<sup>5</sup>
5. In light of the foregoing, Japan agrees with the request of Korea that the Panel should find that the United States acted inconsistently with the requirement of Article 2.4.2 of the *Anti-Dumping Agreement*. 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 the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, will be achieved.

---

<sup>1</sup> First Written Submission of Korea, para. 2.

<sup>2</sup> Appellate Body Report, *US – Softwood Lumber Dumping*, paras. 62-117, First Written Submission of Korea, para. 18.

<sup>3</sup> First Written Submission of The United States, para. 9.

<sup>4</sup> First Written Submission of The United States, para. 10.

<sup>5</sup> Panel Report, *US – Shrimp (Ecuador)*, para.8.1, Panel Report, *US – AD Measures on PET Bags*, para. 8.1.

