

ANNEX D

REQUEST FOR THE ESTABLISHMENT OF A PANEL

Contents		Page
Annex D-1	Request for the Establishment of a Panel by Thailand	D-2

ANNEX D-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THAILAND

WORLD TRADE ORGANIZATION

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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.