ANNEX B

Third Parties' Submissions

ANNEX B-2

THIRD PARTY SUBMISSION OF THE UNITED STATES

5 August 2002

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II. ARGUMENT

A. A MEMBER CAN TAKE MEASURES AFTER THE END OF THE REASONABLE PERIOD OF TIME TO COMPLY WITH THE RECOMMENDATIONS AND RULINGS OF THE

7. We note that the EC states as a general principle that "the relevant date for assessing the consistency of the measures 'taken to comply' with the covered agreements is the date of establishment of the panel".[1] Regulation 696/2002 predates both the request for establishment and the establishment of the Panel, so there is no need in this proceeding to reach the issue of which is the proper benchmark.

B. ARTICLE 2.2.2(II) OF THE ADA IS SILENT WITH REGARD TO THE WEIGHING FACTOR USED TO CALCULATE SG&A PROFIT FIGURES

8. In its first written submission to this Panel, India claims that, contrary to Article 2.2.2(ii) of the *Agreement on Implementation of Article VI of GATT 1994* ("ADA"), the EC applied an improper weighting factor in calculating the weighted average of SG&A and profit figures used to adjust the constructed normal value. Specifically, India claims that the EC improperly overstated the dumping margin by using sales value as the weighting factor, rather than sales volume.

9. The United States disagrees with India's position on this question. Article 2.2.2(ii) specifies that a weighted average is to be utilized; however, it does not specify the manner in which the weighting is to be performed. Article 2.2.2(ii) is silent with respect to this question, providing no guidance, express or implied, as to whether the weighting should be done on the basis of sales value or sales volume.

10. The United States likewise disagrees with India's claim that the "context" of Article 2.2.2(ii) indicates that only a quantity-based weighted average is permissible. The fact that several distinct sections of the ADA refer to sales volume and quantity cannot be taken as evidence that Article 2.2.2(ii) requires a quantity-based weighted average. As noted above, Article 2.2.2(ii) is silent as to the type of weighting factor to be used. If anything, India's argument regarding "context" indicates that Members knew how to insert references to volume or quantity when they wanted to require a calculation to be performed on that basis. Thus, where they have omitted such a reference, it should be considered equally relevant. The Panel should conclude from the silence of Article 2.2.2(ii) that the Members intended the choice of weight-averaging factor to be discretionary.

11. The Panel should also be mindful of Article 17.6(ii) of the ADA, which provides that "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations". In this case, Article 2.2.2(ii) merely dictates that the amounts in question should be weight-averaged; it does not prescribe that a value-based weighting factor must be used, nor does it prescribe that a volume-based weighting factor must be used. Because Article 2.2.2(ii) is silent in this respect, clearly either method would be a permissible interpretation of the ADA. Therefore, the United States submits that the Panel should not disturb the EC's reliance on a value-based weight-averaging in this instance.

C. ARTICLE 21.2 IS NOT MANDATORY

12. The United States concurs with the EC's conclusion that Article 21.2 is not mandatory. We would emphasize that, as used in the covered agreements, "should" is a hortatory term, and not a mandatory term.[2] Moreover, if the use of "should" were to create an obligation, it would have the

[1] EC first written submission, para. 35.

[2] The Appellate Body has on one occasion interpreted "should" as mandatory, but only in the context of a DSU provision concerning a panel's "right" to seek information from the parties to a dispute, and then only because it believed such an interpretation necessary to give meaning to this right. *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, para. 187. Even in this situation, the