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UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

REQUEST FOR CONSULTATIONS BY THE REPUBLIC OF KOREA

The following communication, dated 29 August 2013, from the delegation of the Republic of Korea to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

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Upon instructions from my authorities, and on behalf of the Government of the Republic of Korea ("Korea"), I hereby request consultations with the Government of the United States of America ("United States") pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17 of the *Agreement on Implementation of Article VI of the GATT 1994* ("Anti-Dumping Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") with regard to the following anti-dumping and countervailing measures adopted by the United States Department of Commerce ("USDOC").

I. ANTI-DUMPING MEASURES BY THE UNITED STATES RELATED TO LARGE RESIDENTIAL WASHERS FROM KOREA AS APPLIED

Korea wishes to consult with the United States with regard to anti-dumping measures by the United States related to Large Residential Washers from Korea (Case No. A-580-868), as set forth in, *inter alia*, the following, as well as any closely connected, subsequent measures that apply a measure or measures described in this Request for Consultations:

1. Final Determination of Sales at Less Than Fair Value – Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea, 77 Fed. Reg. 75988 (December 26, 2012).

2. Issues and Decision Memorandum for the Antidumping Investigation of Large Residential Washers From the Republic of Korea (December 18, 2012), available at www.ita.doc.gov.

3. Anti-Dumping Duty Order – Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, 78 Fed. Reg. 11148 (February 15, 2013).

4. Any determination in the proceeding entitled Large Residential Washers from Korea in which the USDOC applies the methodology of "zeroing," as described in Section II, below, including but not limited to preliminary and final determinations in administrative reviews, new shipper reviews, sunset reviews and changed circumstances reviews.

5. Any determination in the proceeding entitled Large Residential Washers from Korea in which the USDOC applies the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, whether described as "targeted dumping," "differential pricing" or by any other name, including but not limited to preliminary and final determinations in administrative reviews, new shipper reviews, sunset reviews and changed circumstances reviews.

Korea considers that the use by the USDOC of the methodology known as "zeroing" (as described in Section II, below) in the final determination of sales at less than fair value in Large Residential Washers from Korea and in the other measures identified above is inconsistent with, inter alia, the following provisions of the Anti-Dumping Agreement, GATT 1994 and the Marrakesh Agreement Establishing the World Trade Organization ("Marrakesh Agreement"):

1. Article 2.1 of the Anti-Dumping Agreement and Article VI:1 and Article VI:2 of the GATT 1994, because the USDOC did not determine a dumping margin for the product as a whole;

2. Article 2.4 and Article 2.4.2 of the Anti-Dumping Agreement, insofar as the comparisons made by the USDOC did not determine dumping margins for the product as a whole, did not conduct fair comparisons between export price and normal value and are otherwise inconsistent with those provisions;

3. Article 5.8 of the Anti-Dumping Agreement insofar as de minimis dumping margins are erroneously determined not to be de minimis;

4. Article 9.4 and Article 9.3 of the Anti-Dumping Agreement insofar as there is as a result of "zeroing" the imposition and collection of anti-dumping duties in excess of the margins properly determined pursuant to Article 2 of the Anti-Dumping Agreement;

5. Article 1 and Article 2.1 of the Anti-Dumping Agreement and Article VI:1 and Article VI:2 of the GATT 1994 insofar as there is as a result of "zeroing," the imposition and collection of an anti-dumping duty that is not consistent with the Anti-Dumping Agreement; and

6. Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement insofar as the United States has not taken all steps to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the GATT 1994 and the Anti-Dumping Agreement.

In regard to these inconsistencies with provisions of the GATT 1994 and the Anti-Dumping Agreement, it is the view of Korea that a determination to use the W-T comparison methodology under Article 2.4.2 of the Anti-Dumping Agreement does not provide authority to apply the methodology of "zeroing."

II. THE UNITED STATES' METHODOLOGY OF "ZEROING" AS SUCH WHEN USING THE WEIGHTED AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY IN ANTI-DUMPING INVESTIGATIONS, ADMINISTRATIVE REVIEWS AND OTHER SEGMENTS OF ANTI-DUMPING PROCEEDINGS

Korea wishes to consult with the United States with regard to the methodology by which, upon determining that, consistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, the W-T comparison methodology is appropriate, the USDOC treats some or all transactions with negative dumping margins as having margins equal to zero (*i.e.*, applies the methodology of "zeroing") when determining weighted average dumping margins in anti-dumping investigations, administrative reviews and other segments of anti-dumping proceedings, including but not limited to the aforementioned anti-dumping proceedings pertaining to Large Residential Washers from Korea. Korea considers that, pursuant to, *inter alia*, the measures set forth below, application of the "zeroing" methodology to the intermediate results of comparing a weighted average normal value to the price of an individual export transaction in anti-dumping investigations, administrative reviews and other segments of anti-dumping proceedings is required in U.S. calculation of dumping margins in proceedings and segments of proceedings where the second sentence of Article 2.4.2 is applied. This measure is evidenced, *inter alia*, by the USDOC's consistent application, and is applied pursuant to, or pursuant to discretion allowed under, the following measures, which are also challenged by Korea as measures at issue:

1. The Tariff Act of 1930, including in particular, sections 771(35)(A) and (B), and 777A(c) and (d).

2. The Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol. I.

3. The implementing regulations of the USDOC, 19 C.F.R. section 351, including in particular sections 351.212 and 351.414.

4. The predecessor versions of these regulations, including the version found at 19 C.F.R. 351.414 (2008), that the USDOC attempted to withdraw (73 Fed. Reg. 74930 (December 10, 2008), but that the U.S. courts have found to still be in effect in Gold East Paper (Jiangsu) Co., Ltd. v. United States, Slip Op. 13-74 (June 17, 2013).

5. The USDOC Import Administration Antidumping Manual, including any amended versions, and including the computer program(s) to which it refers.

6. Any other closely connected, subsequent measures that enable or permit the application of the said zeroing methodology in anti-dumping investigations, administrative reviews and other segments of anti-dumping proceedings.

Korea considers the United States' use of "zeroing" under the W-T comparison methodology in anti-dumping investigations involving the exception of Article 2.4.2 to be inconsistent, "as such," with, inter alia, the following provisions of the Anti-Dumping Agreement:

1. Article 2.1, Article 2.4 and Article 2.4.2 of the Anti-Dumping Agreement and Article VI:1 and Article VI:2 of the GATT 1994, because those provisions do not permit the application of "zeroing" to results of anti-dumping comparisons, including W-T comparisons.

2. Article 2.1, Article 2.4 and Article 2.4.2 of the Anti-Dumping Agreement and Article VI:1 and Article VI:2 of the GATT 1994, because the United States fails to conduct a fair comparison between export price and normal value and fails to determine a dumping margin for the product as a whole.

Korea further considers the United States' use of "zeroing" under the W-T comparison methodology in administrative reviews and other segments of anti-dumping proceedings involving the exception of Article 2.4.2 to be inconsistent, "as such," with, inter alia, the following provisions of the Anti-Dumping Agreement:

1. Article 9.3, Article 9.5 and Article 11 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because the United States establishes an amount of anti-dumping duty that exceeds the margin of dumping as established under Article 2.

2. Article 2.1, Article 2.4 and Article 2.4.2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, because the United States fails to conduct a fair comparison between export price and normal value and fails to determine a dumping margin for the product as a whole.

Korea further considers that the failure of the United States to take all necessary steps to ensure the conformity of its laws, regulations and administrative practices with the provisions of the GATT 1994 and the Anti-Dumping Agreement constitutes a violation of the United States' obligations under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement.

III. THE USDOC METHODOLOGY AS APPLIED FOR DETERMINING THE APPLICABILITY TO THE ANTI-DUMPING INVESTIGATION CONCERNING LARGE RESIDENTIAL WASHERS FROM KOREA IN THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

Korea considers that, in its determination to apply the second sentence of Article 2.4.2 of the Anti-Dumping Agreement to respondents in this investigation, the USDOC acted inconsistently with Article 2.4.2, and with Article 2.1 and Article 2.4 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, in, inter alia, the following respects:

1. The USDOC failed to find "a pattern of export prices which differ significantly among different purchasers, regions or time periods" within the meaning of Article 2.4.2 and failed to provide a reasoned explanation of why the respondents' prices constituted a "pattern" as contemplated by Article 2.4.2.

2. The determination by the USDOC that the prices charged by respondents in this investigation revealed "patterns" of differing prices in all three respects – by purchaser, by region and by time period – is plainly inconsistent with the meaning of "pattern" in Article 2.4.2.

3. The failure of the USDOC to consider legitimate commercial reasons and market explanations for any patterns of differing prices was clearly inconsistent with the meaning of "pattern" in Article 2.4.2.

4. The statistical analysis used by the USDOC to define "patterns" of differing prices was statistically unsound and produced economically irrational results.

5. The USDOC impermissibly, upon finding a pattern of differing prices, applied the W-T comparison methodology to all of the respondents' export sales transactions, rather than applying that methodology only to the subset of export transactions as to which it found "targeted dumping," which is inconsistent with Article 2.4.2.

6. The USDOC failed to provide a reasoned explanation of why the pattern of price differences could not have been "taken into account appropriately by the use of a weighted average to weighted average comparison" and gave no explanation of why it could not have been "taken into account appropriately by the use of a" "transaction to transaction comparison."

IV. THE USDOC METHODOLOGY FOR APPLYING THE SECOND SENTENCE OF ARTICLE 2.4.2 AS SUCH

Korea considers that the uniform insistence of the USDOC that the determination of the existence of "a pattern of export prices which differ significantly among different purchasers, regions or time periods" must be made exclusively by statistical analysis is a norm systematically and uniformly followed. Korea therefore submits that this methodology, which fails to give any consideration to the reasons for price differences or to directly relevant economic or commercial factors in compliance with the meaning of "pattern of prices" under Article 2.4.2, is as such inconsistent with U.S. obligations under Article 2.4.2.

V. COUNTERVAILING MEASURES BY THE UNITED STATES RELATED TO LARGE RESIDENTIAL WASHERS FROM KOREA

Korea wishes to consult with the United States with regard to countervailing measures by the United States related to Large Residential Washers from Korea (Case No. C-580-869), as set forth in, *inter alia*, the following, as well as any closely connected, subsequent measures that apply a measure or measures described in this Request for Consultations:

1. Final Countervailing Duty Determination - Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination, 77 Fed. Reg. 75975 (December 26, 2012).

2. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers From the Republic of Korea (December 18, 2012), available at www.ita.doc.gov.

3. Countervailing Duty Order – Large Residential Washers From the Republic of Korea: Countervailing Duty Order, 78 Fed. Reg. 11154 (February 15, 2013).

4. Any determination in the proceeding entitled Large Residential Washers from Korea, including the investigation and all administrative reviews, new shipper reviews, changed circumstances reviews, sunset reviews and other segments of that proceeding.

Korea considers this determination by the USDOC to be inconsistent with the U.S. obligations under the relevant provisions of the GATT 1994 and the SCM Agreement, including, but not limited to:

With respect to RSTA Article 10(1)(3)

1. Article 2.1 of the SCM Agreement because, inter alia:

   a. the USDOC erred when it determined that the respondent Samsung Electronics Co., Ltd. ("Samsung") did not receive a generally available subsidy as a matter of law under Article 10(1)(3) of Korea's Restriction of Special Taxation Act ("RSTA"), which automatically provided tax credits to all Korean taxpayers that made certain specified types of investments;

   b. the USDOC incorrectly determined that Samsung received a disproportionately large amount of the tax credits available under Article 10(1)(3) of RSTA; and

   c. the USDOC failed to take into account the extent of diversification of economic activities within Korea, as well as the length of time during which Article 10(1)(3) of RSTA had been in effect, from evidence on the record before determining that Samsung had received a disproportionately large amount of the tax credits provided under the Article.

2. Article VI:3 of the GATT 1994 because, inter alia, the USDOC imposed countervailing duties on Samsung that were attributable to tax credits that it received for investments that it made under Article 10(1)(3) of RSTA that pertained to products other than the products subject to investigation, i.e., products other than "Large Residential Washers." For instance, Article VI:3 does not permit a countervailing duty to be levied "on any product . . . in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production, or export of such product in the country of exportation." However, by countervailing tax credits attributable to products other than Large Residential Washers, the USDOC acted inconsistently with this provision.

3. Article 1.1, Article 1.2 and Article 14 of the SCM Agreement because, inter alia:

   a. the USDOC erroneously overstated the amount of the financial contribution that the Government of Korea provided and the resulting benefit that it conferred on Samsung when it failed to recognize that the tax credits provided under Article 10(1)(3) of RSTA benefitted products that Samsung manufactured in locations outside Korea; and

   b. the USDOC did not provide an adequate explanation of the reasons why it failed to take into account in its benefit calculation the fact that the tax credits provided under Article 10(1)(3) of RSTA benefitted products that Samsung manufactured in locations outside Korea.

4. Article 19.4 of the SCM Agreement because, inter alia, the USDOC levied countervailing duties on imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

With respect to RSTA Article 26

1. Article 1.2 and Article 2.2 of the SCM Agreement because, inter alia, the USDOC erroneously found that Article 26 of RSTA provided a specific subsidy because it was limited to certain enterprises located within a designated geographical region. In fact, the evidence on the record proves that the tax credits under Article 26 were generally available throughout Korea except for a small, carved-out tract of land, making the program, therefore, non-specific.

2. Article VI:3 of the GATT 1994 because, inter alia, the USDOC imposed countervailing duties on Samsung that were attributable to tax credits that it received for investments

that it made under Article 26 of RSTA that pertained to products other than the products subject to investigation, i.e., products other than "Large Residential Washers." For instance, Article VI:3 does not permit a countervailing duty to be levied "on any product . . . in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production, or export of such product in the country of exportation." However, by countervailing tax credits attributable to products other than Large Residential Washers, the USDOC acted inconsistently with this provision.

3. Article 19.4 of the SCM Agreement because, inter alia, the USDOC levied countervailing duties on imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

With respect to KDB and IBK Document Against Acceptance (D/A) and Open Account (O/A) Financing

1. Article 1.1 of the SCM Agreement because, *inter alia*, the USDOC erroneously treated the Korea Development Bank ("KDB") and Industrial Bank of Korea ("IBK") as public bodies within the meaning of Article 1.1(a)(1)(i) entirely based on the mere government ownership;

2. Article 1.2 and Article 14 of the SCM Agreement because, *inter alia,* the USDOC erroneously determined that the financing provided by the KDB and IBK were commercially unreasonable and thus conferred benefit within the meaning of those articles, ignoring evidence on the record proving that these financial institutions exercised their own commercial judgment.

3. Article 19.4 of the SCM Agreement because, *inter alia*, the USDOC levied countervailing duties on imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

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The United States' measures discussed above are also inconsistent with Article 1 of the Anti-Dumping Agreement, Article 10 of the SCM Agreement and Article VI of the GATT 1994 as a consequence of the apparent breaches of the Anti-Dumping Agreement and the SCM Agreement described above.

Moreover, the United States' measures appear to nullify or impair the benefits accruing to Korea directly or indirectly under the cited agreements.

Korea reserves its rights to raise additional factual and legal issues during the course of the consultations and in any request for the establishment of a panel.

We look forward to receiving the United States' response to this request in due course in accordance with Article 4.3 of the DSU and to scheduling a mutually convenient date and venue for consultations.

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