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Page: 1/3

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KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

**NOTIFICATION OF AN OTHER APPEAL BY KOREA UNDER ARTICLES 16.4 AND 17
OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING
THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 23(1) OF
THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 4 June 2018, from the delegation of Korea, is being circulated to Members.

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23(1) of the Working Procedures for Appellate Review ("Working Procedures"), the Republic of Korea ("Korea") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in its report on *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan* (WT/DS504) ("Panel Report").

Pursuant to Rules 23(1) and 23(3) of the Working Procedures, Korea files this Notice of Other Appeal together with its Other Appellant Submission to the Appellate Body Secretariat.¹

Korea seeks the review by the Appellate Body of the Panel's conclusions that Japan has demonstrated that the Korean Investigating Authorities acted inconsistently (i) with Articles 3.1 and 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") in their causation analysis as a result of flaws in their analysis of the effect of the dumped imports on prices in the domestic market;² and (ii) with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement with respect to the treatment of information as confidential and the obligation to require the furnishing of non-confidential summaries.³ Korea appeals these findings based on a series of errors of law and legal interpretation of the Panel, as summarized below. In addition, Korea considers that the Panel failed to make an objective assessment of the facts of the case as called for by Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement and that this failure vitiated its above-identified findings.

With respect to the Panel's findings of violation under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, Korea's other appeal consists of three sets of claims.

First, Korea requests the Appellate Body to reverse the Panel's finding that Japan's "causation" claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within the Panel's terms of reference.⁴ In making this erroneous finding, the Panel erred in law since Japan's panel request with respect to Articles 3.1 and 3.5 of the Anti-Dumping Agreement failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in accordance

¹ Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes a brief statement of the nature of this appeal, including identification of the legal errors in the Panel Report, a list of the legal provisions of the covered agreements the Panel erred in interpreting and applying, and an indicative list of the relevant paragraphs of the Panel Report containing the errors – without prejudice to Korea's ability to rely on other paragraphs of the Panel Report in its appeal.

² Panel Report, para. 8.4(a).

³ Panel Report, para. 8.4(b)-(c).

⁴ Panel Report, paras. 7.244, and 8.2(b)-(d).

with Article 6.2 of the DSU. The Panel's contrary findings are in error. In addition, the Panel erred in law by reaching a conclusion that Japan's panel request was consistent with Article 6.2 of the DSU only after "carefully review[ing]" Japan's written submissions, rather than simply on the face of the request.⁵

Second, should the Appellate Body find that Japan's "independent" causation claim is properly within the Panel's terms of reference, Korea requests the Appellate Body to reverse the Panel's finding that Korea acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement as a result of flaws in the analysis of the effect of the dumped imports on prices in the domestic market,⁶ since this finding is vitiated by a number of errors of law and legal interpretation. In particular, and without prejudice to the arguments developed in Korea's Other Appellant Submission, the Panel's interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement is in error since the Panel (i) erroneously subsumed all of the obligations under Articles 3.2 and 3.4 into Article 3.5 thereby rendering inutile Articles 3.2 and 3.4;⁷ (ii) erred in making findings in the absence of Japan establishing a *prima facie* case relating to the question of competition and price comparability that was the premise of its claim;⁸ (iii) erred by imposing a price effects and price comparability analysis that has no basis in the text of Article 3.5 and that went well beyond what is required even under Article 3.2 of the Anti-Dumping Agreement;⁹ and (iv) unduly made findings about the investigating authorities' causation determination based only on isolated aspects of this determination and without considering the Panel's contrary findings on causation as a whole.¹⁰

Third, in reaching its findings of violation under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Panel failed to make an objective examination of the matter before it as required by Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. In particular, the Panel failed to provide a reasoned and adequate explanation for its finding that Japan's claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within its terms of reference and made findings on the sufficiency of the brief summary of the legal basis of the complaint that were internally inconsistent and contradictory. Furthermore, in reaching its finding of violation of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Panel failed to make an objective examination of the matter before it as required by Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement since, among others, the Panel made the case for Japan, failed to provide a reasoned and adequate explanation that its findings were supported by a sufficient evidentiary basis, and made findings that were internally inconsistent and contradictory.

For the reasons to be further elaborated in its submission to the Appellate Body, Korea requests the Appellate Body to reverse and declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the above-identified errors of law and legal interpretations contained in the Panel Report. In particular, Korea requests the Appellate Body to reverse the Panel's finding in paragraphs 7.244 and 8.2(b)-(d) of the Panel Report that certain of Japan's claims relating to Articles 3.1 and 3.5 of the Anti-Dumping Agreement were within its terms of reference. In addition, Korea requests the Appellate Body to reverse and declare moot and of no legal effect the Panel's finding in, among others, paragraphs 7.349 and 8.4(a) of the Panel Report that Korea acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

With respect to the Panel's finding that Korea acted inconsistently with Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement relating to the treatment of confidential information and the provision of non-confidential summaries, Korea's request for reversal of the Panel's finding consists of the following three part claim.

⁵ Panel Report, paras. 7.222, 7.234, and 7.241.

⁶ Panel Report, paras. 7.349, and 8.4(a).

⁷ Panel Report, paras. 7.250-258 (Volume), 7.259-323 (Prices), and 7.324-347 (Impact).

⁸ Panel Report, para. 7.259. The Panel confirms that Japan's relevant claim was that there is no competitive relationship between the dumped imports and the domestic like product, such that their prices are not comparable. The Panel rejected this claim and thus there was no basis for additional findings absent a *prima facie* case. See, e.g. Panel report paras. 7.295 (c), 7.315, 7.318, 7.320 confirming that there was such competition between both products.

⁹ Panel Report, paras. 7.266-7.272, and 7.297-7.323.

¹⁰ Panel Report, para. 7.323, 7.349 without consideration of Panel Report, para. 7.361, para. 7.389.

First, Korea submits that the Panel's finding that Japan's panel request with respect to its claims under Article 6.5 and 6.5.1 of the Anti-Dumping Agreement presented the problem clearly in accordance with Article 6.2 of the DSU is in error and should be reversed.¹¹ Japan's panel request suffered from the same shortcomings as other claims which the Panel correctly rejected as outside its terms of reference. The Panel's finding to the contrary is based on an erroneous application of the law to the facts as the panel request, when examined on its face, fails to present the problem with the required clarity through linking any specific aspects of the challenged measures, or of the underlying investigation, to any of the specific obligations in these provisions. In addition, the Panel erred in law when examining Japan's compliance with Article 6.2 of the DSU by taking into account the scope of the allegations under Articles 6.5 and 6.5.1 as presented in Japan's written submissions.¹²

Second, the Panel erroneously interpreted Article 6.5 of the Anti-Dumping Agreement as requiring investigating authorities to make express statements as to whether good cause is shown with respect to confidential information and erred in applying the law to the facts when it found that the submitters did not show good cause for the confidential treatment of that information.¹³ In particular, the Panel erred in law when it considered that absent an express "indication" on the record that the Korean Investigating Authorities took into account whether the information in question fell into any of the categories for confidential information set forth under Korean law, no good cause was shown to exist.¹⁴ This finding is in error since, absent a legal obligation to do so, the Korean Investigating Authorities could not be faulted for not making specific statements or indicating its consideration about each of the requests for confidentiality.

Third, the Panel also erred in law when applying Article 6.5.1 of the Anti-Dumping Agreement to the facts of the dispute by finding that Korea failed to require the applicants to furnish the required non-confidential summaries.¹⁵ The applicants submitted "non-confidential summaries" of the confidential information, prepared by designating the information that they deemed were entitled to confidential treatment in accordance with Korean law and the guidelines for filling out the questionnaires. In the public versions of the submissions, certain non-confidential descriptive narratives are found with respect to all confidential information, and these narratives permitted a reasonable understanding of the substance of the information and thus enabled interested parties to defend their interests. The Panel's findings to the contrary are in error and should be reversed.

For the reasons to be further elaborated upon in its submission to the Appellate Body, Korea therefore requests the Appellate Body to reverse the Panel's findings that Japan's claims under Articles 6.5 and 6.5.1 were within its terms of reference, as set forth in, among others, paragraphs 7.418 and 8.2(e) of the Panel Report. In addition, Korea requests the Appellate Body to reverse and declare moot and of no effect the Panel's finding of violation of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, as set forth in, in particular, paragraphs 7.451 and 8.4(b)-(c) of the Panel Report.

¹¹ Panel Report, paras. 7.418, and 8.2(e).

¹² Panel Report, para. 7.416.

¹³ Panel Report, para. 7.441.

¹⁴ Panel Report, paras. 7.438 - 7.440.

¹⁵ Panel Report, paras. 7.450, 7.451, and 8.4(c).