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

**REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE REPUBLIC OF KOREA**

The following communication, dated 5 December 2013, from the delegation of the Republic of Korea to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 29 August 2013, the Government of the Republic of Korea ("Korea") requested 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 anti-dumping and countervailing measures on certain large residential washers from Korea.<sup>1</sup> Korea and the United States held consultations on 3 October 2013. The consultations have not led to a satisfactory resolution.

Korea considers that the following measures imposed by the United States are inconsistent with the United States' obligations under the relevant provisions of the WTO Agreements as set forth below in detail.

- 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).
- 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](http://www.ita.doc.gov).
- Anti-Dumping Duty Order – Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, 78 Fed. Reg. 11148 (February 15, 2013).
- Any determination in the anti-dumping proceeding entitled Large Residential Washers from the Republic of Korea, including but not limited to the original investigation, preliminary and final determinations in administrative reviews, new shipper reviews, sunset reviews, changed circumstances reviews, and other segments of that proceeding.

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<sup>1</sup> WT/DS464/1.

- The so-called "zeroing" methodology used in anti-dumping proceedings that use the average-to-transaction methodology to calculate margins of dumping, and the so-called "targeted dumping" and "differential pricing"<sup>2</sup> methodologies used to determine the applicability of Article 2.4.2 of the *Anti-Dumping Agreement*, which are used pursuant to, *inter alia*, the following United States laws, regulations, administrative procedures and measures:
  1. The Tariff Act of 1930, as amended, including in particular, sections 771(35)(A) and (B) (*i.e.*, 19 U.S.C. sections 1677(35)(A) and (B)), and 777A(c) and (d) (*i.e.*, 19 U.S.C. sections 1677f-1(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 United States' Department of Commerce ("USDOC"), 19 C.F.R. Part 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. section 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*, 918 F. Supp. 2d 1317 (Ct. Int'l Trade 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 use of zeroing, targeted dumping or differential pricing in anti-dumping investigations, administrative reviews and other segments of anti-dumping proceedings, including the collection of cash deposits and the assessment and liquidation of anti-dumping duties.
- Final Countervailing Duty Determination – Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination, 77 Fed. Reg. 75975 (December 26, 2012).
- 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](http://www.ita.doc.gov).
- Countervailing Duty Order – Large Residential Washers From the Republic of Korea: Countervailing Duty Order, 78 Fed. Reg. 11154 (February 15, 2013).
- Any determination in the countervailing duty proceeding entitled Large Residential Washers from the Republic of Korea, including but not limited to other determinations issued in the initial investigation, preliminary and final determinations in administrative reviews, new shipper reviews, sunset reviews, changed circumstances reviews, and other segments of that proceeding.

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<sup>2</sup> "Targeted dumping" and "differential pricing" are the terms of art that U.S. law, the United States' Department of Commerce, and other policy makers often use to refer to the justification for utilizing an alternative export price-normal value comparison methodology in anti-dumping calculations pursuant to the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*. Essentially, a finding of "targeted dumping" or "differential pricing" is a finding of a "pattern of prices that differ significantly" pursuant to Section 777A(d)(1)(B) of the Tariff Act of 1930 (*i.e.*, 19 U.S.C. 1677f-1(d)(1)(B)), as amended. And so, when the USDOC finds the existence of "targeted dumping" or "differential pricing," it can depart from the statutorily preferred average-to-average comparison methodology and instead apply an average-to-transaction comparison methodology.

## I. Use of Zeroing "as applied"

Korea considers that the use by the USDOC of "zeroing" in the aforementioned proceedings as well as in the administrative reviews and other segments of Large Residential Washers from the Republic of Korea is inconsistent with, *inter alia*, the following provisions of the *Anti-Dumping Agreement* and GATT 1994:

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 9.3, Article 9.5, Article 11.2, and Article 11.3 of the *Anti-Dumping Agreement* insofar as "zeroing" results in the imposition and collection of anti-dumping duties in excess of the margins properly determined pursuant to Article 2 of the *Anti-Dumping Agreement*; and
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 "zeroing" results in the imposition and collection of an anti-dumping duty that is not consistent with the *Anti-Dumping Agreement*.

## II. Use of Zeroing "as such"

Korea considers the USDOC's use of "zeroing" under the average-to-transaction ("A-T") comparison methodology in anti-dumping investigations involving the second sentence of Article 2.4.2 to be inconsistent, "as such," with, *inter alia*, the following provisions of the *Anti-Dumping Agreement*, the GATT 1994, and the *Marrakesh Agreement Establishing the World Trade Organization* ("Marrakesh 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 A-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.
3. 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*.

Korea also considers the USDOC's use of "zeroing" under the A-T comparison methodology in administrative reviews and other segments of anti-dumping proceedings involving the second sentence of Article 2.4.2 to be inconsistent, "as such," with, *inter alia*, the following provisions of the *Anti-Dumping Agreement*, the GATT 1994, and the *Marrakesh Agreement*:

4. Article 9.3, Article 9.5, Article 11.2 and Article 11.3 of the *Anti-Dumping Agreement*, and Article VI:1 and Article VI:2 of the GATT 1994, because the United States establishes or relies on an amount of anti-dumping duty that exceeds the margin of dumping as established under Article 2.

5. 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.
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*.

### **III. USDOC Methodologies for Applying the Second Sentence of Article 2.4.2 of the *Anti-Dumping Agreement* "as applied"**

Korea considers that both (1) in its determination to apply the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement* to the Korean respondents in the aforementioned investigation and to apply the "targeted dumping" or "differential pricing" methodologies in, *inter alia*, administrative reviews and any other segments of Large Residential Washers from the Republic of Korea, and (2) in its ongoing practice concerning "targeted dumping" and "differential pricing" that places burdens and uncertainties on Korean exporters in their ongoing export pricing decisions, the USDOC acts inconsistently with 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, in, *inter alia*, the following respects:

1. The USDOC fails 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 fails to provide a reasoned explanation of why the respondents' prices constituted a "pattern" as contemplated by Article 2.4.2.
2. Determinations by the USDOC that the prices charged by respondents reveal "patterns" of differing prices in all three respects – by purchaser, by region and by time period – are plainly inconsistent with the meaning of "pattern."
3. The failure of the USDOC to consider legitimate commercial reasons and market explanations for any patterns of differing prices is clearly inconsistent with the meanings of "pattern" and "differ significantly."
4. The mechanical rules used by the USDOC to define "patterns" of differing prices that "differ significantly" are statistically unsound and produce economically irrational results.
5. The USDOC impermissibly, upon finding a pattern of differing prices, applies the A-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" or "differential pricing."
6. The USDOC fails to provide a reasoned explanation of why the pattern of price differences cannot be "taken into account appropriately by the use of a weighted average-to-weighted average ... comparison" and gives no explanation of why it cannot be "taken into account appropriately by the use of a ... transaction-to-transaction comparison."
7. The USDOC's methodologies for determining the applicability of the second sentence of Article 2.4.2 make it impossible for Korea's exporters to determine how their export prices will be analyzed in anti-dumping proceedings.

### **IV. USDOC Methodologies for Applying the Second Sentence of Article 2.4.2 of the *Anti-Dumping Agreement* "as such"**

Korea further considers that the aforementioned USDOC's "targeted dumping" and "differential pricing" methodologies for determining the applicability of the second sentence of Article 2.4.2 are "as such" inconsistent with the meanings of "pattern of prices" and "differ

significantly" and are thus inconsistent with the United States' obligations under Article 2.4.2 of the *Anti-Dumping Agreement* in, *inter alia*, the following respects:

1. The USDOC applies the A-T comparison methodology to all of the respondent's export sales transactions, rather than determining separately the amount of dumping in the targeted subset (purchaser, region or time period).
2. The USDOC refuses to consider economic or market factors that would demonstrate that any significant difference in the pattern of prices is attributable to such factors rather than to the pricing decision of the respondent exporter.

## V. Determination and Calculation of Countervailing Duties

In the countervailing duty proceeding entitled Large Residential Washers from the Republic of Korea, the USDOC determined a countervailing duty margin for Samsung of 1.85 percent,<sup>3</sup> based almost entirely on findings that Samsung received subsidies, that the USDOC determined to be countervailable, under RSTA Article 10(1)(3) and RSTA Article 26. Korea considers that in reaching these findings, the USDOC acted inconsistently with the United States' obligations under 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 1.2 and Article 2.1(c) of the *SCM Agreement* because, *inter alia*,:
  - a. the USDOC erred when it determined that the respondent Samsung received a *de facto* specific subsidy under Article 10(1)(3) of Korea's RSTA, which automatically provided tax credits to all Korean corporate 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 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 attributable to tax credits that it received for investments it made under Article 10(1)(3) of RSTA pertaining to products other than the products subject to investigation, *i.e.*, products other than large residential washers. 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 investments that benefitted products other than large residential washers, the USDOC acted inconsistently with this provision.
3. Article 1.1 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

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<sup>3</sup>The USDOC also determined a 72.30 percent margin for Daewoo on the basis of adverse facts available.

- b. the USDOC did not provide a reasoned and adequate explanation of why it failed to take into account in its benefit calculation the fact that the investments that generated 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 products 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 notwithstanding that the tax credits under Article 26 were generally available throughout Korea.
2. Article VI:3 of the GATT 1994 because, *inter alia*, the USDOC imposed countervailing duties on Samsung attributable to tax credits that it received for investments it made under Article 26 of RSTA pertaining to products other than the products subject to investigation, *i.e.*, products other than large residential washers. 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 investments that pertained 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.

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The United States' measures discussed above are also inconsistent with Article 1 of the *Anti-Dumping Agreement* and with Article 10 and Article 32.1 of the *SCM Agreement*.

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

Therefore, Korea respectfully requests that a panel be established, with the standard terms of reference as set forth in Article 7.1 of the DSU, by the Dispute Settlement Body pursuant to Article 4.7 and Article 6 of the DSU, Article XXIII of the GATT, Article 17.4 of the *Anti-Dumping Agreement* and Article 30 of the *SCM Agreement*.