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

NOTIFICATION OF AN OTHER APPEAL BY KOREA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 25 April 2016, from the delegation of Korea, is being circulated to Members.

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1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Korea hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *United States — Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464/R) ("Panel Report").

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

3. Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Korea's ability to rely on other paragraphs of the Panel Report in its appeal.

I REVIEW OF THE PANEL'S FINDINGS UNDER THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994.

4. Korea seeks review by the Appellate Body of the Panel's interpretation of Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement as they relate to the proper way to combined the two subsets of intermediate results created by the application of the exceptional W-T comparison method in the second sentence of Article 2.4.2.[1] In particular, the Panel erred in finding that:

- The intent of the second sentence of Article 2.4.2 somehow creates an exception to the fundamental principles governing the existence of "dumping" and a "margin of dumping".[2]
- Intermediate comparison results could somehow constitute "dumping" without including the prices of all export transactions in the overall assessment.[3]
- The authority can properly find a "margin of dumping" based on a numerator consisting only some export transactions from the subset using the W-T comparison method, as long as the denominator includes all export transactions.[4]

[1] Panel Report, paras. 7.154-7.167, 7.169.
[2] Panel Report, paras. 7.155, 7.156, 7.157, 7.160.
[3] Panel Report, paras. 7.154, 7.156, 7.157, 7.160.
[4] Panel Report, paras. 7.157, 7.160.

- The need to "unmask" so-called "targeted dumping" somehow justifies departure from the fundamental principles governing the existence of "dumping" and a "margin of dumping".[5]

- Without these exceptions to the fundamental principles there would be mathematical equivalence in all cases, and that equivalence could not be eliminated by changing the assumptions behind the analysis being done.[6]

- Such disregarding of offsets does not inflate the margin of dumping contrary to Article 2.4.[7]

5. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.167, 7.169, 8.1(a)(x) and 8.1(a)(xi), that the authority may disregard offsets from the subset based on the normal comparison methods when combining those results with the subset based on the exceptional W-T comparison method. As part of this review, Korea also requests the Appellate Body to review paragraphs 7.26, 7.27, 7.162, 7.166, and any other discussions that suggest so-called "targeted dumping" can exist among the intermediate comparisons the authority may be conducting, before the authority has properly considered and taken into account all export transactions for the product as a whole. Korea further requests that the Appellate Body complete the analysis and find that (1) the fundamental principles for determining "dumping" and "margin of dumping" also apply to the second sentence of Article 2.4.2, and that authorities cannot deny offsets when combining the subsets of intermediate comparisons created by application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement; and (2) denying such offsets inflates the "margin of dumping" and is thus contrary to the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement.

6. Korea seeks review by the Appellate Body of the Panel's interpretation of the pattern clause of the second sentence of Article 2.4.2 as not requiring the authorities to consider qualitative factors when finding a "pattern" of export prices that "differ significantly.[8] In particular, the Panel erred in finding that:

- Korea had only challenged the failure to address the "reasons" for export price differences, and had not challenged more broadly the failure to address qualitative factors and the factual context more generally.[9]

- The second sentence did not require the authorities to consider the reasons for export price differences as part of properly finding that a "pattern" actually existed,[10] or that the differences could be considered "significant".[11]

7. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.52, 7.119(a), 8.1(a)(ii) and 8.1(a)(v), that the authorities need not consider qualitative factors as part of making a proper finding of export prices that "differ significantly" and constitute a "pattern". As part of this review, Korea also requests the Appellate Body to review paragraphs 7.72, 7.73, 7.76, and any other discussions that suggest "targeted dumping" can exist among the intermediate comparisons the authority may be conducting, before the authority has properly considered and taken into account all export transactions for the product as a whole. Korea further requests that the Appellate Body complete the analysis and find that the authorities must consider both quantitative and qualitative factors when finding a "pattern" of export prices that "differ significantly".

8. Korea seeks review by the Appellate Body of the Panel's interpretation of the explanation clause of the second sentence of Article 2.4.2 as not requiring the authorities to explain why the normal T-T comparison method cannot take into account the pattern of export price differences.[12] In particular, the Panel erred in finding that:

[5] Panel Report, paras. 7.26, 7.27, 7.154, 7.162,
[6] Panel Report, paras. 7.164, 7.165, 7.166.
[7] Panel Report, para. 7.169.
[8] Panel Report, paras. 7.44- 7.52.
[9] Panel Report, paras. 7.33, 7.48, 7.49.
[10] Panel Report, paras. 7.46, 7.47.
[11] Panel Report, paras. 7.48, 7.49.
[12] Panel Report, paras. 7.78-7.81.

- The second sentence of Article 2.4.2 does not require the authorities to consider both of the normal comparison methods – both the W-W comparison method and the T-T comparison method -- before turning to the exceptional W-T comparison method.[13]

- Somehow the burden of considering the T-T comparison justifies ignoring the express requirement that the authority consider this option before turning to the exceptional W-T comparison method.[14]

9. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.81, 7.119(b), 8.1(a)(iv) and 8.1(a)(viii), that the authorities need not explain why the normal T-T comparison method cannot take into account export price differences. Korea further requests that the Appellate Body complete the analysis and find that the authorities must in every case consider both the normal comparison method – both W-W and T-T – before resorting to the exceptional W-T comparison method.

II REVIEW OF THE PANEL'S FINDINGS UNDER THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

10. Korea seeks review by the Appellate Body of the Panel's findings under Article 2.2 of the SCM Agreement as they relate to the USDOC's determination that RSTA Article 26 tax credits are regionally specific.[15]

11. The Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, because it failed to review the USDOC's determination and to determine whether the USDOC's conclusion on regional specificity was reasoned and adequate and based on positive evidence.

12. The Panel misinterpreted and misapplied Article 2.2 in finding that Korea failed to establish that the USDOC's determination of regional specificity is inconsistent with that provision. The Panel erred, *inter alia*, in finding that:

- Article 2.2 of the SCM Agreement covers all measures that include "considerations regarding geographic location" or that "encourage particular enterprises to direct their resources to certain geographic locations".[16]

- "the Article 26 subsidy is contingent on an enterprise becoming 'located within' a designated geographical region".[17]

- "[w]e are not persuaded that the application of Article 2.2 should hinge on the distinction drawn by Korea between an 'enterprise' (as defined by Korea) and the 'facilities' of such an enterprise".[18]

- "an 'industry or group of enterprises or industries' would never meet the definition of 'enterprise' proposed by Korea, because such entities are not companies or businesses with legal personality. The fact that these entities are nevertheless explicitly deemed to constitute 'certain enterprises' by Article 2.1 of the SCM Agreement must mean that Korea's interpretation of the term 'enterprise' is overly restrictive".[19]

- "the designation of *any* geographical region – no matter how small or how large – would suffice to trigger the application of Article 2.2".[20]

[13] Panel Report, paras. 7.79, 7.80.
[14] Panel Report, para. 7.80.
[15] Panel Report, paras. 7.261, 7.266-7.274, 7.279-7.283, 7.286-7.289.
[16] Panel Report, para. 7.273.
[17] Panel Report, para. 7.273.
[18] Panel Report, para. 7.267.
[19] Panel Report, para. 7.268.
[20] Panel Report, para. 7.282. (original emphasis)

- The geographical region need not be affirmatively identified, but rather, "might also be accomplished through less direct means that nevertheless make the region known".[21]

- "Article 23 of the RSTA Enforcement Decree effectively designates the geographical region in which the relevant investments will be eligible for subsidization".[22]

- The USDOC's determination that RSTA Article 26 tax credits are regionally specific is not inconsistent with Article 2.2 despite not being based on positive evidence or a reasoned and adequate explanation.[23]

13. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.289 and 8.1(b)(iii), that Korea failed to establish that the USDOC's determination of regional specificity in respect of the RSTA Article 26 tax credit scheme is inconsistent with Article 2.2 of the SCM Agreement. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article 2.2 of the SCM Agreement in finding that the RSTA Article 26 tax credit scheme is regionally specific.

14. Korea seeks review by the Appellate Body of the Panel's findings under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement as they relate to the USDOC's determination that Samsung failed to meet its burden to provide evidence that "tied" the tax credits that it received under RSTA Article 10(1)(3) and RSTA Article 26 to its development, production, and sale of the large residential washers that were the subject of the USDOC's investigation.[24]

15. The Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, in finding that the "tax credit subsidies are not R&D subsidies".[25]

16. The Panel erred in the interpretation and application of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement in finding, *inter alia*, that:

- The tax credits that Korea bestowed under Article 10(1)(3) and Article 26 were not tied to any particular product.[26]

- As a result, the USDOC was justified in allocating the tax credit subsidies across all products and not just to digital appliances, including large residential washers.[27]

- The relevant subsidies were not R&D subsidies because they were awarded after the underlying R&D activities had been undertaken.[28]

- The benefits that Samsung received as tax credits constituted revenue foregone or not collected, which is equivalent to cash that Samsung could keep in its accounts and/or spend on any product.[29]

- Samsung's discretion regarding the use of the cash resulting from the tax credit subsidies justified the USDOC's treatment of those subsidies as "untied".[30]

- Since the benefits that arose from the tax credit subsidies could be used in any way, the USDOC was not required to find that those subsidies were tied to the production of the products for which the R&D activity was undertaken.[31]

[21] Panel Report, para. 7.280.
[22] Panel Report, para. 7.280.
[23] Panel Report, paras. 7.289 and 8.1(b)(iii).
[24] Panel Report, paras. 7.300-7.306.
[25] Panel Report, para. 7.302.
[26] Panel Report, para. 7.300.
[27] Panel Report, para. 7.302.
[28] Panel Report, para. 7.302.
[29] Panel Report, para. 7.302.
[30] Panel Report, para. 7.302.
[31] Panel Report, para. 7.303.

- The fact that Samsung could identify the precise R&D activities that benefited the production of the products produced in its Digital Appliance business unit was irrelevant to the issue of whether Samsung was able to tie its tax credits to those products.[32]

- The USDOC's finding in the contemporaneous antidumping investigation of large residential washers that it could directly tie R&D activity performed by Samsung's Digital Appliance business unit to the products produced by that unit was irrelevant.[33]

17. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.306 and 8.1(b)(iv), that Korea failed to establish that the USDOC's failure to tie the RSTA Article 10(1)(3) and RSTA Article 26 tax credit subsidies to Digital Appliance products is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 194 when it failed to find that Samsung submitted positive evidence that tied the tax credits attributable to Samsung's Digital Appliance business unit to the products that were produced by that unit.

18. Korea seeks review by the Appellate Body of the Panel's interpretation and application of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement as it relates to the USDOC's determination that it should use the sales value of the products that Samsung produced and sold in Korea, rather than the sales value of the products that Samsung produced and sold worldwide, as the denominator in the formula that the USDOC used to calculate the *ad valorem* subsidy margin for the tax credits that Samsung received under RSTA Article 10(1)(3).[34] The Panel erred, inter alia, in finding that:

- The "real issue" was not the correctness of the USDOC's allocation of the benefit conferred by the RSTA Article 10(1)(3) tax credit subsidies based on the effects of the R&D activities that gave rise to the tax credits.[35]

- The benefit of the tax credit subsidy was the "tax credit cash" that Samsung received, and that benefit was not tied to the R&D activities that gave rise to the tax credits since Samsung was free to dispose of the cash as it saw fit.[36]

- The positive effects of the R&D activities on Samsung's overseas production activities do not constitute a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.[37]

- The USDOC was entitled to rely on its presumption that Korea granted the Article 10(1)(3) tax credits to benefit only domestic production.[38]

- The USDOC was entitled to conclude that neither Samsung nor Korea had rebutted that presumption.[39]

19. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.319 and 8.1(b)(v), that Korea failed to establish that the denominator used to calculate the *ad valorem* margin attributable to RSTA Article 10(1)(3) tax credits should consist solely of the sales value of products produced by Samsung in Korea. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement by failing to use as the denominator the value of Samsung's worldwide product sales, rather than its domestic sales.

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[32] Panel Report, para. 7.303.
[33] Panel Report, para. 7.304.
[34] Panel Report, paras. 7.316-7.319.
[35] Panel Report, para. 7.317.
[36] Panel Report, para. 7.317.
[37] Panel Report, para. 7.317.
[38] Panel Report, para. 7.318.
[39] Panel Report, para. 7.318.