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UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN OIL COUNTRY TUBULAR GOODS FROM KOREA

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY KOREA

The following communication, dated 23 February 2015, from the delegation of Korea to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

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On 22 December 2014, 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"), and Article 17 of the *Agreement on Implementation of Article VI of the GATT 1994* ("Anti-Dumping Agreement") with regard to the anti-dumping measures on certain oil country tubular goods (OCTG) from Korea.[1] Korea and the United States held consultations on January 21, 2015. 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.

- Final Determination of Sales at Less Than Fair Value – Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances, 79 Fed. Reg. 41983 (July 18, 2014) ("Final Determination").
- Issues and Decision Memorandum for the Final Affirmative Determination in the Less Than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea (July 10, 2014) ("Issues & Decision Memorandum"), available at http://enforcement.trade.gov/frn/summary/koreasouth/2014-16874-1.pdf.
- Anti-Dumping Duty Order – Certain Oil Country Tubular Goods from India, the Republic of Korea, Taiwan, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders, 79 Fed. Reg. 53691 (September 10, 2014).
- Any related measure in the proceeding entitled Oil Country Tubular Goods from the Republic of Korea, including the anti-dumping investigation itself as well as all administrative reviews, new shipper reviews, changed circumstances reviews, sunset reviews, and other segments of the proceeding.
- The so-called "viability test" by which, when a respondent's home market sales are not viable for purposes of calculating normal value, the USDOC applies the same test to sales to third-country markets. Specifically, the USDOC automatically disregards the prices of a respondent's exports to any third-country market as a basis for calculating normal value if the respondent's sales volume to that market constitutes less than five percent of the respondent's sales volume to the United States. This test is applied pursuant to, *inter alia*,

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the following United States laws, regulations, administrative procedures, and other measures[2]:

1. The Tariff Act of 1930, including sections 771(35)(A)and 777A(c) and (d) (19 U.S.C. §§ 1677(35)(A) and 1677f-1(c)).

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. Part 351, including paragraphs 351.404(b)(1) and(2).

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

I. USDOC'S USE OF CONSTRUCTED VALUE TO DETERMINE NORMAL VALUE

Korea considers that the USDOC's determination in its anti-dumping investigation of Oil Country Tubular Goods from Korea to disregard a mandatory respondent's actual sales prices to any third-country market as a basis to determine normal value is inconsistent with Article 2.2 of the Anti-Dumping Agreement:

1. "As applied" because, in the aforementioned proceeding, the USDOC failed to consider whether the respondents' sales of OCTG to third-country markets were "representative" and, instead, automatically disregarded these sales because they constituted less than 5 percent of each respondent's total sales to the U.S. market.

2. "As such" because, under its law, regulations, administrative procedures, and other measures identified above, the USDOC automatically disregards a respondent's third-country sales for failing to meet a 5 per cent "viability test" without considering whether the prices at which the like products are sold to the third-country market are "representative," as required under the Article.

II. USDOC'S CALCULATION OF CONSTRUCTED VALUE ("CV") PROFIT

Korea considers the USDOC's calculation of constructed value ("CV") profit in its anti-dumping investigation of Oil Country Tubular Goods from Korea,which was based on information contained in the financial statements of Tenaris SA (a global producer incorporated under the laws of Luxembourg with no record of sales or production in the Korean home market), to be inconsistent with the following provisions of the Anti-Dumping Agreement:

1. Article 2.2.2 because the USDOC disregarded respondents' actual data on the record pertaining to profits realized on home market sales made in the "ordinary course of trade" for "like products."

2. Article 2.2.2 because the USDOC disregarded as a CV profit source actual data that it collected from respondents pertaining to profits realized on third-country sales of "like products" that were made in the "ordinary course of trade."

3. Articles 2.2.2(i) and 2.2.2(iii) because the USDOC applied an impermissibly narrow interpretation of the term "same general category of products."The USDOC's application of the term "same general category of products" resulted in a scope of products that was essentially identical to the scope of the term "like product."

4. Article 2.2.2(iii) because the USDOC declined to examine whether the profit rate that it calculated exceeded "the profit normally realized by other exporters or producers on

[2] These measures include any other related or subsequent measures that enable or implement the so-called "viability test" in anti-dumping investigations, administrative reviews, and other segments of anti-dumping proceedings.

sales of products of the same general category in the domestic market of the country of origin," and it did not provide any legal basis for disregarding this requirement.

5. Article 2.2 because the USDOC did not take any steps to ensure that its calculated CV profit was "reasonable." In fact, the CV profit that the USDOC calculated far exceeded all other potential CV profit rates on the record, including the profit margins that U.S. producers earned on their sales of OCTG in the United States.

6. Article 2.4 because the USDOC ignored evidence on the record regarding differences in products, operations, and customers between Tenaris SA and the Korean respondents that significantly affected the profit margin of the Korean companies. Instead, the USDOC simply applied the company-wide profit margin of Tenaris SA as derived from its financial statements without making due allowance for differences between the products produced by Tenaris SA and those produced by the respondents. As a result, the USDOC failed to make a fair comparison between the export price and the normal value.

III. USDOC'S FINDING OF AFFILIATION BETWEEN NEXTEEL AND NEXTEEL'S SUPPLIER/CUSTOMER

Korea considers the USDOC's determination in its anti-dumping investigation of Oil Country Tubular Goods from Koreathat NEXTEEL is affiliated with its major input supplier and with its main customer during the period of investigation to be inconsistent with the following provisions of the Anti-Dumping Agreement:

1. Article 2.3 because the USDOC erroneously determined that NEXTEEL was affiliated with a major input supplier and a customer. As a result, the USDOC's decision to use the downstream sale price of NEXTEEL's customer was also erroneous.

2. Article 2.2.1.1 because, due to its erroneous finding of affiliation between NEXTEEL and its major input supplier, the USDOC failed to calculate costs "on the basis of records kept by the exporter or producer under investigation." Instead, the USDOC calculated costs based on the major input supplier's records.

IV. PROCEDURAL CLAIMS UNDER THE ANTI-DUMPING AGREEMENT AND THE GATT 1994

Korea further considers that the USDOC's actions taken in the course of its anti-dumping investigation of Oil Country Tubular Goods from Korea failed to protect the respondents' due process rights and were otherwise inconsistent with procedural obligations under the following provisions of the Anti-Dumping Agreement or GATT 1994:

1. Articles 6.2, 6.4, and 6.9 of the Anti-Dumping Agreement because the USDOC did not inform interested parties of its decision to accept the petitioners' submission of Tenaris SA's financial statements for inclusion in the record after all regulatory deadlines for the submission of new factual information had passed.

    a. Because the USDOC did not address Korean respondent's requestto remove the untimely submission from the record until its Final Determination, the respondents were not granted a full opportunity to defend their interests under Article 6.2.

    b. By failing to respond to Korean respondent's request to remove the untimely submission from the record or to clarify whether the financial statements were properly admitted to the official administrative record, the USDOC did not ensure an opportunity for Korean respondents to prepare presentations on the basis of this information under Article 6.4.

    c. Because the USDOC did not respond to Korean respondents' requests or clarify whether the financial statements were properly on the record, and because the USDOC used the Tenaris SA financial statements to calculate anti-dumping

margins for the Korean respondents for the first time in the Final Determination, the USDOC failed to inform interested parties of "essential facts" that formed the basis of its decision to apply definitive measures under Article 6.9.

2. Article 6.10, including Articles 6.10.1 and 6.10.2, of the Anti-Dumping Agreement because the USDOC's selection of only two mandatory respondents was not made in consultation with, and with the consent of, exporters, producers, or importers concerned, and because it did not provide a basis for declining to examine timely-submitted responses of voluntary respondents. SeAH, for instance, was the only Korean exporting company that carried out further processing and created added-value in the United States. Yet, despite having a sales channel completely different from all other Korean OCTG producers through which the company sold not only to distributors, but also directly to end-users, SeAH was not selected as a voluntary respondent.

3. Article 12.2.2 of the Anti-Dumping Agreement because the USDOC's affirmative Final Determination and accompanying Issues & Decision Memorandum did not contain "all information on the matters of fact and law and reasons which have led to the imposition of final measures." In particular, the USDOC did not adequately address: "reasons for the acceptance or rejection of relevant arguments or claims made by exporters and importers," including: Korean respondents' arguments regarding the differences in products, operations, and customers between Tenaris SA and the Korean respondents; NEXTEEL's claims regarding its relationship with its major input supplier and customer; and voluntary respondents' claims that they should be allowed to participate fully in the investigation.

4. Article I of the GATT 1994 because, inter alia, the USDOC expressly provided interested parties in its investigation of OCTG produced in other subject countries an opportunity to defend their interests by responding to the placement of Tenaris SA's financial statements on the record. Because the Korean respondents were not granted an opportunity to present submissions responding to Tenaris SA's financial statements, the USDOC's actions resulted in less favorable treatment of OCTG from Korea compared to like products originating from other countries under investigation.

5. Article X:3 of the GATT 1994 because the USDOC permitted petitioners to place Tenaris SA's financial statements on the record after the expiration of the regulatory time limit for submission of new factual information, while the USDOC applied its regulatory deadlines for the submission of new factual information with respect to other parties and other submissions. Consequently, the USDOC failed to administer its regulations in a uniform, impartial, and reasonable manner.

Korea considers that the United States' measures discussed above are also inconsistent with Article 1 and Article 9.3 of the Anti-Dumping Agreement, and Article VI of the GATT 1994, as a consequence of the above breaches of the Anti-Dumping Agreement. The measures also appear to be inconsistent with Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization 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.

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 1994, and Article 17.4 of the Anti-Dumping Agreement.

Korea further requests that this request be placed on the agenda for the next meeting of the Dispute Settlement Body to be held as early as possible.

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