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

(DS464)

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

May 27, 2015

Madame Chairperson, members of the Panel:

1. The United States has demonstrated that Korea has failed to establish any breach of any provision of any of the covered agreements. In this statement, we draw to the Panel's attention and correct a number of the misstatements made by Korea during these proceedings.

1. Korea Misstates the Appellate Body's Previous Zeroing Findings

2. From the outset, Korea has misstated the nature and extent of prior Appellate Body findings relating to the use of zeroing in connection with the alternative, average-to-transaction comparison methodology. We are confident the Panel will agree that the question of whether zeroing is permissible in connection with the alternative, average-to-transaction comparison methodology, applied pursuant to the second sentence of Article 2.4.2, is a novel one; one that has not been decided by the Appellate Body previously, either explicitly or implicitly.

2. Korea Fails to Identify Anything in the Text of the Second Sentence of Article 2.4.2 of the AD Agreement that Prohibits the Use of Zeroing

3. Korea distorts the findings of the Appellate Body because it can find no support for its argument in the text of the second sentence of Article 2.4.2. The prohibitions on zeroing that the Appellate Body has found in the past are rooted firmly in the text of the first sentence of Article 2.4.2. The Appellate Body has found that its textual interpretations are supported by contextual analysis of other provisions of the AD Agreement, including, *inter alia*, the terms "dumping" and "margin of dumping." But the obligations – the prohibitions on zeroing that the Appellate Body has found – are in the text of the first sentence of Article 2.4.2. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

3. Korea Has Not "Broken" Mathematical Equivalence, and the United States Has Not Abandoned that Argument

4. Rather than being broken, mathematical equivalence has been confirmed by Korea's own paid consultant. As Korea's consultant demonstrates, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the washers antidumping investigation, and also using hypothetical data.

5. Korea suggests that the United States has abandoned the mathematical equivalence argument, and goes as far as characterizing certain passages of the U.S. responses to the Panel's questions as an "abrupt change in the U.S. position." Korea has misunderstood the U.S. responses to the Panel's questions. When the U.S. arguments are examined, it is evident that Korea is asserting that the U.S. arguments convey the opposite of their actual meaning by selectively quoting U.S. statements, divorced from their context.

6. The dispute at this point is not about math. The parties agree on the math. The dispute is about so-called "assumptions" about the calculation of normal value, the export transactions used in the different comparison methodologies, and whether different adjustments may or should be

made to export prices. The United States does not see why an investigating authority would calculate normal value differently, examine a different universe of export transactions, or make the kinds of adjustments that Korea proposes. In any event, these are questions of legal interpretation, and such questions are for the Panel to resolve itself. Korea's consultant has inadvertently waded into legal interpretation waters that are beyond the depth of his expertise.

4. Korea Misrepresents the U.S. Arguments Relating to the Negotiating History of the AD Agreement

7. Documents from the negotiating history of the AD Agreement confirm that the use of zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. Korea misrepresents the U.S. arguments related to the negotiating history of the AD Agreement.

8. Korea suggests that the United States "maintain[s] that Japan and Hong Kong approved the use of the zeroing practice when implementing the second sentence." This distortion of the U.S. position is plainly contradicted by what the United States actually argued in the U.S. first written submission. What is established by the negotiating history documents is that the concern about and opposition to asymmetrical comparisons and zeroing were connected. Neither Japan nor Hong Kong mentioned "zeroing" in their proposed changes to the Antidumping Code. One view of the negotiating history is that neither viewed doing so as necessary. That is, they could have considered it sufficient that the revised Code require the use of symmetrical comparisons, which would, by necessity, in their view, preclude the use of the zeroing methodology about which they had expressed concerns.

9. The cited negotiating history documents are consistent with the view that the use of zeroing is impermissible in connection with the application of the symmetrical comparison methodologies, but its use is allowed in connection with the application of the alternative, asymmetrical comparison methodology. The compromise is evidenced on the face of Article 2.4.2, and is confirmed by reference to documents from the negotiating history.

5. Korea's Statistical Arguments Rest on Flawed Premises and Mischaracterizations of what Commerce Actually Did

10. Korea has recognized that "there is no single 'right way' to determine a 'pattern'" and that "[t]he text does not specify any specific method." This recognition, however, has not prevented Korea from elaborating rigid, specific requirements that it contends Article 2.4.2 of the AD Agreement imposes on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. The obligations Korea asks the Panel to find simply are not supported by the text of the second sentence of Article 2.4.2, and Korea's arguments are based on flawed premises and mischaracterizations of Commerce's analysis.

11. The "pattern clause" of Article 2.4.2 of the AD Agreement does not require the use of any particular formal statistical techniques. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause." Korea mischaracterizes the *Nails* test, which does not involve the type of statistical analysis discussed by Korea. Korea also incorrectly alleges that Commerce "ignores actual

market prices." Commerce most certainly does not ignore actual market prices. Commerce's analysis is based on an examination of all of the actual export prices reported by the respondents.

6. Korea's Arguments Related to the "Explanation Clause" Are Aimed at Depriving the Second Sentence of Article 2.4.2 of any Meaning

12. Korea's arguments related to the "explanation clause" would again read the second sentence of Article 2.4.2 out of the AD Agreement, contrary to the principle of effectiveness, and are at odds with the Appellate Body's recognition that the second sentence provides Members a means to "unmask targeted dumping" in "exceptional" situations. Korea openly invites the Panel to find that such exceptional situations simply never would arise. The Panel should decline Korea's invitation.

7. Korea Has Failed to Establish the Existence of any So-Called "Differential Pricing Methodology" Measure

13. Korea has failed to establish the existence of any "differential pricing methodology" measure, and thus Korea's "as such" claims relating to such a purported measure must fail. Korea seeks to minimize the U.S. arguments, suggesting that the lone basis for the U.S. position is that "Korea cannot challenge the differential pricing methodology in general because there is always some chance the USDOC might change the policy in the future." Korea again misunderstands and misstates the U.S. arguments, which speak for themselves.

14. Korea has presented the Panel with little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be challenged "as such," but the Appellate Body has warned that panels may not simply divine the existence of a measure in the abstract on the basis of such a string of cases, or repeated action. In light of Korea's characterization of the measure it seeks to challenge, the Appellate Body's analysis in the zeroing disputes of the evidence necessary to establish the existence of a measure of this nature would appear to be most apt. Unfortunately for Korea, Korea has failed to adduce evidence here that is comparable to the evidence presented in the zeroing disputes.

8. Korea's Criticisms of the Cohen's *d* Test Are Exaggerated

15. In its second written submission, Korea contends that Commerce's use of the Cohen's *d* test as part of its differential pricing analysis reflects the use of "arbitrary benchmarks" with "little inherent value." As with its other arguments, Korea overstates what the evidence on the record of this dispute actually supports. Despite Korea's suggestion that "the Cohen's *d* test is not an accepted measure of 'significance'," academic literature in fact recognizes the usefulness of effect size, which can be measured by the Cohen's *d* coefficient, in measuring significance. Moreover, the thresholds associated with the Cohen's *d* test have been "widely adopted" and "provide a good basis for interpreting effect size and for resolving disputes about the importance of one's results."

9. Korea Also Misstates Prior Appellate Body Findings Related to the Disproportionality Analysis and Introduces a New, Largely Incomprehensible Argument

16. Korea similarly misunderstands and misstates the Appellate Body report in *US – Large Civil Aircraft (Second Complaint)* to support its claims under the SCM Agreement. Korea does not rely on the Appellate Body's findings in *US – Large Civil Aircraft (Second Complaint)* so much as it relies on arguments the United States made in that dispute, arguments that the Appellate Body rejected. To be clear, the United States argued that the subsidy at issue was not *de facto* specific, and the Appellate Body upheld the panel's finding that the subsidy was *de facto* specific. The U.S. arguments on which Korea relies were not successful.

17. On facts very similar to those in this dispute, the Appellate Body found that the subsidy challenged in *US – Large Civil Aircraft (Second Complaint)* was *de facto* specific because Boeing received a disproportionately large amount of the subsidy. On the basis of the Appellate Body's interpretation and application of Article 2.1(c) of the SCM Agreement, the Panel should find that Commerce's determination that RSTA Article 10(1)(3) was *de facto* specific because Samsung and LG received a disproportionately large amount of the subsidy is not inconsistent with Article 2.1(c).

18. Korea also advances a puzzling new argument that is premised on mischaracterizations of the facts and U.S. arguments, and on a misreading of Article 2.1(c). Korea now argues that the Panel should "focus upon" the amount of tax credits *earned* during the period of investigation rather than the amount of tax credits *granted*. However, this does not align with Article 2.1(c) of the SCM Agreement, which refers to the *granting* of disproportionately large amounts of the *subsidy*. Furthermore, the tax credit earned under RSTA Article 10(1)(3) in a given year is not the amount of subsidy granted. The amount of subsidy granted is the amount of revenue foregone by the Korean government. Korea mischaracterizes the facts of its own subsidy program and the argument of the United States.

10. Korea Misconstrues the Text of Article 2.2 of the SCM Agreement and the U.S. Arguments Regarding RSTA Article 26

19. Korea seeks to avoid the disciplines of the SCM Agreement by relying on irrelevant policy justifications and by advancing an overly restrictive – and ultimately untenable – interpretation of the term "enterprises." Korea suggests that the term "enterprises" in Article 2.2, which is collocated with the term "certain," somehow should not be read as "certain enterprises," which is defined for purposes of the SCM Agreement in Article 2.1 as "an enterprise or industry or group of enterprises or industries." Korea's suggestion simply is not credible. The Panel should reject Korea's approach and find that Commerce's regional specificity determination reflects a straightforward application of Article 2.2 of the SCM Agreement that is not inconsistent with that provision.

11. Korea's Arguments against Commerce's Tying Analysis Rely Increasingly on Irrelevant Non-Record Evidence and Mischaracterizations

20. Korea's arguments regarding Commerce's attribution of subsidies similarly rely on misstatements and extraneous evidence and arguments. First, Korea persists in its misguided effort to color this dispute with the introduction of non-record evidence from separate antidumping proceedings that were subject to rules that are distinct from those that govern Commerce's countervailing duty investigation of washers from Korea. Second, Korea is not

taking a principled stand in support of a requirement that investigating authorities tie subsidies to a particular product. Korea is simply advocating a subsidy calculation at a level of generality (the corporate division level) that is somewhat lower than the level of generality of Commerce's subsidy calculation (the company level). Third, Korea asserts that Commerce was "passive" when presented with evidence allegedly germane to the tying analysis. In reality, Commerce did not act passively, but appropriately focused on evidence relevant to the issue at hand. Finally, Korea again misunderstands and misstates that Commerce's tying analysis in the washers countervailing duty investigation was an "irrebuttable presumption." Commerce's approach did not presume that the subsidies were tied or untied; it simply provided a means of classifying the programs based on the nature of the programs themselves.

12. Korea Misstates the Facts Concerning Commerce's Determination of the Denominator Used to Calculate Samsung's Subsidy Rate

21. Korea continues to misconstrue Commerce's determination in the refrigerators countervailing duty investigation. Commerce did not make an affirmative finding that RSTA Article 10(1)(3) benefits should be attributed to Samsung's global sales in the refrigerators investigation. Commerce simply made a mistake based on Samsung's erroneous reporting of data. To demonstrate this, we are providing Exhibit USA-86, an excerpt of Samsung's response to the USDOC's initial questionnaire in the refrigerators countervailing duty investigation, which shows that Commerce instructed Samsung to "not include the volume and value of merchandise produced outside of Korea" in its reported sales data.

22. Korea also asserts that Samsung raised the "royalty payment" issue with Commerce during the washers countervailing duty investigation. This is yet another mischaracterization of the record by Korea. During the washers investigation, neither Samsung nor Korea argued that these royalty payments also supported a finding that RSTA Article 10(1)(3) benefits should be attributed to global production, and Commerce had no reason to consider them in that context.

13. Conclusion

23. The United States has set out in some detail in this statement numerous errors made by Korea in this proceeding, including interpretations that are divorced from the text of the agreements and misunderstandings, misstatements, or mischaracterizations of the facts and determinations made by Commerce, the arguments of the United States, and prior findings of the Appellate Body.

24. As we have demonstrated in the U.S. written submissions, statements, and responses to the Panel's questions, all of Korea's claims are without merit, and the United States respectfully renews its request that the Panel reject them.