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 FIRST SUBSTANTIVE MEETING OF THE PANEL

March 18, 2015

Madame Chairperson, members of the Panel:

1. This dispute places before the Panel a number of important questions concerning the proper interpretation and application of the AD Agreement, the SCM Agreement, and the GATT 1994. Resolving this dispute will require the Panel to discern the meaning of various provisions of these agreements through the application of the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU. Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from those rules.

I. KOREA'S CLAIMS UNDER THE AD AGREEMENT ARE WITHOUT MERIT

A. Zeroing Is Necessary for the Alternative, Average-to-Transaction Comparison Methodology To Have Any Effect

2. The Appellate Body has explicitly stated that it "has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2." Of course, the United States recognizes that a number of Appellate Body and panel reports include findings that bear on the interpretive questions before the Panel. None of those findings compels the Panel to find against the United States. On the contrary, when understood in the context in which they were made, the logical extension of the Appellate Body's zeroing findings is that zeroing is permissible – indeed, it is necessary – under the alternative, average-to-transaction comparison methodology.

3. The second sentence of Article 2.4.2 describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." The Appellate Body has found that Members must offset positive and negative comparison results when using the "normal" comparison methodologies, and must calculate an aggregate margin of dumping for an exporter for the product as a whole. However, in a situation where a pattern of significantly different export prices is observed among different purchasers, regions, or time periods, such offsetting may "mask" what has been referred to as "targeted" dumping. Unmasking such dumping requires not offsetting the lower-priced export sales with the higher-priced export sales; that is, it requires zeroing. The Appellate Body has further observed that the third methodology is an "exception" to the comparison methodologies that "normally" are to be used. As an exception, the third methodology, logically, *should* "lead to results that are *systematically* different" from the two "normal" comparison methodologies when the conditions for its use have been met.

4. The concept of mathematical equivalence is critical to the resolution of the interpretive questions before the Panel because, if a proposed interpretation of a provision of the AD Agreement would lead to the alternative comparison methodology set forth in the second sentence of Article 2.4.2 yielding, in all cases, results that are identical to the results of the average-to-average comparison methodology, then that proposed interpretation cannot be accepted. Such an interpretation would render the second sentence of Article 2.4.2 ineffective, which would be inconsistent with the customary rules of interpretation. That is precisely what would happen under Korea's proposed interpretations. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology will always yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all.

5. Japan, China, and Korea suggest that the Appellate Body has already rejected the mathematical equivalence argument in the past. The Appellate Body's prior consideration of the

mathematical equivalence argument neither supports nor compels rejection of the mathematical equivalence argument in this dispute.

6. Japan, China, and Korea further suggest that the mathematical equivalence argument must fail because it rests on particular "assumptions." With respect to export prices, limiting the application of the alternative, average-to-transaction methodology only to the "targeted" export sales raises at least two potential concerns. First, doing so in a way that would exclude entirely from the dumping calculation other "non-targeted" sales would result in the calculation of even higher dumping margins. Second, applying the alternative, average-to-transaction comparison methodology to the "targeted" sales while applying the "normal" average-to-average comparison methodology to the remaining sales, without zeroing, would also lead to a result that is mathematically equivalent to the application of the average-to-average comparison methodology to all export sales. The identification of this assumption is no answer to the mathematical equivalence argument.

7. Likewise, identifying an assumption about the calculation of normal value does not mean that the mathematical equivalence argument fails. There is no reason why a weighted average normal value would be calculated any differently when applying the average-to-average comparison methodology pursuant to the first sentence of Article 2.4.2 and when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2. Neither Japan nor China explains *why* manipulation or adjustment of the calculation of normal value, which is based on sales prices in the *home* market, would be appropriate to address a potential issue where there is a pattern of prices that differ significantly in the *export* market. The lower-price *export* sales are "masked" by other higher-price *export* sales. How would calculating *normal value* differently help "unmask targeted dumping"? Logically, using different normal values would not help "unmask targeted dumping" at all, and the identification of the normal value assumption is no response to the mathematical equivalence argument.

B. If Application of the Alternative, Average-to-Transaction Comparison Methodology Is Limited Only to Lower-Priced Sales, then the Exceptional Methodology Would Have No Effect

8. If zeroing is prohibited, then it does not matter whether the average-to-transaction comparison methodology is applied to all or just some export sales. If zeroing is prohibited, then, after the intermediate calculations are aggregated, the mathematical result will be the same as it would be if the "normal" average-to-average comparison methodology had been used. Assuming that zeroing is permissible, then it must also be permissible to apply the average-to-transaction comparison methodology not only to the export sales that are at significantly lower prices, but also to the higher-priced export sales that may "mask" the dumping evidenced by the lower-priced export sales.

C. The "Pattern Clause"

9. The conclusion that flows from an analysis in accordance with the customary rules of interpretation is that the "pattern clause" requires a finding of a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent among different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically. As we have demonstrated, that is precisely what the U.S. Department of Commerce ("Commerce") did in the washers antidumping investigation.

10. Korea urges that an analysis pursuant to the "pattern clause" must take into account the qualitative, in addition to the quantitative significance of any observed differences. Korea means

that the differences in export prices must "reflect what reasonably can be inferred to be targeting conduct." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. The "reason" for the low prices changes nothing.

D. The "Explanation Clause"

11. The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear the reason that it is not possible in the dumping calculation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average or the transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

12. In the washers antidumping investigation, Commerce evaluated the difference between what the weighted-average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. The "explanation" that Commerce provided in the washers antidumping investigation is not inconsistent with Article 2.4.2 of the AD Agreement.

E. Korea's "As Such" Claims Related to the "Differential Pricing Methodology"

13. Korea has failed to adduce evidence sufficient to support its claims regarding the alleged "differential pricing methodology." While the United States does not agree that there is any validity to Korea's claims with respect to the so-called "differential pricing methodology," we continue to consider that Korea has not made a *prima facie* case of inconsistency.

II. KOREA'S CLAIMS UNDER THE SCM AGREEMENT AND GATT 1994 ARE WITHOUT MERIT

14. Korea's challenge to Commerce's countervailing duty determination is equally without merit. Contrary to the rhetoric in Korea's submissions, Commerce's findings were thoughtful, reasoned, and grounded in the evidence. It is Korea who has pushed the envelope in this dispute, offering strained, results-driven interpretations of the relevant obligations and Appellate Body guidance, while presenting a distorted picture of the factual record. The Panel should decline Korea's invitation to import new obligations into the SCM Agreement or GATT 1994, and to substitute its own assessment of the facts for that of the investigating authority.

A. The Department of Commerce's Findings on Disproportionality Were Reasoned and Adequate, and Supported by Positive Evidence

15. Turning to Korea's first claim, the evidence amply supports Commerce's determination that subsidies conferred on Samsung under RSTA 10(1)(3) were *de facto* specific. Samsung received a large percent of all subsidies distributed in 2010, out of nearly 12,000 participants. By comparison, the average recipient obtained a very small percentage. Commerce found that this disparity was contrary to what would be expected, and indicated disproportionality – an approach that is fully consistent with the text of Article 2.1(c) of the SCM Agreement and the Appellate Body's findings in the *US – Large Civil Aircraft* dispute.

16. Korea's primary argument – i.e., its "size" defense – has no basis in law or fact. Commerce observed that, even if Samsung's size argument were factually accurate, it would still

not apply this standard because to do so would "undermine the purpose" of the disproportionality inquiry.

17. Korea has submitted a copy of a redetermination that the Department of Commerce conducted pursuant to remand from a domestic court. While that redetermination occurred well after this Panel was established, it nonetheless further supports the conclusion that Commerce's specificity findings were not in error.

B. Subsidies Conferred Under RSTA Article 26 are Regionally Specific

18. Equally, there is no basis for Korea's assertion that the significant amount of facilities subsidies received under RSTA Article 26 should avoid scrutiny under the SCM Agreement. Eligibility is expressly limited to investments located in a designated geographic region – the area falling outside the Seoul overcrowding area. Korea's claim rests on legal theories that have no grounding in the text of the SCM Agreement, and have been repeatedly rejected by WTO panels.

19. Korea falls back on the argument that subsidies limited to large designated regions are not regionally specific. But Article 2.2 does not privilege or exempt certain categories of region. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large. And it would be particularly inappropriate to overlook such geographic limitations here. The area excluded from eligibility includes Seoul, the capital of Korea and site of a large proportion of Korea's economy and population.

C. Commerce Appropriately Found that RSTA Subsidies Were Not "Tied" to Particular Products, and Calculated the Subsidy Ratio Accordingly

20. Likewise, there is no basis for Korea's criticism of the ratios calculated with respect to subsidies received by Samsung under RSTA Articles 10(1)(3) and 26.

21. Korea attempts to ground its preferred approach in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. These provisions do not support Korea's arguments, but instead undermine them because they do not specify particular attribution methodologies, much less Korea's.

22. Absent rules on applying specific methodologies, an investigating authority must determine an appropriate approach. As explained in the U.S. first written submission, an investigating authority may derive guidance from certain provisions. Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that in determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts surrounding the Member's "bestowal" of the subsidy will be a key consideration. Annex IV of the SCM Agreement indicates that both "tied" and "untied" approaches to attribution are, in principle, compatible with the SCM Agreement. The Informal Group of Experts ("IGE") report to the Committee on Subsidies and Countervailing Measures is instructive, although not binding. Commerce's determination was consistent with these sources, and grounded in the facts relating to the bestowal of subsidies on Samsung.

23. Korea nonetheless argues that Commerce should have adopted a novel variation of the "tied" approach to attribution, based on the "retroactive" use and effect of the subsidy. And Korea criticizes Commerce for declining to accept and review accounting records that it says would have helped Commerce implement this approach by quantifying the amount of underlying expenses with some connection to washers. These arguments fail, for several reasons.

24. First, Korea has offered no basis in the SCM Agreement to consider that investigating authorities are compelled to calculate subsidy ratios based on how a portion of the benefit is "used."

25. Second, the structure, architecture, and design of the RSTA subsidy programs do not reflect a product-specific tie. Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on formulas that related to *aggregate* and *average* expenses for the *corporation as a whole*. It is not meaningful to attempt to trace a given KRW of tax credit received to any KRW of underlying expense, much less to a particular product.

26. Third, even aside from the legal flaws in Korea's argument, it also rests on a flawed factual premise. RSTA tax credits do not "retroactively" reduce expenses, much less those related to a particular product.

27. Finally, the documents that Korea refers to have nothing to do with the "bestowal" of the subsidy. It is undisputed that the granting authority, Korea, was not presented with these documents when it bestowed the tax credits. And even under Korea's theory, these documents would not enable Commerce to derive a meaningful subsidy ratio that carves out expenses and sales information for washers – as opposed to the entire Digital Appliances unit, which includes a range of product lines, such as refrigerators. Even Korea is unable to undertake the kind of forensic analysis that it suggests is needed for a "retroactive" approach. All of this confirms that Korea's preferred approach is not a more "precise" way to attribute subsidies.

D. Korea's Overseas Effects Theory Has No Basis In Law or Fact

28. Korea's final attempt to impugn Commerce's attribution methodology fares no better than its earlier attempts. Korea argues that the denominator in the subsidy ratio for RSTA 10(1)(3) should have included sales of merchandise produced outside Korea.

29. This argument has no legal basis. Consistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, Commerce attributed subsidies based on the way in which they were bestowed on Samsung. Korea argues that Commerce instead should have calculated the subsidy ratio based on the possible knock-on effects of subsidies on overseas manufacturing. But it is unclear why this effects-based investigation is required to ensure that the elements in the numerator "match" those in the denominator. Korea's proposed effects-based inquiry would also impose a considerable administrative burden on investigating authorities, with no apparent advantage. Needless to say, neither the Appellate Body nor any WTO panel has ever imposed the requirement that Korea suggests.

30. It is significant that Korea does not challenge Commerce's attribution of RSTA Article 26 facilities subsidies to domestic production. Korea asserts that "R&D" subsidies are different, and that they "normally" benefit overseas production. This argument has no basis in the bestowal of the subsidy. But even on a purely effects-based reasoning, Korea's argument is unsupported and untenable.

III. CONCLUSION

31. As we have demonstrated in the U.S. first written submission and again this morning, Korea's claims are without merit, and the United States respectfully requests that the Panel reject them.