

***KOREA – ANTI-DUMPING DUTIES ON
IMPORTS OF CERTAIN PAPER FROM INDONESIA***

(WT/DS312)

**EXECUTIVE SUMMARY OF THE
THIRD PARTY SUBMISSION OF
THE UNITED STATES**

January 21, 2005

I. Article 6.10 Does Not Require Investigating Authorities To Determine Separate Dumping Margins For Separate Legal Entities If They Constitute a Single “Exporter” Or “Producer”

1. Indonesia argues incorrectly that Article 6.10 of the AD Agreement does not permit an investigating authority to “treat distinct exporters that are separate natural or legal persons as a single ‘exporter’ for the purpose of calculating dumping margins.”¹ Where the facts demonstrate that multiple legal entities constitute a single “exporter” or “producer,” the investigating authority may, consistent with Article 6.10 of the AD Agreement, determine a single dumping margin for those entities.

2. The AD Agreement does not define either the term “exporter” or “producer.” Moreover, the terms “exporter” and “producer” reflect commercial functions (*i.e.* exporting and producing) rather than corporate structure. Thus, the facts of a particular case may support a finding that the operations of two or more affiliated parties are so closely intertwined that the parties effectively constitute a single “exporter” or “producer” within the meaning of Article 6.10.

II. Article 2.2 Does Not Limit An Investigating Authority’s Discretion To Use Constructed Value As “Facts Available” To Determine Normal Value In the Absence Of Timely-Submitted, Verifiable Home Market Sales Data

3. Contrary to Indonesia’s arguments, Article 2.2 does not limit an investigating authority’s discretion to use constructed value as “facts available” to determine normal value for purposes of conducting the dumping calculation under Article 2.1 in the absence of timely-submitted, verifiable home market sales data.

4. Article 6.8 expressly permits an investigating authority to rely on “facts available” in making a determination if a party to the proceeding does not provide necessary information within a reasonable period or significantly impedes the investigation. Nothing in Articles 6.8 or 2.2 either limits an investigating authority’s discretion in choosing from among the facts available in making its determination or imposes conditions on the use of certain categories of information, such as the cost information at issue in this dispute. Moreover, paragraph 3 of Annex II makes clear that an investigating authority may disregard certain information if it is not verifiable or not submitted in a timely fashion.

5. There is thus no legal basis for concluding that an investigating authority’s discretion in the selection of facts available under Article 6.8 is subject to the obligations set out in Article 2.2 regarding the determination of normal value.

¹ First Written Submission of Indonesia, para. 121.

III. Article 2.4 Of The AD Agreement Requires Adjustment To Price Only Where Differences In Selling Expenses Affect Price Comparability

6. Indonesia claims that Korea breached its obligation under Article 2.4 of the AD Agreement by failing to make “due allowance” for certain differences in selling expenses between the Korean and Indonesian markets. Indonesia misstates the obligations under Article 2.4. Contrary to Indonesia’s arguments, Article 2.4 obligates an investigating authority to make “due allowance” only for differences that are “demonstrated to affect price comparability.” If, as Indonesia appears to suggest, *any* difference in expenses warranted an adjustment under Article 2.4, regardless of whether it had an effect on price comparability, the references to “price comparability” in Article 2.4 would be rendered meaningless.

IV. Examining Information In The Application For Initiation Under Article 5.3 Of The AD Agreement Does Not Necessarily Satisfy The Obligation To Corroborate Information From Secondary Sources Under Paragraph 7 of Annex II

7. Indonesia claims in its first submission that Korea breached its obligations under paragraph 7 of Annex II of the AD Agreement because the Korean investigating authorities failed to corroborate certain secondary information used as facts available.² Korea responds by arguing that, as part of the initiation process, the authorities examined the information in the application and found it to be accurate and adequate as required by Article 5.3 of the AD Agreement.³ The United States notes, in this regard, that the obligations under Article 5.3 and paragraph 7 of Annex II are distinct. The obligation to corroborate information from secondary sources under Paragraph 7 of Annex II is not necessarily satisfied by an investigating authority’s examination of the information in an application for initiation during the initiation process. Whether the steps taken to satisfy the obligation under Article 5.3 have also satisfied the obligation under paragraph 7 of Annex II will depend on the facts and circumstances of the particular case.

V. Article 5.8 Of The AD Agreement Does Not Require Immediate Termination Of An Investigation Upon Calculation Of A Preliminary *De Minimis* Dumping Margin For A Responding Party

8. Indonesia claims that Korea breached its obligations under Article 5.8 of the AD Agreement because the KTC did not immediately terminate the investigation as to an Indonesian responding party upon calculating a preliminary *de minimis* dumping margin for that company.⁴ Indonesia’s argument is based on a flawed interpretation of Article 5.8. Under Article 5.8, the

² First Written Submission of Indonesia, paras. 83-88.

³ First Written Submission of Korea, para. 99.

⁴ First Written Submission of Indonesia, para. 130.

obligation to terminate an investigation upon a finding of no or *de minimis* dumping applies solely with respect to final determinations of dumping.

VI. An Investigating Authority Does Not Act Inconsistently With Article 2.6 Or Fail To Take Into Account Differences In The Markets For Different Products Simply By Defining The “Like Product” To Include Items That Are Not Identical To Each Of The Items Comprising The Product Under Consideration

9. The United States respectfully requests the Panel, in assessing the “like product” claims of Indonesia, to take into account the following general points concerning the definition of the like product in antidumping cases and the relationship between that definition and the injury analysis.

10. First, the like product analysis under Article 2.6 requires a comparison of the *overall* scope of the product under consideration with the *overall* scope of the like product. There is no requirement that each *individual* item within the like product be “like” each *individual* item within the imported product subject to consideration. Further, as there are no substantive obligations other than those set out in Article 2.6 relating to the definition of the appropriate like product in each particular investigation, it is left to the discretion of the investigating authorities to determine which domestic product is “alike in all respects, or . . . has characteristics closely resembling those of the product under consideration.”

11. Second, by determining that there is only one “like product” for purposes of an injury determination, an investigating authority does not necessarily fail to “distinguish between the markets” for different types of the product subsumed within the single like product, as Indonesia suggests.⁵ The AD Agreement allows for authorities to take into account differences in the markets for different types of products within the same like product.

VII. Article 3.2 Of The AD Agreement Requires That Investigating Authorities “Consider” Whether There Was Significant Price Undercutting By Subject Imports

12. Indonesia challenges the KTC’s findings regarding the price impact of subject imports, claiming that there was no positive evidence that would permit an investigating authority to find that there was price undercutting by subject imports within the meaning of Article 3.2 of the AD Agreement.⁶ The United States agrees that each injury determination – including the one at issue in this dispute – must be supported by positive evidence, as required under Article 3.1. However, the United States notes that Article 3.2 does *not* require the authorities to find significant volume increases, price undercutting, and price effects as a precondition to making an affirmative injury

⁵ See First Written Submission of Indonesia, para. 151.

⁶ First Written Submission of Indonesia, paras. 159-161, 164.

determination. Article 3.2 of the AD Agreement simply requires that the authorities *consider* whether there have been significant volume increases and significant price undercutting, and whether subject imports have had significant price depressing or suppressing effects.

VIII. Article 3.5 Does Not Prescribe A Particular Methodology To Be Used In Determining Whether Dumped Imports Are The Cause Of Injury To Domestic Producers Or Specify The Level Of Detail At Which The Analysis Must Be Conducted

13. Indonesia challenges Korea’s analysis of whether dumped imports were the “cause” of injury to the domestic producers of the like product, claiming that Korea did not undertake a sufficiently detailed analysis under Article 3.5.⁷ Further, Indonesia claims that Korea failed to conduct a proper analysis of the effects of non-subject imports under Article 3.5.⁸

14. The United States notes that while Article 3.5 of the AD Agreement sets out several factors that “may” be considered by investigating authorities in ascertaining whether there is a “causal relationship” between dumped imports and injury to the domestic industry, it does not specify the type of information that the authorities must collect and examine or the detail in which they must explain their analysis of the information.

15. Article 3.5 also provides that the investigating authorities must examine any known factors other than the dumped imports which are injuring the domestic industry to ensure that injury caused by these other factors is not attributed to the dumped imports. However, it does not prescribe the particular methods and approaches to be used by investigating authorities to separate and distinguish the injurious effects of unfair imports from the injurious effects of the other known causal factors.

IX. The Fact That Some Domestic Producers Import The Subject Merchandise Does Not Preclude An Affirmative Injury Finding

16. Indonesia claims that Korea breached various provisions of the AD Agreement because, in making its injury determination, the KTC failed to take into account the fact that some members of the domestic industry were importing subject merchandise from the countries under investigation.⁹ The United States notes, in this regard, that the fact that domestic producers may be importing some dumped merchandise does not preclude an affirmative injury finding. Article 4.1(i) provides investigating authorities with the *discretion* to exclude from the domestic industry those domestic producers that are importing the dumped product. However, neither Article

⁷ First Written Submission of Indonesia, paras. 180-187.

⁸ First Written Submission of Indonesia, para. 180.

⁹ First Written Submission of Indonesia, paras. 188-195.

4.1(i), nor any other provision of the AD Agreement, *requires* that such domestic producers be excluded from the domestic industry in order to make an affirmative finding of injury.

X. Article 6.9 Requires That Interested Parties Be Given Advance Notice Of The *Facts* Under Consideration, Not the Legal Reasoning Of The Authorities

17. Indonesia claims that Korea breached Article 6.9 because the KTC failed to inform the interested parties in advance that it would determine that subject imports were causing present material injury, rather than threatening to cause material injury.¹⁰ Contrary to Indonesia’s arguments, however, Article 6.9 does not obligate the investigating authorities to give interested parties advanced notice of the *legal reasoning* of their determination. Rather, Article 6.9 requires investigating authorities to inform the interested parties of the “essential *facts* under consideration which form the basis for the decision whether to apply definitive measures.” (Emphasis added).

¹⁰ First Written Submission of Indonesia, para. 202.