***Korea – Anti-dumping Duties on***
***Imports of Certain Paper from Indonesia***

**(WT/DS312)**

**Oral Statement of the United States at the Third Party Session**
**of the First Substantive Meeting of the Panel with the Parties**

**February 2, 2005**

Mr. Chairman, members of the Panel:

1. It is a pleasure to appear before you today to present the views of the United States concerning certain issues in this dispute.

2. As the Panel will recall, the United States has already filed a third party submission in this dispute. In today's statement, we would like to elaborate on three issues: (i) whether an investigating authority may find that two or more legal entities constitute a single "exporter or producer" under Article 6.10 of the *Agreement on Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and calculate a single dumping duty for them; (ii) whether Article 2.2 limits an investigating authority's discretion in selecting among the "facts available" to use in calculating normal value when a respondent does not provide verifiable home market sales data; and (iii) how the "like product" and "product under consideration" may be defined for purposes of making an injury determination.

## I. A Single Dumping Margin May Be Calculated For Two Or More Legal Entities Under Article 6.10 If They Constitute A Single "Exporter or Producer"

3. Indonesia has argued in its first written submission that investigating authorities may not find that separate legal entities constitute a single "exporter" within the meaning of Article 6.10 of the AD Agreement and determine a single dumping margin for the entities. According to

Indonesia, investigating authorities *must* consider each separate legal entity to be a separate "exporter or producer" for purposes of calculating dumping margins. The United States disagrees.

4. Article 6.10 states that "authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned in the investigation." The terms "exporter" and "producer" are not defined in the AD Agreement. Therefore, nothing in the text of the Agreement supports Indonesia's argument that the term "exporter" can encompass only a single legal entity.

5. Moreover, the terms "exporter" and "producer" reflect commercial functions (*i.e.* exporting and producing) rather than corporate or legal structure. Thus, the facts of a particular case may demonstrate that the operations of one or more separate legal entities are so closely intertwined that – as a matter of commercial fact – they constitute a single "exporter" or "producer."

6. Consider, for example, that XYZ corporation produces widgets in four separate factories. It determines – for tax and other commercial reasons – that it will separately incorporate each of its factories, which will become wholly-owned subsidiaries of XYZ corporation. Prior to the corporate change, a single dumping margin could be calculated for the corporation and its factories. However, after the corporate change, under Indonesia's interpretation, an investigating authority would be *precluded* from finding that the separately incorporated factories and the parent company constitute a single "producer or exporter" and calculating a single dumping margin for them. In the view of the United States, such a result is not mandated under Article 6.10.

## II. Article 2.2 Does Not Limit An Investigating Authority's Discretion To Select Among The "Facts Available" To Calculate Normal Value When A Respondent Does Not Provide Verifiable Home Market Sales Data

7. In the investigation that is the subject of this dispute, Korean investigating authorities calculated the normal value of sales for two Indonesian respondents on the basis of "facts available." They did so because, according to the Korean authorities, the home market sales data submitted by the respondents could not be verified. The Korean authorities selected as the "facts available" certain cost information, which they used to "construct" the normal value of sales. Indonesia is challenging Korea's actions. Indonesia argues that, under Article 2.2 of the AD Agreement, cost information can be used to determine normal value only in certain limited circumstances – that is (according to Indonesia), in circumstances where there are either no home market sales of a "like product" or the home market sales do not provide a proper basis for comparison. Indonesia asserts that, because Korean authorities did not make a finding that such circumstances existed, they were precluded from determining normal value on the basis of the cost information.

8. In the view of the United States, Indonesia's argument is off the mark. Article 2.2 establishes a requirement that home market sales be used to calculate normal value where such sales are available and provide a proper basis for comparison. Article 2.2 says nothing about what an investigating authority should do when a respondent fails to cooperate in an investigation and does not provide verifiable home market sales data. That issue is governed by Article 6.8 of the AD Agreement.

9. Article 6.8 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. Further, Paragraph 3 of Annex II recognizes that an investigating authority may decide not to take into account information that is not verifiable. Applied together, these provisions allow an investigating authority to disregard home market sales data if they are found to be unverifiable and to determine normal value on the basis of "facts available."

10. Article 6.8 does not require that the limitations under Article 2.2 be observed when making a normal value determination on the basis of "facts available." Moreover, Article 6.8 does not impose conditions on the use of certain categories of information, such as the cost information at issue in this dispute. Thus, there is no legal basis for Indonesia's argument that cost information cannot be used as "facts available" to determine normal value unless an investigating authority makes the findings outlined in Article 2.2.

11. Moreover, Indonesia's argument may lead to illogical results. Imagine, for example, that a respondent submits home market sales and cost data for purposes of calculating normal value. The sales data is ultimately found to be inaccurate but the cost data is verified and found to be accurate. Under Indonesia's proposed approach, the investigating authority could use the cost data instead of the flawed sales data to calculate normal value only if it found that there were no home market sales of a like product in the ordinary course of trade. If the home market sales data on the record of the proceeding is flawed, however, how can the investigating authority make such a finding without *relying* on the same flawed sales data? In the view of the United States, Article 2.2 cannot be interpreted in a way that would require such a result.

## III. The Definition of the Domestic "Like Product" and the "Product Under Consideration" In Injury Determinations

12. In its third party submission, the United States provided its views on certain issues raised in Indonesia's submission relating to the definition of the domestic "like product" in injury determinations. The United States would like to submit two other observations today. First, the United States agrees with Canada that, in defining the domestic product that is "like" the "product under consideration" for purposes of an injury determination, nothing in the AD Agreement precludes an investigating authority from considering both physical characteristics – including technical specifications and quality factors – and market characteristics.[1] In the view of the United States, the market characteristics relevant in defining the domestic "like product" in injury determinations might include end uses, interchangeability, channels of distribution, and perceptions of the market participants. Similarities in production facilities, processes, and employees may also be relevant to this analysis.

13. Second, the United States agrees with Korea's explanation in its submission that, for purposes of the injury determination, the "like product" is defined by considering the similarity to the imported "product under consideration."[2] The United States notes, in this regard, that a "like product" may be similar to a "product under consideration" even if the two include items that have some different characteristics. As the United States explained in its third party submission, the domestic "like product" analysis requires a comparison of the *overall* scope of the product under consideration with the *overall* scope of the like product.

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[1] *See* Third Party Submission of Canada, para. 16.

[2] *See* Written Submission of the Republic of Korea, para. 164.

## Conclusion

14. This concludes our presentation. Thank you for your attention.