

ANNEX A

FIRST WRITTEN SUBMISSIONS OF THE PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF KOREA

1. In this dispute, Korea contends that the final determinations, amended final determinations, anti-dumping duty orders, and amended anti-dumping duty orders of the United States in three specific anti-dumping duty investigations involving Korean products are inconsistent with U.S. obligations under the first sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994* (the "Anti-Dumping Agreement"), due to the application of the methodology commonly known as "zeroing" by the United States Department of Commerce ("USDOC") in the calculation of dumping margins in the cases.

A. THE MEASURES AT ISSUE

2. The specific measures in this dispute are the final determinations, amended final determinations, anti-dumping orders and amended anti-dumping orders imposed by the United States in cases on imports of:

- (i) Stainless Steel Plate in Coils from the Republic of Korea (A-580-831);
- (ii) Stainless Steel Sheet and Strip in Coils from the Republic of Korea (A-580-834); and
- (iii) Diamond Sawblades and Parts Thereof from the Republic of Korea (A-580-855).

In the final determinations and amended final determinations in these three cases, the USDOC applied the zeroing methodology to determine the dumping margins for certain Korean exporters of the products under investigation. Accordingly, for certain Korean exporters, the determinations and the ensuing anti-dumping orders reflected and included dumping margins that were calculated on the basis of zeroing.

3. In calculating the dumping margins for the respondents in each of the investigations, the USDOC:

- (i) identified different "models," *i.e.*, types of products based on the most relevant product characteristics;
- (ii) calculated weighted average prices for sales in the United States and weighted average normal values for sales in the comparison market on a model-specific basis, for the entire period of investigation;
- (iii) compared the weighted average normal value of each model to the weighted average United States price for that same model;
- (iv) calculated the dumping margin for an exporter by summing up the amount of dumping for each model and then dividing it by the aggregated United States price for all models; and in doing so
- (v) effectively set to zero all negative margins on individual models prior to summing the total amount of dumping for all models.

By applying this zeroing methodology, the USDOC calculated margins of dumping in amounts that exceeded the actual extent of dumping, if any, by the investigated companies. Consequently, the United States also collected anti-dumping duties in excess of those that would have been due had the zeroing methodology not been applied in contravention of U.S. obligations under the Anti-Dumping Agreement.

B. ARGUMENT

4. As the Panel is aware, the first sentence of Article 2.4.2 of the Anti-Dumping Agreement establishes the following requirements for comparison of export prices and normal values in an anti-dumping investigation:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis.

Under this provision, the existence of margins of dumping must normally be established using one of two permissible methodologies: (1) an average-to-average methodology that compares "weighted average normal value with a weighted average of prices of all comparable export transactions," or (2) a transaction-to-transaction methodology that compares transaction-specific normal values to transaction-specific export prices.

5. The zeroing methodology that the USDOC used in the anti-dumping investigations subject to this dispute is virtually identical to the methodology that was held to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (WT/DS141/R and WT/DS141/AB/R), and also in *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264/R and WT/DS264/AB/R).

6. It is well-settled that an investigating authority may, when applying an average-to-average methodology, initially divide the product under investigation into "models" or other sub-groups, and compare average normal values to average export prices for the individual sub-groups. However, it is clear from Article 2.1 of the Anti-Dumping Agreement and Article VI of GATT 1994 that "dumping is defined in relation to a product as a whole as defined by the investigating authority." As the Appellate Body has observed, this means that "'[d]umping,' within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product." It follows, then, that "[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole." In sum, "[a]s with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product."¹

7. As a result, while investigating authorities may be permitted to compare normal values and export prices for sub-groups, the results of those comparisons do not constitute "margins of dumping" within the meaning of Article 2.4.2. Instead, those model-specific results "reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation." In other words, "[i]t is only on the basis of aggregating *all* such

¹ *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004.

intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole."²

8. In this regard, a proper aggregation of the intermediate results of model-specific comparisons must reflect the result of *all* such comparisons. As the Appellate Body has explained:

We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the "results" of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the "results" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results". If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.³

In short, an investigating authority is not permitted to disregard some of the intermediate results of model-specific comparisons, or to treat some of those intermediate results as being greater or less than they actually are.

9. The practice of zeroing, as employed by the USDOC in the cases subject to this dispute, does not comport with this requirement. As the Appellate Body has explained:

Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.⁴

10. In these circumstances, the USDOC's use of the zeroing methodology in investigations in the cases that are the subject of this dispute is not consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement.

11. As the Panel is undoubtedly aware, this interpretation of the inconsistency of zeroing with the requirements of Article 2.4.2 is entirely in accordance with the Appellate Body's decision in the dispute concerning *United States – Final Dumping Determination on Softwood Lumber from Canada*.⁵ The same result was also reached by panels reviewing the identical zeroing methodology used by the USDOC to calculate dumping margins in its anti-dumping investigations of shrimp from Ecuador and Thailand and of retail carrier bags from Thailand.⁶ A similar result has also been reached by the Appellate Body in several additional disputes.⁷

² *Id.*

³ *Id.*, para. 98 (emphasis in original). The Appellate Body has noted that this interpretation is also consistent with a review of the context provided by other provisions of the Anti-Dumping Agreement. *See, id.*, paras. 99-100.

⁴ *Id.*, para. 101 (emphasis in original).

⁵ *Id.*, paras. 86-103, 122.

⁶ *See United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, Panel Report, 30 January 2007; *United States – Measures Relating to Shrimp from Thailand*, Panel Report, WT/DS343/R, 29 February 2008; *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, Panel Report, WT/DS383/R, 22 January 2010. These Panels closely followed the reasoning of the Appellate Body in *US – Softwood Lumber* in concluding that the USDOC's application of its zeroing methodology in

12. In short, "there is a consistent line of Appellate Body Reports finding that 'zeroing' in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2, first sentence."⁸ Of course, the Panel is not bound by the reasoning in prior Appellate Body and panel reports. Nevertheless, adopted Reports create legitimate expectations among WTO Members,⁹ and "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same."¹⁰ And, because review of the text, context and object and purpose of Article 2.4.2 confirms that the practice of zeroing as described above is not consistent with the requirements of that provision, the Panel should rule that the USDOC's use of zeroing in its calculation of the margins of dumping for the products under investigation in the cases subject to this dispute is not consistent with the obligations of the United States under the Anti-Dumping Agreement.

C. CONCLUSION

13. As this analysis demonstrates, the final determinations, amended final determinations, anti-dumping duty orders and amended anti-dumping orders of the United States in the three cases subject to this dispute are inconsistent with U.S. obligations under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement.

14. Therefore, Korea requests that the Panel find that the United States acted inconsistently with the requirements of the first sentence of Article 2.4.2 of the Anti-Dumping Agreement when it calculated the anti-dumping margins in its anti-dumping investigations of Stainless Steel Plate in Coils from the Republic of Korea, Stainless Steel Sheet and Strip in Coils from the Republic of Korea, and Diamond Sawblades and Parts Thereof from the Republic of Korea. Korea further requests that the Panel recommend that the United States be instructed to bring its measure into conformity with its obligations under that provision.

weighted-average to weighted-average comparisons in investigations is inconsistent with its obligations under Article 2.4.2 of the Anti-Dumping Agreement.

⁷ See *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (EC)*, WT/DS294/AB/R, Appellate Body Report, 18 April 2006, paras. 222 and 263(b); *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, Appellate Body Report, 30 April 2008, para. 109; *United States – Measures Relating to Zeroing and Sunset Reviews (Japan)*, WT/DS322/AB/R, Appellate Body Report, 9 January 2007, para. 121 *et seq.*

⁸ See *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand*, Panel Report, WT/DS383/R, 22 January 2010, para. 7.24.

⁹ See *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Appellate Body Report, 4 October 1996, at 13; *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW, Appellate Body Report, 22 October 2001, paras. 108-109; *United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004, paras. 109-112.

¹⁰ See *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, Appellate Body Report, 29 November 2004, para. 188 ("The Panel had before it exactly the same instrument that had been examined by the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review*; thus, it was appropriate for the Panel...to rely on the Appellate Body's conclusion in that case. Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.").

ANNEX A-2

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. The Republic of Korea ("Korea") claims that the United States breached its obligations under the first sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-dumping Agreement") when the U.S. Department of Commerce applied the "zeroing" methodology to calculate certain dumping margins in the final determinations and amended final determinations in the anti-dumping investigations of Stainless Steel Plate in Coils from Korea, Stainless Steel Sheet and Strip in Coils from Korea, and Diamond Sawblades and Parts Thereof from Korea.¹

2. As an initial matter, the United States would like to thank the Panel for providing adequate time to prepare this submission. This time was useful in allowing the United States to review the evidence and arguments presented by Korea and in turn helping to narrow the issues presented to the Panel, as indicated below.

3. In WTO dispute settlement, the complaining party bears the burden of proving that a Member has acted inconsistently with an obligation.² In addition, Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the covered agreements. Thus, recently, in *US – AD Measures on PET Bags*, the panel correctly stated that it had to satisfy itself that Thailand had established a prima facie case by presenting evidence and arguments to identify the measure being challenged and explain the basis for the claimed inconsistency with a WTO provision, despite the fact that the responding party did not contest the claims made by Thailand.³

4. In this dispute, Korea alleges that when calculating certain dumping margins in the challenged investigations, the Department of Commerce: (i) identified different "models," i.e., types, of products based on the most relevant product characteristics; (ii) calculated weighted average prices for sales in the United States and weighted average normal values for sales in the comparison market on a model-specific basis, for the entire period of investigation; (iii) compared the weighted average normal value of each model to the weighted average U.S. price for that same model; (iv) calculated the dumping margin for an exporter by summing the amount of dumping for each model and then dividing it by the aggregated U.S. price for all models; and (v) set to zero all negative margins on individual models before summing the total amount of dumping for all models.⁴

¹ Korea's Request for the Establishment of a Panel, WT/DS402/3 (8 April 2010), pp. 1-2.

² *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157.

³ *US – AD Measures on PET Bags*, paras. 7.5-7.7. The panel in *US – AD Measures on PET Bags* cited with approval the reasoning of the panel in *US – Shrimp (Ecuador)*, which had similarly concluded:

[T]he fact that the United States does not contest Ecuador's claims is not a sufficient basis for us to summarily conclude that Ecuador's claims are well-founded. Rather, we can only rule in favor of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.

US – Shrimp (Ecuador), para. 7.9.

⁴ First Written Submission of The Republic of Korea, paras. 4 and 17 (hereinafter "Korea's First Written Submission").

5. The United States does not contest the accuracy of Korea's description of the zeroing methodology set forth in paragraphs 4 and 17 of Korea's First Written Submission, as it relates to the investigations challenged in this dispute.

6. Korea specifies that its challenge pertains to the application of "zeroing" in the calculation of certain margins in anti-dumping investigations of Stainless Steel Plate in Coils from Korea, Stainless Steel Sheet and Strip in Coils from Korea, and Diamond Sawblades and Parts Thereof from Korea.⁵ Specifically, with respect to the investigations of stainless steel plate in coils and stainless steel sheet and strip in coils, Korea's claim pertains to the use of the zeroing methodology in calculating margins for Pohang Iron & Steel Co. (POSCO) and the "all others" rate. With respect to the investigation of diamond sawblades, Korea's claim pertains to the use of the zeroing methodology in calculating margins for the three investigated Korean producers as well as the "all others" rate.

7. Korea provides the following descriptions of the calculation of the dumping margins at issue:

In the SSPC [stainless steel plate in coils] investigation, the USDOC's use of the zeroing methodology affected the determination of dumping margins for the Korean exporter Pohang Iron & Steel Co., Ltd. ("POSCO"). In addition, . . . use of the zeroing methodology affected the determination of the "all-others" rate, which was equal to the rate established for [POSCO]⁶

In the SSSS [stainless steel sheet and strip in coils] investigation the USDOC . . . applied its zeroing methodology to the determination of dumping margins for POSCO. In addition, the use of the zeroing methodology affected the determination of the "all-others" rate, which was equal to the rate calculated for POSCO⁷

[Referring to the investigation of Diamond Sawblades], [t]he USDOC applied its zeroing methodology to the determination of dumping margins for the three investigated Korean producers: Ehwa Diamond Industrial Co., Ltd. ("Ehwa"), Hyosung Diamond Industrial Co. ("Hyosung"), and Shinhan Diamond Industrial Co., Ltd. ("Shinhan"). In addition, . . . use of the zeroing methodology affected the determination of the "all others" rate, which was calculated as the weighted-average of the responding companies' dumping margins⁸

8. To substantiate its factual claims, Korea has provided evidence consisting of the Department of Commerce's published determinations, issues and decision memoranda, and computer programs used to calculate the margins of dumping related to the final determinations in the original investigations at issue.

9. The United States has reviewed the factual evidence submitted by Korea and does not contest that the submitted documentation, including the computer programs used to calculate the dumping margins, were generated by the Department of Commerce during its conduct of the three original investigations at issue.

10. Korea argues that the zeroing methodology applied to certain exporters in the three challenged original investigations is the same as the methodology found by the Appellate Body to be inconsistent with Article 2.4.2 of the Anti-dumping Agreement in *US – Softwood Lumber Dumping*.⁹ The United States recognizes that in *US – Softwood Lumber Dumping*, the Appellate Body found that

⁵ Korea's First Written Submission, para. 2.

⁶ Korea's First Written Submission, para. 8.

⁷ Korea's First Written Submission, para. 11.

⁸ Korea's First Written Submission, para. 14.

⁹ Korea's First Written Submission, para. 18.

the use of "zeroing" with respect to the average-to-average comparison methodology in investigations was inconsistent with the first sentence of Article 2.4.2 when it interpreted the terms "margins of dumping" and "all comparable export transactions" as used in the first sentence of Article 2.4.2 in an integrated manner.¹⁰ The United States acknowledges that this reasoning is equally applicable to the margins at issue in this dispute.

11. To the extent that Korea suggests that the Panel should simply base its findings upon a "consistent line of Appellate Body Reports,"¹¹ however, it should be noted that prior panel and Appellate Body reports are not binding on panels considering other disputes.¹² The rights and obligations of Members flow from the text of the covered agreements. While prior adopted panel and Appellate Body reports may be taken into account, the Panel in this dispute is not bound to follow the reasoning set forth in any prior report. Rather, as noted above, under Article 11 of the DSU, the Panel is charged with making its own objective assessment of the matter before it, including its own objective assessment of the facts, and the applicability of and conformity with the relevant covered agreements.

¹⁰ See *US – Softwood Lumber Dumping (AB)*, paras. 62-117.

¹¹ Korea's First Written Submission, para. 24.

¹² See *US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan-Alcoholic Beverages II (AB)* and *US – Shrimp (Article 21.5 – Malaysia (AB))*). As the Appellate Body noted in its *US – Softwood Lumber Dumping* report, adopted reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute." *US – Softwood Lumber Dumping (AB)*, para. 111 (quoting *Japan – Alcoholic Beverages II (AB)*).