ANNEX C

ORAL STATEMENTS OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL OR EXECUTIVE SUMMARIES THEREOF

ANNEX C-1

OPENING STATEMENT OF KOREA

Mr. Chairman and Members of the Panel.

1. On behalf of the Republic of Korea, I would like to extend our thanks for your participation in this proceeding. The dispute settlement system established by the WTO Agreements only works through the willingness of panelists to devote their time and effort, as you have, to consider the arguments of the parties. We very much appreciate, therefore, the opportunity you have given us today to present Korea's views on the issues raised in this dispute.

2. This dispute is, of course, one in a long line brought to challenge the practice known as "zeroing" that has been used in anti-dumping investigations by the United States. Following a number of rulings by the Appellate Body holding that the practice of zeroing in anti-dumping investigations is not consistent with the provisions of Article 2.4.2 of the Anti-Dumping Agreement, the United States itself agreed several years ago to cease using that practice. However, the change in U.S. practice only affected investigations pending on, or initiated after, 22 February 2007.[1] We have, therefore, commenced this dispute to correct the effects of using "zeroing" in three investigations involving Korean products that were completed before the change in U.S. practice took effect.

3. As described in our first submission, this dispute challenges the use of zeroing by the United States Department of Commerce ("USDOC") in the following three cases:

(1) Stainless Steel Plate in Coils from the Republic of Korea;

(2) Stainless Steel Sheet and Strip in Coils from the Republic of Korea; and

(3) Diamond Sawblades and Parts Thereof from the Republic of Korea.

4. We have already provided extensive documentation in our first submission to demonstrate that, in calculating the dumping margins for the respondents in each of the investigations, the USDOC used the following five-step process:

(1) It identified different "models," i.e., types of products based on the most relevant product characteristics;

(2) It 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;

(3) It compared the weighted average normal value of each model to the weighted average United States price for that same model;

[1] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (27 December 2006) (Exhibit KOR-4-A); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 Fed. Reg. 3783 (26 January 2007) (Exhibit KOR-4-B).

(4) It 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

(5) It effectively set to zero all negative margins on individual models prior to summing the total amount of dumping for all models.[2]

And, as we noted in our first submission, this zeroing methodology is virtually identical to the methodology that was held to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *EC – Bed Linen*, and also in *US – Softwood Lumber from Canada*.[3]

5. We have also explained in detail in our first submission how this methodology is inconsistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement.[4] In the interest of brevity, I will not repeat our entire argument, but will make only a few additional observations.

6. *First*, it is clear that Korea has presented a *prima facie* case that the measures adopted by the United States in the three investigations that are the subject of this dispute are not consistent with the obligations set forth in the relevant provision of the Anti-Dumping Agreement. Among other things, we have provided extensive documentation showing that the USDOC did, in fact, employ a methodology involving the five steps I have described. This documentation included not only the published determinations by the USDOC, but also the actual computer instructions the USDOC used to set the dumping margins to zero when the export price or constructed export price was greater than normal value. We have cited the relevant language in Attachment 1 to our first submission. An explanation of the manner in which that language caused the USDOC to "zero" negative dumping margins is set forth in footnotes 8, 15 and 23 of our first submission. And, significantly, the United States has confirmed that our interpretation of the relevant documentation is correct.[5]

7. Furthermore, we have also provided an extensive analysis of the relevant provisions of the Anti-Dumping Agreement. As we have shown, 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."[6] This means, to use the Appellate Body's words, 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."[7] 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."[8] 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."[9]

8. 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

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[2] *See* Korea's First Written Submission, Attachment 1.
[3] *See* Korea's First Written Submission, para. 18.
[4] *See* Korea's First Written Submission, paras. 16 to 24.
[5] *See* U.S. First Written Submission, para. 9.
[6] *See United States – Final Dumping Determination on Softwood Lumber from Canada*, Appellate Body Report, WT/DS264/AB/R, 11 August 2004, paras. 92-93.
[7] Id., para. 93.
[8] Id., para. 96.
[9] Id.

the product under investigation."[10] In other words, "[i]t is only on the basis of aggregating *all* such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole."[11]

9. In these circumstances, a proper aggregation of the intermediate results of model-specific comparisons must reflect the result of *all* such comparisons.[12] 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.

10. The practice of zeroing, as employed by the USDOC in the cases subject to this dispute, does not comport with this requirement. "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."[13] As a result, "Zeroing … 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."[14] And, consequently, "Zeroing thus inflates the margin of dumping for the product as a whole."[15] 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. Taken as a whole, therefore, it is clear that Korea has satisfied its burden of presenting a *prima facie* case. Unless that case has been rebutted by the United States, the Panel must find in favour of Korea's claims.

12. This leads me to my second point — which is that there does not appear to be any dispute between the Parties regarding the factual matters described in our first submission. Indeed, in its first submission, the United States has informed the Panel that it "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."[16] In addition, the United States has also informed the Panel that it "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."[17] And, finally, the United States has not disputed Korea's claim that the zeroing methodology utilized in the three investigations that are the subject of the present case is virtually identical to the methodology that was held to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement in *Softwood Lumber*.

13. The third point I would like to make is to emphasize that the argument outlined in our first submission, which I have summarized for you today, is based on a careful reading of the relevant provisions of the Anti-Dumping Agreement. It is obviously significant that the Appellate Body has adopted a similar analysis in its decisions. But, it is even more significant that the reasoning set forth in our first submission, as well as the reasoning adopted by the Appellate Body, stands on its own as an appropriate interpretation of the relevant provisions.

14. My fourth point is that the United States has not objected to the reasoning relied upon by Korea in this dispute. Instead, the United States has informed the Panel that it:

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[10] Id., para. 97.
[11] Id.
[12] Id., para. 98.
[13] Id., para. 101 (emphasis in original).
[14] Id. (emphasis in original).
[15] Id.
[16] *See* U.S. First Written Submission, para. 5.
[17] *See* U.S. First Written Submission, para. 9.

> recognizes that in *US – Softwood Lumber Dumping*, the Appellate Body found that 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. The United States acknowledges that this reasoning is equally applicable to the margins at issue in this dispute.[18]

By the same token, the United States has not offered any arguments suggesting that the zeroing methodology utilized in the three investigations that are the subject of this dispute is consistent with the provisions of Article 2.4.2.

15. We understand that the United States has objected to any suggestion that past decisions by the Appellate Body might be considered "binding" precedent.[19] For its part, the European Union appears to take issue with the U.S. position regarding the legal import of such past decisions.[20] This apparent disagreement between the United States and the European Union certainly touches upon an interesting question of legal nuance that may be important in other disputes. However, their disagreement would not appear to have any relevance to the present dispute.

16. As we noted in our first submission, it is well-settled that the Panel is not strictly bound by the reasoning in prior Appellate Body and panel reports. Thus, we have not made the claim that the United States is objecting to.[21] Nevertheless, it is clear that adopted Reports create legitimate expectations among WTO Members[22], 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."[23]

17. Importantly, although the United States and the European Union may disagree about the philosophical issue of just how binding the non-binding past reports should be, there is no disagreement about the actual legal issue presented in this dispute. As indicated in our first submission, and as I have described earlier, a review of the text, context and object and purpose of Article 2.4.2 confirms that the practice of zeroing, as employed by the USDOC in the three investigations that are the subject of this dispute, is not consistent with the requirements of that provision.

18. Consequently, the facts and the law relevant to the present dispute are clear. The zeroing methodology that the United States used in the three investigations that are the subject of this dispute is not permissible. And, as a result, the Panel should issue a report finding that the measures at issue

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[18] *See* U.S. First Written Submission, para. 9.

[19] *See* U.S. First Written Submission, para. 11.

[20] *See* E.U. Third Party Submission, paras. 6 to 9.

[21] *See* Korea's First Written Submission, para. 24.

[22] *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.

[23] *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.").

are not consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement, and recommending that the United States bring those measures into conformity with its obligations.

19. Thank you for your attention.

ANNEX C-2

OPENING STATEMENT OF THE UNITED STATES

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel. We will not offer a lengthy statement, as our first written submission fully presents the U.S. views on the arguments raised by Korea. We are hopeful that our statement today, like our first written submission, will help to narrow the issues presented to the Panel.

2. As stated in our written submission, the United States has fully reviewed the factual evidence presented by Korea and does not contest that the documents submitted by Korea were generated by the Department of Commerce during its conduct of the three original investigations at issue.

3. Further, the United States recalls the Appellate Body's finding in *US – Softwood Lumber V* that the use of "zeroing" with respect to average-to-average comparisons in investigations was inconsistent with the first sentence of Article 2.4.2 of the Anti-dumping Agreement[1], when it interpreted the terms "margins of dumping" and "all comparable export transactions" in an integrated manner.[2] The United States acknowledges this reasoning applies equally to the margins at issue in this dispute.

4. To be clear, as Korea and the United States agree, prior adopted panel and Appellate Body reports are not binding on panels considering other disputes. Rather, the rights and obligations of Members flow from the text of the covered agreements.[3] In that regard, we disagree strongly with the presentation by one third party relating to the status of adopted Appellate Body reports under the DSU and their relation to the role of this Panel. In addressing the issues presented in this dispute, what we have asked you to do, and are confident you will do, is to fulfil your function under Article 11 of the DSU[4], and make an objective assessment of the matter before you, including an objective assessment of the facts and the conformity of the challenged measures with the relevant covered agreements.

5. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] *See US – Softwood Lumber V (AB)*, paras. 62-117.
[3] U.S. First Written Submission, para. 11, n. 12; Korea's First Written Submission, para. 24.
[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

ANNEX C-3

CLOSING STATEMENT OF KOREA

Mr. Chairman and Members of the Panel,

1. Our proceedings today have confirmed that there is no dispute between the parties regarding the facts and the law that apply to this case. The zeroing methodology utilized by the U.S. Department of Commerce in the three investigations that are the subject of this dispute is not consistent with the requirements of Article 2.4.2 of the Anti-Dumping Agreement. The U.S. measures should, therefore, be brought into conformity with the obligations established by Article 2.4.2.

2. Article 3.3 of the DSU reminds us that "[t]he *prompt* settlement of [disputes] … is *essential* to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."[1] In accordance with that objective, and in the absence of any disagreement between the parties with respect to the substantive issues in this dispute, Korea appreciates the Panel's willingness to consider whether a modification of its Working Procedures - to eliminate, for example, the requirement of a rebuttal submission and a second substantive meeting between the Parties and the Panel - might be appropriate to allow a resolution to be achieved as promptly as possible.

3. Thank you, again, for your attention.

[1] (Emphasis added.)