

ANNEX E

SECOND WRITTEN SUBMISSIONS OF THE PARTIES OR EXECUTIVE SUMMARIES THEREOF

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ANNEX E-1

SECOND WRITTEN SUBMISSION OF KOREA

1. This submission is presented by the Government of the Republic of Korea ("Korea"), in accordance with the time-table established by the Panel in the dispute settlement proceedings concerning *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea* (WT/DS402) to respond to the arguments presented by the United States in its first written submission, in its statement at the first substantive meeting of the Panel, and in its response to the Panel's questions.

2. In Korea's view, a review of the U.S. submissions confirms that there is no substantive disagreement between the Parties regarding the factual and the legal issues that are relevant in this dispute. Korea has presented a prima facie case that the "zeroing" methodology employed by the United States Department of Commerce ("USDOC") 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. It is Korea's understanding that the United States does not dispute Korea's arguments on the relevant facts or law.

3. In its letter to the Panel of 18 October 2010, the United States indicated that it is "not in a position to waive the second meeting at this time, but ... will be examining the issue further in the light of Korea's answers to the Panel's questions." We would note that there appears to be no difference between the Parties regarding the answers to questions 1 or 2 of the Panel's questions. We understand that the United States may have concerns regarding the responses to the Panel's third question, which addressed the calculation of the "all others" rate. To be honest, we are not entirely sure what those concerns might be, or how we might address them. We would note, however, that it is not necessary for the Panel to reach a decision on the specific issue addressed by its third question, in light of the fact that there appears to be agreement between the Parties that Korea's only claim in this dispute - i.e. that the methodology used by the USDOC in the three investigations was not consistent with Article 2.4.2 of the Anti-Dumping Agreement - is correct. Whether and to what extent the correction of that methodology would also require a modification of the "all others" rate is an issue that can be addressed by the USDOC in its implementation of the Panel's ruling.

4. In these circumstances, and in light of the argument and evidence presented by Korea and the agreement of the Parties on the substantive issues in this dispute, Korea reiterates its request that the Panel find that the USDOC acted inconsistently with the requirements of the first sentence of Article 2.4.2 of the Anti-Dumping Agreement when it calculated the 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 measures into conformity with its obligations under that provision.

ANNEX E-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. In this rebuttal submission, the United States provides comments on certain issues raised in Korea's answers to the first set of questions from the Panel.

2. As noted in our first written submission and in Korea's statements at the meeting with the Panel, the United States does not contest certain evidence that Korea has brought forward in support of its arguments as to "zeroing" in the calculation of certain margins of dumping in the investigations at issue.¹ In particular, the United States does not contest that the documentation submitted by Korea, 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. However, as the parties agree, it is for the Panel to determine whether Korea has established a prima facie case, including with respect to whether, as a matter of fact, the United States did not provide offsets for non-dumped comparisons in the investigations at issue. Whether Korea has established that a prima facie case that any failure to provide offsets in the investigations at issue is inconsistent with Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-dumping Agreement") is also for the Panel to decide, as a matter of law.

3. The Panel asked both parties in Question 3, "Do the parties agree that the Appellate Body's findings and reasoning in *US – Softwood Lumber V* extends to the calculation of the "all others" rate in each investigation?" Korea did not answer the question directly, but its answer does not support a finding that the reasoning set forth in *US – Softwood Lumber V (AB)* extends to the determination of the "all others" rate.

4. As the panel in the *US – Shrimp (Ecuador)* dispute acknowledged, the issue of the "all others" rate was not explicitly addressed in *US – Softwood Lumber V (AB)*.² However, because the United States understood that the findings concerning the company-specific margins in *US – Softwood Lumber V (AB)* necessarily affected the all others rate, when implementing the DSB's recommendations and rulings the United States recalculated both the individual company rates and the "all others" rate, without a separate finding having been made with respect to the "all others" rate.³

¹ E.g. with respect to the investigation of stainless steel plate in coils: Exh. KOR-1-H; Exh. KOR-1-I at lines 16065-16087 (demonstrating that there were non-dumped comparisons); with respect to the investigation of stainless steel sheet and strip in coils: Exh. KOR-2-E; Exh. KOR-2-F at lines 13809-13840 (demonstrating that there were non-dumped comparisons); with respect to the investigation of diamond sawblades: Exh. KOR-3-G at line 2611; Exh. KOR-3-I at line 5119; Exh. KOR-3-K at line 2619 (demonstrating that there were non-dumped comparisons).

² *US – Shrimp (Ecuador)*, para. 7.42.

³ The panel report in *US – Shrimp (Ecuador)* stated that "[o]ur finding that Ecuador has established that the calculation of the margins of dumping for Exporklore and Promarisco was inconsistent with Article 2.4.2 means that the calculation of the 'all others' rate as the weighted average of the individual rates necessarily incorporates this methodology. The parties agree." *US – Shrimp (Ecuador)*, para. 7.42 (footnotes omitted). In that dispute, the United States had explained that, with respect to the findings in *US – Softwood Lumber V*, "The U.S. Department of Commerce . . . understood that these findings concerning the company-specific margins necessarily affected the "all others" rate. Therefore, when the United States implemented the DSB recommendations and rulings, Commerce recalculated both the individual company rates and the "all others" rate, without a separate claim having been made under Article 9.4." See Annex B-3, U.S. Answers to the Panel's Questions, para. 1.

Similarly, any challenges to the "all others" rates in this dispute are consequential to Korea's challenge to the antidumping measures themselves.

5. As explained in the response by the United States to Question 3 from the Panel⁴, the reasoning set forth in *US – Softwood Lumber V (AB)* focused on how the existence of dumping is determined, pursuant to the methodology described in the first sentence of Article 2.4.2 of the Antidumping Agreement. The "all others rate" is determined as a consequence of the finding that dumping exists to a degree sufficient to justify the imposition of the dumping measure, and it is not determined using the methodology described in Article 2.4.2.

6. Finally, the United States notes that in its response to Panel Question 3, Korea referred to Article 9.4 of the Anti-dumping Agreement. It should be noted that the panel in *US – Shrimp (Ecuador)* did not make any findings, or offer any analysis, under Article 9.4.

7. Moreover, Article 9.4 is not within the Panel's terms of reference. Korea did not make a claim with respect to Article 9.4 in its panel request. Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."⁵ At a minimum, providing a brief summary of the legal basis of the complaint sufficient to present the problem clearly would require that Korea's panel request identify Article 9.4.⁶ Accordingly, Article 9.4 is not within the Panel's terms of reference. Subject to confirmation from Korea's submission being filed today that Korea did not request a finding under Article 9.4, the United States does not see the need for a second meeting with the Panel.

⁴ U.S. Answers to Panel's First Set of Questions, para. 2.

⁵ The Appellate Body has explained that:

[T]he requirements in Article 6.2 serve two distinct purposes. First, as a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of a panel. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying respondents and potential third parties of the nature of the dispute and of the parameters of the case to which they must begin preparing a response. To ensure that such purposes are fulfilled, a panel must examine the request for the establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU". Such compliance must be "demonstrated on the face" of the panel request, read "as a whole".

US – Continued Zeroing (AB), para. 161 (footnotes omitted).

⁶ See, e.g., *Korea – Dairy (AB)*, para. 124 ("Identification of the treaty provisions claimed to have been violated by the respondent is . . . a minimum prerequisite if the legal basis of the complaint is to be presented at all.") (footnote omitted).