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UNITED STATES - ANTI DUMPING AND COUNTERVAILING MEASURES

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ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

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discussions that suggest so-called "targeted dumping" can exist among the intermediate comparisons the authority may be conducting, before the authority has properly considered and taken into account all export transactions for the product as a whole. Korea further requests that the Appellate Body complete the analysis and find that (1) the fundamental principles for determining "dumping" and "margin of dumping" also apply to the second sentence of Article 2.4.2, and that authorities cannot deny offsets when combining the subsets of intermediate comparisons created by application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement; and (2) denying such offsets inflates the "margin of dumping" and is thus contrary to the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement.

6. Korea seeks review by the Appellate Body of the Panel's interpretation of the pattern clause of the second sentence of Article 2.4.2 as not requiring the authorities to consider qualitative factors when finding a "pattern" of export prices that "differ significantly. In particular, the Panel erred in finding that:

Korea had only challenged the failure to address the "reasons" for export price differences, and had not challenged more broadly the failure to address qualitative factors and the factual context more generally. 9

The second sentence did not require the authorities to consider the reasons for export price differences as part of properly finding that a "pattern" actually existed, 10 or that the differences could be considered "significant". 11

7. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in

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II REVIEW OF THE PANEL'S FINDINGS UNDER THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

- 14. Korea seeks review by the Appellate Body of the Panel's findings under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement as they relate to the USDOC's determination that Samsung failed to meet its burden to provide evidence that "tied" the tax credits that it received under RSTA Article 10(1)(3) and RSTA Article 26 to its development, production, and sale of the large residential washers that were the subject of the USDOC's investigation.²⁴
- 15. The Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, in finding that the "tax credit subsidies are not R&D subsidies". 25
- 16. The Panel erred in the interpretation and application of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement in finding, , that:

The tax credits that Korea bestowed under Article 10(1)(3) and Article 26 were not tied to any particular product.²⁶

As a result, the USDOC was justified in allocating the tax credit subsidies across all products and not just to digital appliances, including large residential washers.²⁷

The relevant subsidies were not R&D subsidies because they were awarded after the underlying R&D activities had been undertaken.²⁸

The benefits that Samsung received as tax credits constituted revenue foregone or not collected, which is equivalent to cash that Samsung could keep in its accounts and/or spend on any product.²⁹

Samsung's discretion regarding the use of the cash resulting from the tax credit subsidies justified the USDOC's treatment of those subsidies as "untied".³⁰

Since the benefits that arose from the tax credit subsidies could be used in any way, the USDOC was not required to find that those subsidies were tied to the production of the products for which the R&D activity was undertaken.³¹

Т

18. Korea seeks review by the Appellate Body of the Panel's interpretation and application of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement as it relates to the USDOC's determination that it should use the sales value of the products that Samsung produced and sold in Korea, rather than the sales value of the products that Samsung produced and sold worldwide, as the denominator in the formula that the USDOC used to calculate the subsidy margin for the tax credits that Samsung received under RSTA Article 10(1)(3).³⁴ The Panel erred, inter alia, in finding that:

The "real issue" was not the correctness of the USDOC's allocation of the benefit conferred by the RSTA Article 10(1)(3) tax credit subsidies based on the effects of the R&D activities that gave rise to the tax credits.³⁵

The benefit of the tax credit subsidy was the "tax credit cash" that Samsung received, and that benefit was not tied to the R&D activities that gave rise to the tax credits since Samsung was free to dispose of the cash as it saw fit. 36

The positive effects of the R&D activities on Samsung's overseas production activities do not constitute a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.³⁷

The USDOC was entitled to rely on its presumption that Korea granted the Article 10(1)(3) tax credits to benefit only domestic production.³⁸

The USDOC was entitled to conclude that neither Samsung nor Korea had rebutted that presumption.³⁹

19. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.319 and 8.1(b)(v), that Korea failed to establish that the denominator used to calculate the margin attributable to RSTA Article 10(1)(3) tax credits should consist solely of the sales value of products produced by Samsung in Korea. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement by failing to use as the denominator the value of Samsung's worldwide product sales, rather than its domestic sales.

³⁴ Panel Report, paras. 7.316-7.319.

³⁵ Panel Report, para. 7.317.

³⁶ Panel Report, para. 7.317.

³⁷ Panel Report, para. 7.317.

³⁸ Panel Report, para. 7.318.

³⁹ Panel Report, para. 7.318.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

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Panel based its findings concerning the operation of the alternative, average-to-transaction

ANNEX B-2

EXECUTIVE SUMMARY OF KOREA'S

- 7. The Panel also seems to have believed that prohibiting zeroing within each of the two subsets meant that all comparisons would be considered equally. But prohibiting zeroing within each subset ensures only that the net amounts emerging from each subset reflect all of the transactions within each subset. Those amounts still have to be combined. By setting any negative amount from the subset using the normal comparison methods equal to zero (and denying any offsets for this negative amount), the Panel's approach improperly acts as if the export prices in that subset were lower than they really were. Each export price should be given the same full effect in either subset, regardless of the comparison method applied to that subset.
- 8. The Panel also showed a fundamental misconception about the relationship between any "dumping" and the associated "margin of dumping". The numerator and denominator must refer to the same total universe of export sales. The Panel's approach ignores the interrelationship of the amount of "dumping" and the "margin of dumping". This connection is expressed most directly in Article VI:2 of the GATT and the Anti-Dumping Agreement, where the "amount" of the duty imposed to offset "dumping" is limited to no more than the "full margin of dumping" (Article 9.1) and "shall not exceed the margin of dumping"-(Article 9.3). The same connection can also be seen in Article 7.2 regarding provisional measures. Article VI:1 of the GATT and Article 3 also require a connection between "dumping" or the "dumped imports" and the material injury to the domestic industry. The Panel's approach also disregards prior Appellate Body decisions that require both the numerator and denominator to reflect all comparison results.
- 9. A major part of the Panel's rationale was its belief that the purpose of the second sentence was to allow authorities to "unmask" so-called "targeted dumping". But the Panel misunderstood the purpose of the second sentence, and then used this misunderstanding to disregard the consistent Appellate Body jurisprudence about the concepts "dumping" and "margin of dumping".
- 10. One must look beyond short-hand phrases and look at the actual provision and its purpose more closely. The purpose that most closely links the text and context of the second sentence is simply to allow the authority to undertake the more careful examination of individual export prices that the W-T comparison method allows. The purpose to "unmask" individual export prices,

- E. The Panel Erred in Finding that Samsung Failed to Tie the Subsidies that it Received Under RSTA Article 10(1)(3) and RSTA Article 26 that Were Attributable to Investments Made by its Digital Appliance Business Unit to the Products Made by that Unit
- 27. Samsung, a large and highly diversified Korean company, utilized two provisions of Korean law that provided tax credit subsidies for making specified investments in R&D activities

- 33. Since the Panel failed to apply the correct tying test, it thereby failed to apply either Article VI:3 of the GATT 1994 or Article 19.4 of the SCM Agreement. Had the Panel applied the required tying analysis, it would have determined that the Article 10(1)(3) and Article 26 tax credits that Samsung received on its development, production, and sale of large residential washers were at the de minimis level, i.e. they provided a total benefit of less than 1% ad valorem. Consequently, the USDOC would not have issued a countervailing duty order to Samsung based on undisputed record facts.
- 34. The USDOC itself has stated that the manner in which the proceeds from any type of subsidy are spent is irrelevant to the issue of whether a subsidy can be tied to a particular product or group of products. In the preamble to the final countervailing duty regulations that the USDOC published on November 25, 1998, the USDOC provided an extended discussion of the concept of tying, and it addressed various comments that interested parties submitted on the subject of how and when tying to a particular product should be found. Some commenters "argued that because money is fungible, the Department should not allow subsidies to be tied to particular products or to particular export markets." The USDOC rejected this argument. Therefore, the Panel erred in finding that the unrestricted use of proceeds from a subsidy program constituted the deciding factor in determining whether those proceeds could be tied to a particular product or product line.
- 35. Equally important, the Panel was not free to reject the USDOC's finding that the use of proceeds from a subsidy was irrelevant to a tying analysis. By doing so, the Panel improperly substituted its own rationale as its legal basis

40. The Panel rejected Korea's arguments on the same ground as it rejected the arguments that Korea made concerning the tying issue. Specifically, the Panel found that the "tax credit cash" benefit that Samsung received as a result of the tax credit program was "not tied to the R&D activities that gave rise to the tax credits, since Samsung is free to dispose of the tax credit cash as it sees fit." Moreover, even though Samsung's overseas subsidiaries may have benefited from the R&D activities that Samsung performed in Korea, the "positive effect" of those activities "does not constitute 'benefit' within the meaning of Article 1.1(b)

ANNEX B-3

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY¹

- 1. Korea appeals a number of Panel findings related to the U.S. anti-dumping and countervailing duty measures that Korea has challenged in this dispute. As demonstrated in this submission, the Panel did not err in its interpretation and application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Additionally, as shown below, Korea's various claims that the Panel acted inconsistently with Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") lack merit.
- 2. The U.S. appellee submission is organized as follows, and includes detailed discussion of, the following arguments.
- 3. <u>Section II.A</u> responds to Korea's appeal of the Panel's findings related to the approach of the U.S. Department of Commerce ("USDOC") to the application of a "mixed" comparison methodology. In Korea's view, the Panel should have found the USDOC's approach inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement for the same reasons that it found zeroing inconsistent with those provisions of the AD Agreement. The Panel was correct to reject Korea's claims. Indeed, if, as the Panel found, the alternative comparison methodology can only be applied to a subset of sales, then the Panel's finding with respect to a "mixed" comparison methodology is the only way to interpret the second sentence of Article 2.4.2 so as to give meaning to this key provision of the AD Agreement.
- 4. Korea fails to offer any legal argument against the USDOC's approach that would accord with the customary rules of interpretation as to why mandatory re-masking is required under the second sentence of Article 2.4.2 of the AD Agreement. Instead, Korea argues that the USDOC's

- 8. The Panel did not find that "individual low prices" can be "dumped" or that "dumping" can "exist at the level of individual export prices." The Panel found that the second sentence of Article 2.4.2 of the AD Agreement provides a means for investigating authorities "to ensure that any evidence of dumping with regard to [pattern transactions] is not masked by non-dumping in respect of transactions falling outside of the pattern." When the price of an export transaction is below normal value, that may, indeed, be "evidence of dumping." When the price of an export transaction is above normal value, that may be evidence suggesting that no dumping has occurred. However, such a price also could be masking evidence of dumping under certain circumstances, such as when the "stringent conditions" set forth in the second sentence of Article 2.4.2 of the AD Agreement have been established.
- 9. Contrary to Korea's argument, the second sentence of Article 2.4.2 establishes "special rules." The Panel was right to interpret the second sentence of Article 2.4.2 as being an exception to the first sentence of Article 2.4.2, and as setting forth a special methodology for establishing margins of dumping that may be used when certain conditions are met.
- 10. The United States does not disagree that all of an exporter's export transactions must be "taken into account" in the determination of dumping. The USDOC's approach does, in fact, take account of all export transactions. What Korea really means, however, is that evidence of "targeted dumping" must be re-masked by aggregating all results for all transactions in the numerator of the calculation of the margin of dumping. Korea provides no legal or logical basis for this conclusion.
- 11. Korea's arguments raise the question of what it means for an export transaction to be "consider[ed]" or "taken into account." To the extent that certain export transactions may be masking "evidence of dumping," it is appropriate for those export transactions to be "taken into account" in a way that prevents such masking.
- 12. The weakness of Korea's appeal is evidenced by Korea's astonishing attempt to contest the clear and obvious role of the second sentence of Article 2.4.2 within the context of the AD Agreement as a whole. Korea now argues that the "purpose" of the second sentence "is simply to allow the authority to undertake the more careful examination of individual export prices that the [average-to-transaction] method makes possible." Korea's argument makes no sense. If Korea were correct, there would never be any reason for an investigating authority to resort to the alternative, average-to-transaction comparison methodology described in the second sentence of Article 2.4.2. The transaction-to-transaction comparison methodology, set forth in the first sentence of Article 2.4.2, already provides an investigating authority with the possibility of undertaking such a "granular examination of individual export prices," and also individual normal value sales transactions.
- 13. The only logical conclusion, as the Appellate Body has itself observed, and as the Panel, both of the parties (at one time or another), and all but one of the third parties in this dispute agreed, is that the second sentence of Article 2.4.2 of the AD Agreement is intended "to enable investigating authorities to 'unmask' so-called 'targeted dumping'."
- 14. Korea's arguments related to mathematical equivalence lack merit. The U.S. appellant submission discusses the Appellate Body reports in prior disputes to which Korea refers and demonstrates that the Appellate Body's previous consideration of mathematical equivalence neither supports rejection of the mathematical equivalence argument in this dispute, nor compels it. Korea also contends that the Panel "provided no support" for its mathematical equivalence finding. However, it is evident from the panel report that, after considering the positions of the parties, the Panel agreed with the United States and did not agree with Korea.
- 15. The U.S. appellant submission conclusively demonstrates mathematical equivalence. It is evident from Korea's arguments regarding different weighted average normal values and different adjustments that breaking mathematical equivalence is Korea's goal. Korea is not seeking an interpretation that gives meaning to the second sentence of Article 2.4.2 of the AD Agreement. On the contrary, Korea seeks to read the second sentence of Article 2.4.2 out of the AD Agreement entirely. Such an interpretation is inconsistent with the customary rules of interpretation of public international law, in particular the principle of effectiveness.

16. Korea also argues that the Panel erred in finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent, "as such," with Article 2.4 of the AD Agreement. Korea's arguments concerning Article 2.4 are dependent on its arguments

account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

25. Korea argues that the Panel incorrectly interpreted the "explanation clause" by finding that it does not require an investigating authority to provide an explanation regarding both the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. Korea's arguments lack merit. The Panel's interpretation follows from a proper analysis pursuant to the customary rules of interpretation of public international law. Korea's proposed interpretation fails to read the terms of the "explanation clause" in their proper context, in particular in the context of the first sentence of Article 2.4.2, which affords an

- 34. Korea adduces a narrow, results-oriented reading of Article 2.2 of the SCM Agreement. According to Korea, the phrase "certain enterprises" in Article 2.2 means that regional specificity exists only where access to a subsidy is limited to the "legal personality" of enterprises falling within the region. On this theory, an enterprise can only have a single "location" i.e., the "place" of its legal personality (despite the fact that an enterprise's legal personality is a fiction, and may not be affixed to a particular location).
- 35. The Panel correctly rejected this interpretative legerdemain. As the Panel observed, this line of reasoning is inconsistent with the text, context, and rationale of Article 2.2. Article 2.2 applies to situations in which access to subsidies is limited to a designated geographical region. The term "certain enterprises," which appears in Article 2.2, does not imply an additional requirement i.e., that subsidies also must be limited with respect to the "location" of an individual enterprise's legal personality. Such a reading would be inconsistent with the definition of "certain enterprises" found in the chapeau of Article 2.1(a) of the SCM Agreement, and the ordinary meaning of the terms within that definition. Nor is Article 2.2 restricted to the location in which an enterprise happens to receive the "benefit" of a subsidy (which may or may not correspond to the location of that enterprise's "legal personality"). Korea's attempt to conflate concepts of "benefit" and specificity is improper.
- 36. And Korea's approach would create gaping loopholes where the text does not provide for them. Korea draws a sharp distinction between an "enterprise" and its "facilities," asserting that the latter are somehow excluded from the former and irrelevant to Article 2.2. This interpretation would permit RSTA Article 26 subsidies which are available with respect to "facilities" that are located in a designated region to evade scrutiny under the SCM Agreement.
- 37. In addition, Korea effectively re-asserts its argument that there is a "hierarchy" between Articles 2.1(b) and 2.2 of the SCM Agreement. The Panel

- 42. In <u>Section III.B</u>, we address Korea's arguments with respect to the USDOC's calculation of the subsidy ratio for RSTA Articles 10(1)(3) and 26. Korea impugns the USDOC's decision to calculate these ratios in an "untied" manner. According to Korea, the USDOC should have employed a novel variation of the "tied" approach to attribution. Under Korea's theory, the USDOC should have carved up both the numerator and denominator of the subsidy ratio, based on a forensic accounting analysis of R&D and facilities expenses previously incurred.
- 43. The Panel appropriately rejected Korea's novel theory. As the Panel found, Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require that approach. Korea's theory is based on the alleged effect—which Korea misleadingly refers to as the "benefit"—of expenses that were incurred and associated activities that were undertaken well before the subsidy was bestowed. The Panel observed that the concept of an "expense" or "activity" conferring a "benefit" is alien to the SCM Agreement.
- 44. As the Panel's findings and record demonstrate, the R&D and facilities subsidies at issue lacked a "tie" to particular products:

The RSTA legislation did not specify any product-specific tie, and eligibility criteria were not limited by product type. In particular, the legislation did not require that the recipient use subsidies in connection with a particular product.

The structure, architecture, and design of the RSTA subsidy programs did not reflect a product-specific tie. As the Panel found, the tax credits were conferred by reference to "total R&D activities." Samsung submitted an pool of expenses, and received an pool of tax credits based on formulas that related to and expenses for the company's entire domestic operations and not to particular products.

Samsung's tax return did not indicate any product-specific use of RSTA subsidies, and the granting authority—the Government of Korea ("GOK")—did not acknowledge any such product-specific use at the time of bestowal.

- 45. Korea's remaining assertions including its reliance on cost accounting materials from separate anti-dumping proceedings are equally deficient. As the Panel explained, there is no basis for importing cost accounting principles into this countervailing duty proceeding. Nor did the Panel fail to conduct an objective assessment under Article 11 of the DSU, as Korea asserts.
- 46. <u>Section III.C</u> refutes Korea's claim with respect to overseas manufacturing. Korea criticizes the Panel for upholding the USDOC's decision not to include overseas sales in the denominator of the ratio for RSTA Article 10(1)(3) subsidies. Korea portrays this as a failure to "match" the elements in the numerator and denominator.

ANNEX B-4

EXECUTIVE SUMMARY OF KOREA'S APPELLEE'S SUBMISSION¹

A. The Panel Correctly Found That the Second Sentence of Article 2.4.2 Does Not Permit Zeroing

- 1. The Appellate Body has repeatedly clarified that "dumping" only exists based on a full consideration of <u>all</u> export transactions by each exporter, and only based on the product as a whole. Considering all export transactions is not "masking" anything, and is an indispensable part of a proper finding of "dumping".
- 2. The U.S. arguments on why the second sentence of Article 2.4.2 allows zeroing share two overarching flaws. First, the United States tries to distinguish the second sentence from the first sentence based on a few words in isolation without taking into account the Anti-yes4952(f)5(ro)-5(m 4 51 0 0 1 283.61 774.96 Tm[(Tm[(ye)-3(sETBT1 0 0 1 166.7 6237.9 Tm[(A)4(n)6(t)-4.51 0 0 1 166.7 6237.9 Tm](A)4(n)6(t)-4.51 0 0 166.7 6237.9 Tm](A)4(n)6(t)-4.51 0 0 166.7 6237.9 Tm](A)4(n)6(t)-4.51 0 0 166.7 6237.9 Tm](A)4(n)6(t)-4

- 8. Second, as is true with its hypothetical examples, the specific U.S. examples from also depend on the same assumption that normal value does not change. Korea submitted specific evidence to the Panel demonstrating what would have happened in the original investigation if normal value had been changed from an annual average to monthly averages. The results showed materially different dumping margins for both Samsung and LG. The United States never disputed this evidence.
- 9. Third, this argument of "mathematical equivalence" has been considered and rejected by the Appellate Body four times. The Appellate Body has repeatedly found that even if "under certain circumstances" or "under a specific set of assumptions" the results from different comparison methods are equivalent, such a situation does not render a provision . The U.S. efforts to distinguish these repeated Appellate Body findings fail. The Appellate Body's occasional use of the phrase "unmask targeted dumping" does not require any different conclusion.
- 10. The Panel did not create a new approach that "effectively rewrote the second sentence". The Appellate Body has already provided repeated clarification of what "dumping" and "margin of dumping" mean for the Anti-Dumping Agreement. It is the United States not the Panel that now seeks to rewrite the text of Article 2.4.2 to create a different concept of "dumping" one that finds "dumping" to exist in a subset of export transactions and ignores the remainder of the export transactions for an exporter.

B. The Panel Correctly Interpreted the "Pattern" Requirement

11. The Panel correctly found that the "pattern" must consist of a set of export prices that actually demonstrate some discernible order, and cannot just be a collection of random export price differences. The current USDOC methodology takes any situation of enough price differences beyond a certain threshold and then labels those differences as a "pattern" even if they are actually just random price differences.

1. High and Low Prices Are Not Part of the Same "Pattern"

- 12. The fundamental flaw in the U.S. argument is that it fails to properly read the ordinary meaning of "pattern" in the overall context of the second sentence. The United States simply strings together dictionary definitions, and misses the most important contextual point in the second sentence—that the terms "pattern" and "differ significantly" set forth distinct requirements that both must be met. It is not enough to have export prices that "differ significantly" within one of the three specially enumerated categories. This need to focus on specific categories is precisely why the text does not just say the authorities must "find export prices which differ significantly". The text also requires finding a "pattern".
- 13. A "pattern" of lower prices makes sense because the lower prices can constitute the "intelligible form" that can be discerned from the other prices. There might even be a "pattern" of higher prices higher export prices that stand out from the other export prices in some discernible and intelligible way. Yet the United States ignores this aspect of the term "pattern" and allows a "pattern" to be any collection of differing prices including both higher and lower prices at the same time.
- 14. The United States also incorrectly believes that because the lower prices are being distinguished with reference to the higher prices, both the lower prices and the higher prices and all of the other prices are necessarily part of the "pattern". The Panel correctly dismissed this argument by noting the higher and lower prices could not be part of the same "pattern". The Panel noted that the "characteristic for establishing the degree of price variation is therefore not the same", since being higher than other prices or being lower than other prices are distinct "patterns".

- 15. Any need to "unmask" so-called "targeted dumping" does not change this interpretation. Korea has explained at some length in its Other Appellant Submission that the Panel misconceived the purpose of the second sentence, and that this language, "unmask targeted dumping", used by the Appellate Body in a single decision must be understood in context.
- 2. Random Price Differences Cannot Be Aggregated to Find a "Pattern"
- 16. The Panel correctly found two textual bases for its interpretation that distinct categories cannot be combined. First, the Panel reasonably interpreted the term "or". Since the categories of

ANNEX C

ARGUMENTS OF

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

ANNEX C-2

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY¹

- 1. Canada is participating in this appeal as it has a substantial systemic interest in the interpretation of WTO anti-dumping rules.
- 2. Canada's written submission addresses three issues regarding the application of the exceptional weighted average-to-transaction (average-to-transaction) methodology referred to in

does not accord with the requirement to determine a margin of dumping for the product as a whole.

- 23. The United States insists that the second sentence of Article 2.4.2 would be inutile unless zeroing is permitted. In the United States' view, in order to avoid inutility, it is essential that the results of use of the W-T comparison methodology differ systematically from those that would arise under the W-W comparison methodology. Yet, to the extent that the investigating authority considers it necessary to ensure that the application of the W-T comparison methodology leads to a different outcome than the application of the W-W comparison methodology, it may always have recourse to the existing WTO-consistent alternative techniques for calculating the weighted average normal value.
- 24. Overall, although certain elements of the Panel's reasoning are problematic, the Appellate Body should uphold the Panel's finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Article 2.4.2, second sentence.
 - C. The Panel erred by allowing investigating authorities to disregard certain results when combining the results of W-T comparisons with other comparisons obtained through using the W-W comparison methodology
- 25. The Panel erred when it rejected Korea's claim that USDOC's practice of failing to give the full mathematical weight to the intermediate results of certain comparisons when aggregating those results with the intermediate results of other comparisons, amounts to a form of zeroing. Under the challenged p

30. The Appellate Body should uphold the Panel's finding and find that the Panel did not err in finding that the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the and with Article VI:2 of the GATT 1994.

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

A. Korea's claims under the Anti-Dumping Agreement

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10. The European Union agrees with the Appellate Body in that the application of one of the sub-paragraphs of Article 2.1 is not

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

- 1. In this appellate proceeding, Japan will focus on the requirements of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement and the USDOC's methodologies concerning the application of the said provision. In doing so, Japan would particularly like to address the systemic issues arising out of the USDOC's continued use of zeroing when determining dumping and calculating margins of dumping by referring to the second sentence of Article 2.4.2.
- 2. To start with the overview of the relevant provisions of the Anti-Dumping Agreement and the understanding of dumping and margins of dumping as a background, Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement recognise dumping when "a product" is

- 8. The appropriate scope of the application of the W-T comparison methodology under the second sentence should be determined by considering not only the term "pattern" in isolation but also its context, including, , its explanation clause as well as the first sentence. Since the W-W and T-T comparison methodologies under the first sentence cover situations where all export transactions are taken into account, it appears natural to limit the application of the W-T comparison methodology under the second sentence in a manner necessary and appropriate to unmask the "three kinds of" targeted dumping, i.e. dumping targeted purchasers, regions or time periods. This reading is consistent with the use of the term "may" in the second sentence, as well as the Appellate Body's explanation in
- 9. Regarding the permissibility of zeroing under the second sentence of Article 2.4.2, neither that provision nor other provisions of the Anti-Dumping Agreement contain any language suggesting that an investigating authority is allowed to depart from the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-specific, and not transaction-specific, concepts. Zeroing is also at odds with, and goes far beyond, the role and function of the second sentence of Article 2.4.2 to unmask the "three kinds of" targeted dumping. Furthermore, the mathematical equivalence argument does not warrant an interpretation that zeroing is permitted. While this argument rests on the assumption that W-W and W-T comparison methodologies always or normally use the exact same set of pricing data (i.e. normal value(s) and export prices), such assumption finds no basis in the Anti-Dumping Agreement.
- 10. Finally, with respect to the application of the second sentence of Article 2.4.2 to the specific methodology adopted by the USDOC, the DPM relies solely on mechanical and inflexible criteria such as +0.8 or 0.8, and 33% in order to determine whether export prices "differ significantly" from one another. Thus, the DPM fails to consider the prevailing factual circumstances on a case-by-case basis, which is inconsistent with the second sentence of Article 2.4.2. In addition, the DPM fails to identify a pattern of export prices which differ significantly "among different purchasers, regions or time periods", because it aggregates unrelated price variations different purchasers, regions time periods, and because it takes into account price variations among different

EXECUTIVE SUMMARY OF NORWAY'S THIRD PARTICIPANT'S SUBMISSION

THE USE OF ZEROING

- 1. The Panel found that the United States' use of zeroing when applying the "weighted-average-to-transaction" methodology is both "as applied" and "as such" inconsistent with the second sentence of Article 2.4.2 and Article 2.4 of the

 The United States seeks review of these findings. Norway argues that the Panel's findings on these issues should be upheld.
- 2. In line with previous Appellate Body Reports, Norway holds that "dumping" and "margins of dumping" cannot occur at the level of individual transactions. The Appellate Body has emphasized that the concepts have the same meaning throughout the and for all types of proceedings. All intermediate comparison results must be aggregated in order to establish the margin of dumping for the product as a whole and for each individual exporter. The negotiation history referred to by the United States furthermore only shows that some Members were concerned about the use of zeroing when applying the comparison methodology in question. A permission of applying zeroing when using said methodology cannot be deducted.
- 3. Furthermore, the use of zeroing while applying the "weighted-average-to-transaction" methodology distorts certain facts related to the investigation and contains an inherent bias, making a positive determination of dumping more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the

EXECUTIVE SUMMARY OF VIET NAM'S THIRD PARTICIPANT'S SUBMISSION

1. The Panel

ANNEX D

PROCEDURAL RULING

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ANNEX D-1

PROCEDURAL RULING OF 9 MAY 2016

- 1. On 5 April 2016, the United States and Korea jointly addressed a letter ("joint request") to the Chairman of the Appellate Body, requesting that the Division that would hear the appeal in this dispute adopt, pursuant to Rule 16(1) of the Working Procedures, additional procedures for the protection of business confidential information (BCI) on the record of this dispute.
- 2. The United States and Korea requested the Appellate Body to adopt additional procedures for the protection of BCI on the basis of the BCI procedures adopted by the Panel and attached draft procedures to their joint request. They explained that BCI procedures in this appeal would serve "the interest of fairness and orderly procedure in the conduct of an appeal", according to Rule 16(1) of the Working Procedures.
- 3. The United States and Korea stated that the BCI procedures adopted by the Panel were necessary to enable the parties to submit to the Panel BCI that was previously treated as confidential in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute. They requested additional protection of BCI allowing third pa

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information, its competitors, customers, or suppliers; the degree of potential harm in the event of

or the staff of the Appellate Body Secretariat, an employee of a participant or third participant, and an outside advisor for the purposes of this dispute to a participant or third participant. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations at issue in this dispute.

- 18. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant or third participant shall have responsibility in this regard for its employees as well as any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.
- 19. A participant or third participant that submits a document containing BCI to the Appellate Body, including in written submissions and oral statements, shall clearly identify such information in the document. The participant or third participant shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as

information on pages XXX", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party or third party that intends to