Korea - Anti-dumping Duties on Imports of Certain Paper from Indonesia
(DS312)

Recourse to Article 21.5 by Indonesia
Third Party Submission
by the European Communities

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. CLAIMS ARISING FROM THE MEASURES TAKEN BY KOREA TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS 1

A. On Korea's alleged violation of Article 6.8 and Annex II of the *Anti-dumping Agreement* *3*

B. On Korea's alleged violation of Articles 2.2 and 2.2.2 of the *Anti-dumping Agreement* *1*

III. CLAIMS RELATING TO KOREA'S PROCEDURAL OBLIGATIONS 6

A. On KTC's reconsidering the issue of CMI's activities *6*

B. On Korea's refusal to accept new information on CMI's activities provided by the exporters and on Korea's refusal to provide interested parties with access to information on which it based its re-determination of injury *7*

I. INTRODUCTION

1. The European Communities makes this third party submission to provide the Panel with its views on the correct interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "***Anti-dumping Agreement***"). In line with the European Communities' submission in the original proceedings in this case, this submission will only address those issues of legal interpretation that are of particular interest to the European Communities. The European Communities reserves the right to comment on other matters in its oral statement.

II. CLAIMS ARISING FROM THE MEASURES TAKEN BY KOREA TO COMPLY WITH THE DSB'S RECOMMENDATIONS AND RULINGS

A. On Korea's alleged violation of Article 6.8 and Annex II of the Anti-dumping Agreement.

(i) The parties' arguments

2. Indonesia notes that the original Panel Report concluded that the Korean Trade Commission ("**KTC**") had failed to exercise special circumspection in the use of information from secondary sources when applying facts available, because it did not explain in its decision why it calculated CMI's financial expenses on the basis of the financial expenses of a *manufacturing* company, although KTC had in its possession data relating to a company which carried out solely *trading* activities, i.e., activities similar to those of CMI.[1] Indonesia also notes that the original Panel Report states that CMI is a trading company and that, during the original panel proceedings, the parties did not contest the fact that CMI did not manufacture the products under investigation.[2]

3. Indonesia then argues that, in light of these Panel findings, KTC could only do one thing in implementing the relevant Panel conclusion: replace the allegedly

[1] See Indonesia's First Submission, at paras. 34 to 38.

"erroneous" information on CMI's financial expenses with the "correct" one, based on the data already in KTC's possession and relating to the company with activities similar to those of CMI, i.e., the company carrying out solely trading activities.[3] Indonesia thus appears to assert that Article 6.8 and Annex II of the *Anti-dumping Agreement* impose on an investigating authority, which is in the process of complying with the conclusions of a panel report, the obligation to seek from the best and most appropriate sources *only* the specific "missing information".[4]

4. Korea claims that the error identified by the Panel on this point was simply the lack of adequate explanation in the KTC analysis. Korea notes that the Panel accepted that it would be possible to use the interest expenses of a manufacturing company as "facts available" for the calculation of the interest expenses of a trading company, as long as the investigating authority provides an adequate explanation for its decision.[5] Korea argues that KTC provided such an adequate explanation in its new decision.[6]

(ii) <u>The European Communities' views</u>

5. The European Communities reads Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "**DSU**") to impose on Members the obligation to do what is necessary to bring their measures into conformity with the panel's findings and conclusions. There may be several ways to do this. Where, for example, the panel finds that a particular figure in an anti-dumping decision is incorrect, the investigating authority would need simply to replace the wrong figure in the text of the decision with the correct one. However, where, as in the present case, the panel concludes that the reasoning of an anti-dumping decision is not sufficiently developed, the investigating authority would need to redraft the relevant part of the decision providing a more complete analysis, to the panels' satisfaction. The European Communities takes the view that investigating authorities have the discretion to decide the amendments they

[2] See Indonesia's First Submission, at para, 94.
[3] See Indonesia's First Submission, at paras. 93, 95 and 103.
[4] See Indonesia's First Submission, at paras. 98 and 125.
[5] See Korea's Fist Submission, at paras. 5 and 48.
[6] See Korea's First Submission, at para. 32.

need to introduce to their decision in order to improve its reasoning and, thus, comply with the panel's findings.

6. The European Communities considers that Article 6.8 and Annex II of the *Anti-dumping Agreement* provide the procedural safeguards that investigating authorities should follow in the collection and evaluation of evidence, in order to ensure the evidence's reliability, accuracy and completeness. The European Communities does not consider that Article 6.8 and Annex II of the *Anti-dumping Agreement* were intended to restrict the application of Article 19.1 of the DSU and limit the measures an investigating authority could take in order to comply with a panel report.

7. Therefore, the European Communities submits that an investigating authority does not violate Article 6.8 and Annex II of the *Anti-dumping Agreement* where, in complying with a panel finding that the reasoning of the anti-dumping decision is not sufficiently developed, it seeks to develop improved arguments and explanations in its new decision (as long as its alternative action is consistent with the *Anti-dumping Agreement*).

B. On Korea's alleged violation of Articles 2.2 and 2.2.2. of the Anti-dumping Agreement

(i) <u>The parties' arguments</u>

8. Indonesia claims that the KTC has violated Articles 2.2 and 2.2.2 of the *Anti-dumping Agreement*, because it failed to calculate properly the selling, administrative and general expenses of the exporters: in calculating the costs of the company selling the products under investigation in the Indonesian market (i.e., CMI), KTC used a *trading* company (i.e., a company without any manufacturing activities) as a proxy for the general selling and administrative expenses, but added to these expenses the interest expenses of a *manufacturing* company. Indonesia contends that, since CMI was only selling and not producing the subject products,

KTC should have taken into consideration only the interest expenses of a purely trading company and not those of a company with manufacturing activities.[7]

9. Korea claims that KTC's calculation of the exporters' interest expenses did not depend on the exact scope of the activities of CMI.[8] Korea notes that KTC's decision states clearly that the exact nature of the activities of CMI could not be determined, because the Indonesian exporters had refused to cooperate and provide the necessary information on time. KTC assigned the particular interest expenses to CMI not because these were the interest expenses of a trading company, or of a manufacturing company, but because KTC's analysis led it to conclude that such interest expenses were a "reasonable" estimate. In reaching this conclusion, KTC took into consideration the costs of Korean companies operating in the same product market in Korea and Indonesian companies operating in different product markets in Indonesia.[9] Finally, Korea asserts that the value assigned to CMI's interest expenses was favourable to the Indonesian exporters, because it was lower than the value of the interest expenses actually recorded by the Indonesian manufacturing company allegedly used as a proxy, the Korean traders of the products under investigation and the Indonesian producers of unrelated products.[10]

(ii) <u>The European Communities' views</u>

10. The European Communities notes that the original panel exercised judicial economy and did not address the Indonesian claims under Article 2 of the *Anti-dumping Agreement* in its report. The European Communities also notes that Korea's first written submission in the present case does not fully answer Indonesia's Article 2 claims. The European Communities reserves the right to make additional comments after having the opportunity to review the parties' rebuttals. At this stage and on the basis of the parties' first written submissions, the European Communities would like to make two comments.

[7] See Indonesia's First Submission, at paras. 68, 75 and 83.
[8] See Korea's First Submission, at paras. 44, 45 and 53 to 55.
[9] See Korea's First Submission, at paras. 31 and 56.
[10] See Korea's First Submission, at para. 56 and footnote 30.

11. First, with regard to Korea's claims, the European Communities notes that Article 2.1 of the *Anti-dumping Agreement* imposes on investigating authorities the obligation to compare the export price of the product under investigation with the sale price of the same product in the exporter's home market. Where this is not possible, Article 2.2 allows investigating authorities to use as a basis of comparison the cost of production of the like product in the exporters' home country. When investigating authorities choose to follow the Article 2.2 procedure, Article 2.2.2 obliges them to calculate the general, selling and administrative costs of the companies under investigation on the basis of their actual production and sales costs. Where this is not possible, the three sub-paragraphs of Article 2.2.2 permit investigating authorities to calculate general, selling and administrative costs and profits on the basis of (i) the actual amounts incurred by the companies under investigation for the production and sale of the same general category of products in their home market, (ii) the weighted average of the actual costs incurred by other companies under investigation for the production and sale of the like product in their home market, or (iii) any other reasonable method, provided that the amount for the profit will not exceed the one normally realised by other companies for the sales of products of the same general category in the exporters' home market. Korea appears to argue in its first written submission that, in determining the amount of interest expenses to be assigned to CMI, KTC followed the procedure under Article 2.2.2(iii).[11] The European Communities reserves the right to comment upon the "reasonableness" of KTC's calculations after having the opportunity to review the parties' rebuttals on this point.

12. Second, with regard to Indonesia's claims, the European Communities takes the view that a company that simply re-sells the product under investigation, but also manufactures *other* products would normally incur interest expenses stemming from both activities. Interest expenses linked to long term obligations, such as those aimed at financing capital infrastructure to support the manufacturing activities, would normally affect the general cost structure of the company and hence influence the pricing of *all* the products it offers, including those products

[11] See Korea's First Submission, at para. 29

that the company does not produce itself. This characteristic differentiates those interest expenses from e.g., pure selling expenses that would normally affect the cost and pricing only of the particular product they aim to promote.

13. Therefore, the European Communities submits that an investigating authority would not act inconsistently with Articles 2.2 and 2.2.2 of the *Anti-dumping Agreement* if, on the facts of a particular case, it calculates the normal value taking into consideration interest expenses resulting from a company's manufacturing activities, even where these manufacturing activities are not directly linked to the sale of the product under investigation. This is particularly true where such interest expenses are linked to long term obligations, such as those aimed at financing capital infrastructure. The European Communities reads the original Panel's statement that "we do not suggest that the IA is generally precluded from using the interest expenses of a producing company as proxy for those of a trading company" to support the European Communities' view.[12]

III. CLAIMS RELATING TO KOREA'S PROCEDURAL OBLIGATIONS

A. On KTC's reconsidering the issue of CMI's activities.

(i) The parties' arguments

14. Indonesia argues that, in implementing a panel's decision, an investigating authority may not "reject or discount undisputed facts from the original investigation", or else it risks violating Article 6.8 and Annex II of the *Anti-dumping Agreement*.[13] Indonesia claims that the characterisation of CMI as a purely trading company was an "undisputed fact", noting that both parties accepted before the original panel that CMI did not produce the products under investigation.[14] The Panel Report also states that CMI was a trading company.

[12] See the original panel's report in *Korea – Anti-dumping duties on imports of certain paper from Indonesia*, at para. 7.110
[13] See Indonesia's First Submission, at para. 155.
[14] See Indonesia's First Submission, at paras. 29 to 32, 35, 37, 148 and 149.

15. Korea argues that it never conceded that CMI was a purely trading company and that it consistently took the position that the full range of the activities of CMI could not be ascertained due to the lack of cooperation of the Indonesian exporters.[15] Korea also argues that the original Panel identified as an error in the KTC analysis only the lack of explanation for KTC's findings and that, as a consequence, the KTC was justified in seeking to improve its analysis on this point.[16]

(ii) The European Communities' views

16. The European Communities notes that neither the DSU, nor the *Anti-dumping Agreement* defines what would be an "undisputed fact". Moreover, the European Communities reads Article 21.1 of the DSU to mean that the panel's findings and recommendations are the only parts of a panel report that are binding upon a Member, following the adoption of the panel report by the Dispute Settlement Body. The European Communities finds no support in either the DSU, or the *Anti-dumping Agreement* for the proposition that any general statements of fact in an original panel report should have the same binding effect. The power of Article 21.5 panels to assess the measures taken in compliance with the findings of an original panel report in their totality and examine new and different claims from those raised in the original panel proceedings, further supports the view of the European Communities.[17]

17. Therefore, the European Communities submits that, in complying with a panel finding, an investigating authority does not violate Article 6.8 and Annex II of the *Anti-dumping Agreement*, where its new decision provides an appreciation of facts that is different to that of its original decision, so long as the investigating authority acts in accordance with the findings and recommendations of the panel.

B. On Korea's refusal to accept new information on CMI's activities provided by the exporters and on Korea's refusal to provide interested parties with access to information on which it based its re-determination of injury

[15] See Korea's First Submission, at paras. 36 and 37.
[16] See Korea's First Submission, at para. 48.
[17] See the Appellate Body report in *US Shrimp Article 21.5- Malaysia*, at paras. 85 to 87.

(i) The parties' arguments

18. Indonesia claims that the KTC "partially re-opened the record" when it decided to reconsider the nature of CMI's activities.[18] When the Indonesian exporters realised that the KTC intended to "re-open the record" and collect evidence showing that CMI had both selling and manufacturing activities, they submitted to the KTC new information on CMI.[19] This new information consisted of (i) documents submitted for the first time (e.g., legal opinions issued by Indonesian law firms) and (ii) documents that had been submitted during the original investigation, but were rejected by the KTC (e.g., CMI domestic sales figures). Indonesia argues that, since the KTC decided to re-visit the issue of CMI's overall activities, it was obliged "to proceed as if it were addressing this issue for the first time and to conform with the requirements of Article 6 regarding the collection, analysis and rejection of factual information".[20]

19. Korea accepts that the KTC obtained "new information" during the implementation proceeding to support its analysis of CMI's interest expenses, but it asserts that the Indonesian exporters were given access to this material and the opportunity to comment upon it during the course of the implementation procedure.[21]

20. In addition, Korea argues that the KTC did not open a new investigation, nor was it obliged to open a new investigation to determine the precise scope of CMI's activities, because such an investigation would require the documentation and cooperation at verification that the Indonesian exporters had refused to provide during the original investigation. Korea asserts that there was no requirement to offer the exporters a second chance to cooperate, especially when doing so would have required KTC to conduct a second verification to confirm that the information provided by the exporters this time was complete and accurate. And Korea concludes that, if KTC was to open a new investigation, it would need "to reverse its previous finding that the exporters' refusal to provide the required

[18] See Indonesia's First Submission, at para. 150.
[19] See Indonesia's First Submission, at para. 46.
[20] See Indonesia's First Submission, at para. 166.
[21] See Korea's First Submission, at para. 64.

documentation or to cooperate at verification had impeded the investigation and dictated that the KTC base its decision on "facts available"."[22]

21. Under a separate heading, Indonesia claims that the KTC refused to disclose to the exporters the facts, information and essential elements on which it based its injury re-determination, despite the exporters' explicit requests. Indonesia argues that this refusal constitutes a violation of Articles 6.1, 6.2, 6.4, 6.5 and 6.9 of the *Anti-dumping Agreement*.[23]

22. Korea responds that the KTC analysis was based on information that had already been made available to the Indonesian exporters during the original investigation and that an investigating authority is not required to allow exporters to comment upon such information again during the implementation proceeding. Korea asserts that "nothing in Korean law or the WTO Agreements requires the KTC to solicit comments on its final determination (and accompanying explanation) after the final determination is made".[24]

(ii) The European Communities' views

23. The European Communities considers that these claims should be analysed together. The issue to be determined is the extent to which Article 6 of the *Anti-dumping Agreement* applies to the procedures followed by an investigating authority when it takes measures to comply with panel findings.

24. The case law supports the view that, in taking the measures necessary to comply with a panel finding, an investigating authority must respect the rights of interested parties contained in Article 6.4 of the *Anti-dumping Agreement*. The provisions of Article 6.4 of the *Anti-dumping Agreement* would apply both on new information (i.e., information used by the investigating authority for the first time within the context of its complying with the panel findings) and on information that was already used in previous proceedings.[25] The European Communities agrees with this interpretation of Article 6.4.

[22] See Korea's First Submission, at para. 7.
[23] See Indonesia's First Submission, at paras. 168 to 186.
[24] See Korea's First Submission, at paras. 61 and 62.
[25] See the panel report in *United States – Oil Country Tubular Goods Sunset Reviews Article 21.5-Argentina*

25. However, the European Communities notes that there is no clause in the *Anti-dumping Agreement* stating expressly that *all* of the provisions of Article 6 apply *every time* an investigating authority takes measures to comply with the findings of a panel. This leads the European Communities to conclude that the application of the provisions of Articles 6.1, 6.2 and 6.9 depends on the nature and extent of the measures required to be taken by the investigating authority in order to comply with the findings of the panel.

26. If, for example, compliance with the panel findings involves only a limited number of simple textual amendments of the original decision, it would appear unnecessary to require the investigating authority to provide opportunities for all interested parties to meet with each other and hold detailed discussions (as provided by Article 6.2). At the other end of the spectrum, where an investigating authority accepts new material and submissions from some interested parties, it should fully respect the "due process" rights of all interested parties contained in Articles 6.1, 6.2 and 6.9 of the *Anti-dumping Agreement*.

27. Therefore, the European Communities submits that the obligation of an investigating authority to comply with the provisions of Articles 6.1, 6.2 and 6.9 of the *Anti-dumping Agreement* in the implementation phase of a panel report, depends on the nature and extent of the measures required to be taken in order to comply with the findings of the panel. The European Communities further submits that, where an investigating authority accepts new information or material from some interested parties, the provisions of Articles 6.1, 6.2 and 6.9 of the *Anti-dumping Agreement* should apply fully.

IV. CONCLUSION

28. The European Communities thank the Panel for the opportunity to present its views on the proper interpretation of the provisions of the DSU and of the *Anti-dumping Agreement*. After having reviewed the parties' second written submissions, the European Communities may offer to the Panel further comments in its oral statement.