KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN

(DS504)

THIRD PARTY EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA

March 23, 2017

EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

I. ARTICLES 3.1 AND 4.1 OF THE AD AGREEMENT

1. Japan argues that the Korea Trade Commission's ("KTC") definition of the domestic industry is inconsistent with Articles 3.1 and 4.1 of the AD Agreement.

2. Article 3.1 informs the interpretation of Article 4.1. Article 4.1 establishes that the "domestic industry" can be defined as either (1) the "domestic producers as a whole of the like products," *i.e.*, all domestic producers, or (2) a subset of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production" of the like products. Article 4.1 of the AD Agreement does not require that all domestic producers be included in the domestic industry, nor does it articulate a minimum limit on the percentage of domestic production that must be included to constitute a "major proportion" of the total domestic production of those products.

3. Although undefined in the AD Agreement, the term "major proportion" must be interpreted in the context of Article 3.1 of the AD Agreement. Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence." The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

4. In this case, the Panel should consider whether the authority, consistent with Article 3.1, defined the domestic industry in a fair and unbiased manner. A flawed definition of the domestic industry can distort an authority's material injury analysis. For a material injury determination to be based on "positive evidence and involve an objective examination," the authority must rely upon a properly defined domestic industry to perform the analysis. The Appellate Body has recognized that a proper definition of the domestic industry is critical to ensuring an accurate and unbiased injury analysis.

5. In evaluating whether an authority's definition of the domestic industry introduces a distortion to the analysis, a Panel should consider the existence of an inverse relationship between the proportion of producers included in the domestic industry and the absence of a risk of material distortion in the assessment of injury.

II. ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT

6. Japan contends that the KTC's analyses of the volume of subject imports and price effects were inconsistent with Articles 3.1 and 3.2 of the AD agreement.

7. The obligations of Article 3.2 of the AD Agreement must be considered in conjunction with the overarching principles of Article 3.1 of that Agreement.

8. With respect to volume, Article 3.2 of the AD Agreement states that an investigating authority shall "consider whether there has been a significant increase in dumped imports," either in absolute terms or relative to production or consumption of the importing country.

9. Based upon the clear text of the AD Agreement, which uses the disjunctive terms "either" and "or," analysis of the volume of subject imports should include consideration of the absolute volume of subject imports, as well as whether there was a significant increase in the volume of subject imports in absolute terms, a significant increase in the volume of subject imports relative to production in the importing Member, or a significant increase in the volume of subject imports relative to consumption in the importing Member. The last sentence of Article 3.2 specifies that "no one or several" of the Article 3.2 factors "can necessarily give decisive guidance."

10. The United States recalls that the Appellate Body in *China – GOES* found that Article 3.2 does not require an authority "to make a *definitive determination*" on price effects, recognizing the distinction between use of the verb "consider" in Article 3.2 of the AD Agreement and the verb "demonstrate" in Article 3.5. However, the fact that no definitive determination is required "does not diminish the scope of *what* the investigating authority is required to consider."

11. The text contemplates three inquiries with regard to the effects of dumped imports on prices: price undercutting, price depression and price suppression. As the Appellate Body in *China – GOES* explained, the inquiries set out in Article 3.2 are separated by the words "or" and "otherwise," indicating that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression. Thus, even if prices of subject imports do not significantly undercut those of the like domestic products, subject imports could still have a price-depressing or price-suppressing effect on domestic prices.

12. The Appellate Body has explained, however, that the investigating authority's inquiry must provide the authority with a "meaningful understanding of whether subject imports have explanatory force" for price depression or suppression, and, as required by Article 3.1, that understanding must be based on positive evidence and an objective examination.

13. In assessing price depression or suppression, the authority may not confine its consideration to an isolated analysis of domestic prices. Rather, the plain text of Article 3.2 envisions an inquiry into the relationship between subject imports and domestic prices. Article 3.2 introduces the obligations on price effects by clarifying that the nature of the inquiry is to understand the "effect of the dumped imports on prices." An authority's analysis of the three delineated price effects – price undercutting, price depression, and price suppression – must necessarily be in reference to the subject imports. The Appellate Body has endorsed this interpretation that it is not enough for an authority to simply observe what is happening to domestic prices.

14. The United States recalls that the Appellate Body in *China – GOES* has explained that (1) Article 3.2 requires an investigating authority in its final determination to provide sufficient reasoning as to what explanatory force parallel pricing trends have for the depression or suppression or domestic prices, and (2) that although price depression and price suppression are not contingent on a finding of price undercutting, the investigating authority must conduct an

objective examination of all the evidence in making its determinations with respect to these effects.

15. Regarding price comparability, when there is record evidence indicating that subject imports are not a homogenous product and/or that subject imports differ from the domestically-produced product, an investigating authority should evaluate those differences to determine whether they affected prices and take steps to explain the implications of such price comparability (or lack thereof) between subject imports and the domestic product.

16. The AD Agreement does not prescribe a particular methodology to be used in an investigating authority's volume and price effects analysis.

III. ARTICLES 3.1 AND 3.4 OF THE AD AGREEMENT

17. Japan argues that the KTC's analysis of adverse impact is inconsistent with Articles 3.1 and 3.4.

18. All determinations or findings made in connection with Article 3.4 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

19. Article 3.4 of the AD Agreement sets out an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

20. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation.

21. Thus, in examining "the relationship between subject imports and the state of the domestic industry" pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry's performance trends. The "examination" contemplated by Article 3.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."

22. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. The United States observes that the Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination.

IV. ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT

23. Japan claims that the KTC's causation analysis was inconsistent with Articles 3.1 and 3.5 of the AD Agreement.

24. As with Articles 3.2, 3.4, and 4.1 of the AD Agreement, the Appellate Body has recognized that it is appropriate to read the obligations of Article 3.5 in conjunction with Article 3.1 of the AD Agreement.

25. With respect to the interpretation of Articles 3.2 and 3.5, the United States agrees with Japan's argument that a deficient volume or price effects analysis could compromise a causation analysis where the findings on volume or price effects serve as a key element of the causation analysis. As the Appellate Body explained in *China – GOES*, the provisions in Article 3 "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination." Fatal deficiencies in a volume or price effects analysis could compromise the objective nature of the causation analysis.

26. The first sentence of Article 3.5 sets out the general requirement for a demonstration that dumped imports are causing injury under the AD Agreement, and contains an explicit link back to Articles 3.2 (volume and price effects) and 3.4 (impact on domestic industries). If the volume or price effects findings are found to be inconsistent with Articles 3.1 and 3.2, or the impact findings are found to be inconsistent with Articles 3.1 and 3.4, an Article 3.5 causal link analysis relying on such findings would fail. That is, if an authority relies on a price effects finding to support its impact and injury determinations, its decision must be supported by positive evidence on these counts. In such circumstances, a failure to demonstrate price effects or significant impact would constitute a failure to demonstrate that dumped imports are causing injury, as required by the first sentence of Article 3.5 of the AD Agreement.

27. The third sentence of Article 3.5 of the AD Agreement provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. Under Article 3.5, the premise of a non-attribution analysis is that there is at least one known factor other than the dumped imports that is at the same time injuring the domestic industry. As the Appellate Body has found, if known factors other than dumped imports are simultaneously causing injury, the third sentence of Article 3.5 requires the authority to engage in a non-attribution analysis to ensure that the effects of those other factors are not attributed to the dumped imports. If there are no known factors other than the dumped imports that are injuring the domestic industry, Article 3.5 does not require an authority to conduct a non-attribution analysis.

28. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct a causation analysis, including the non-attribution aspect of that analysis.

V. ARTICLE 12 OF THE AD AGREEMENT

29. Japan argues that Korea breached Articles 12.2 and 12.2.2 of the AD Agreement by failing to issue a public notice or report disclosing all relevant information supporting its decision to impose anti-dumping duties against Japanese imports.

30. Article 12.2 requires investigating authorities to provide public notice or a separate report of preliminary or final determinations. The notice or report must provide "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities."

31. Article 12.2.2 is triggered after an investigating authority makes a final determination to impose anti-dumping duties. According to the Appellate Body in *China – GOES*, the notice requirement of Article 12.2.2 "capture[s] the principle that those parties whose interests are affected by the imposition of final anti-dumping…duties are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties." If the relevant information is confidential, the investigating authorities may provide non-confidential summaries of that information.

32. Article 12.2.2 does not require investigating authorities "to disclose *all* the factual information that is before them, but rather those ["matters of fact"] that allow an understanding of the factual basis that led to the imposition of final measures."

33. The Appellate Body also stated in *China – GOES* that public notice under 12.2.2 must include a discussion of the elements that establish injury under Article 3.

34. Article 12.2.2 further requires that a public notice or report contain "reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers." Because the interests of exporters and importers may be adversely affected by a final dumping determination, it is important that such parties are able to provide input on the evidence and methodology used by investigating authorities during the course of an investigation. If the public notice or report does not contain a detailed explanation as to why an argument was rejected, there is little way of knowing whether the investigating authority considered the comments of an interested party, or whether the final determination was consistent with the provisions of the AD Agreement.

VI. KOREA'S PRELIMINARY RULING REQUEST

35. In its preliminary ruling request, Korea asserts that Japan's panel request breaches Article 6.2 of the DSU by failing to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" with respect to its claims under Articles 3.1, 3.2, 3.4, 3.5, and 4.1 of the AD Agreement.

36. Article 7.1 of the DSU establishes that a panel's terms of reference are to examine the "the matter referred to the DSB" by the complaining party in the request for the establishment of a panel, in the light of relevant provisions of the covered agreement cited by the parties to the dispute.

37. Article 6.2 of the DSU provides that the panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." These two distinct requirements – "(i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the

complaint" – "constitute the 'matter referred to the DSB,' which forms the basis of a panel's terms of reference under Article 7.1 of the DSU."

38. The Appellate Body has stated that the "legal basis of the complaint . . . [is] 'the specific provision of the covered agreement that contains the obligation alleged to be violated.'" The identification of the covered agreement provision claimed to have been breached is thus the "minimum prerequisite" for presenting the legal basis of the complaint. Further, the requirement of a "brief summary" sufficient to "present the problem clearly" entails connecting the challenged measure with the provisions alleged to have been infringed. Consequently, "to the extent that a provision contains not one single distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."

39. However, a panel request is required to state the *claim* at issue. It is not required to provide argumentation as to why and precisely how the measure breaches the relevant obligation. Thus, for Korea to demonstrate that a particular claim falls outside the Panel's terms of reference, it must show that the panel request did not clearly identify the obligation or provision alleged to be breached by the challenged measure.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

Response to Question 8

40. Japan has requested the Panel to find the measures at issue to be inconsistent with Article VI of the GATT 1994 "as a consequence of the inconsistencies with the Anti-Dumping Agreement" as described in its submission. Japan raised no new arguments specific to Article VI of the GATT 1994. The United States submits that the Panel need not make any findings with respect to Article VI of the GATT 1994 because such findings would not contribute to the resolution of the dispute between the parties.

41. Article 3.4 and Article 3.7 of the DSU provide, respectively, that "[r]ecommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter" and that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Pursuant to Articles 7.1 and 11 of the DSU, panels and the Appellate Body are charged with making those findings that may lead to such a recommendation. Given the findings requested by Japan under Article VI of the GATT 1994 are purely consequential, additional findings would not affect the DSB's recommendations and rulings, and the Panel therefore should exercise judicial economy with respect to those claims.