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**KOREA – ANTI-DUMPING DUTIES ON PNEUMATIC VALVES FROM JAPAN**

**NOTIFICATION OF AN APPEAL BY JAPAN UNDER ARTICLES 16.4 AND 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND RULE 20 OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 28 May 2018, from the delegation of Japan, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review ("Working Procedures"), Japan hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law covered in the Panel Report in *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan* (WT/DS504/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

Pursuant to Rules 21(1) of the Working Procedures, Japan is simultaneously filing this Notice of Appeal and its Appellant Submission with the Appellate Body.

For the reasons to be elaborated in its submissions and oral statements to the Appellate Body, Japan appeals the following errors in the issues of law in the Panel Report and legal interpretations developed by the Panel, and requests the Appellate Body to reverse and modify the related findings, conclusions and recommendations of the Panel,<sup>1</sup> and where indicated to complete the analysis.

1. With respect to Japan's claim<sup>2</sup> that Korea defined the domestic industry producing the like product contrary to the requirements of Articles 3.1 and 4.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"), Japan requests the Appellate Body:

- a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found all of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.60 – 7.66, and it refused to address this claim, Panel Report, para. 7.67;
- b. then to conclude that Japan's claim is consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute; and
- c. then to complete the analysis, and find that the definition by the Korea Trade Commission ("KTC") of the domestic industry as including only the two petitioning firms among the nine domestic producers of like products did not properly represent the total domestic production as a whole and then did not meet the "major proportion" requirement as required by Articles 3.1 and 4.1 of the Anti-Dumping Agreement.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of Japan to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Panel Request, page 2, para. 7.

2. With respect to Japan's claim<sup>3</sup> that Korea found a significant increase in the volume of imports contrary to the requirements of Article 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

- a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found all of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.89 – 7.93, and it refused to address this claim, Panel Report, para. 7.94;
- b. then to conclude that Japan's Panel Request was consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute;
- c. then to complete the analysis, and find that Korea violated Articles 3.1 and the first sentence of Article 3.2 of the Anti-Dumping Agreement, by improperly finding a "significant increase" in subject imports considered in isolation, while: (i) disregarding the lack of continuous increase of subject imports in either absolute or relative terms in each year of the comparison period; (ii) improperly assuming a competitive relationship between domestic products and subject imports without an objective examination based on positive evidence; and (iii) improperly finding displacement of domestic sales by subject imports without examining whether the increased imports replaced domestic like products through market competition; and
- d. as part of completing the analysis, to reverse the Panel's mistaken interpretation of how to consider the volume of imports as set forth in its discussion of this issue in its causation findings, including paras. 7.254-7.257.

3. With respect to Japan's claim<sup>4</sup> that Korea found the effects of imports on domestic prices to be significant contrary to the requirements of Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

- a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found all of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.123 – 7.130, and it refused to address this claim, Panel Report, para. 7.131;
- b. then to conclude that Japan's Panel Request is consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute; and
- c. then to complete the analysis, and find that Korea violated Articles 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement, by incorrectly determining the effect of imports on the domestic prices to be significant as required by the same Articles, both as price depression and price suppression, while: (i) ignoring the facts of consistent and significant overselling of subject imports; (ii) disregarding the dramatically diverging price trends; (iii) focusing on a single year of 2013, and ignoring the absence of any evidence of price suppression in 2011 and 2012; and (iv) incorrectly finding price comparability between subject imports and domestic like products without demonstrating any competition between them.

4. With respect to Japan's claim<sup>5</sup> that Korea analyzed the impact of imports on the domestic industry contrary to the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

- a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found significant parts of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.165 – 7.174, and it refused to address several important aspects this claim, Panel Report, paras. 7.172, 7.175;

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<sup>3</sup> Panel Request, page 1, para. 1.

<sup>4</sup> Panel Request, page 1, para. 2.

<sup>5</sup> Panel Request, page 1, para. 3.

- b. then to conclude that Japan's Panel Request is consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute;
- c. then to complete the analysis, and find that Korea violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement because the KTC's examination of the impact of the dumped imports on the state of the domestic industry was inadequate in the following aspects: (i) failure to link its analysis of volume and price effects with the alleged consequent impact from the dumped imports; (ii) failure to demonstrate any "explanatory force" of the dumped imports on the state of the domestic industry; and (iii) failure to properly take into account positive trends; and
- d. as part of completing the analysis, to reverse the Panel's mistaken interpretations and conclusions that the authority: (i) need not establish a logical link in its analysis of impact, as set forth at paras. 7.328-7.330; (ii) need not address the explanatory force of imports when analyzing the impact of imports, as set forth at para. 7.339; and (iii) could dismiss with insufficient consideration positive trends during the period, as set forth at paras. 7.342-7.346, in the Panel's discussion of these issues as part of its findings about causation.

5. With respect to Japan's claim<sup>6</sup> that Korea analyzed the impact of imports on the domestic industry contrary to the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

- a. to note the Panel correctly agreed to consider one aspect of this claim regarding two specific factors, Panel Report, para. 7.169 – 7.170, including the magnitude of the margin of dumping, but to find the Panel erred as a matter of law by accepting as sufficient the mention of the margin of dumping without more, Panel Report, paras. 7.189 - 7.191, and thus acted contrary to the requirements of Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and
- b. then to reverse the Panel's finding, Panel Report, paras. 7.187 – 7.192, that Japan has not demonstrated that Korea did not assess the relevance of the magnitude of the margin of dumping and the weight to be attributed to it in the injury analysis, and find that Korea violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement by not properly assessing the margin of dumping.

6. With respect to Japan's claim<sup>7</sup> that Korea found causation without a proper foundation of intermediate findings regarding the volume, price effects, and impact of imports contrary to the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

- a. to note Panel correctly found what it called Japan's first causation claim to be within its terms of reference, Panel Report, paras. 7.218 - 7.226; and
- b. to, regarding the Panel's following errors as a matter of law in several key respects regarding this claim:
  - i. reverse the Panel's error in misapplying the legal standard when assessing the volume of subject imports, and improperly viewing its analysis for purpose of Article 3.5 as constrained by its narrow interpretation of the first sentence of Article 3.2, Panel Report, paras. 7.254 – 7.258; and find that Korea's focus on the volume of imports in 2013 in isolation from the broader period of investigation as context fundamentally undermined its causation finding;
  - ii. reverse the Panel's error in misapplying the legal standard when it considered its findings about diverging price trends in isolation from its other findings about price comparability and price overselling, Panel Report, paras. 7.278, 7.295-7.296; and

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<sup>6</sup> Panel Request, page 1, para. 3.

<sup>7</sup> Panel Request, page 2, para. 6.

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find that Korea's assessment of the diverging prices and other evidence does not support its finding of causation;

- iii. reverse the Panel's error in misapplying the legal standard when it considered the KTC's allegations of "fierce competition" for a small fraction of the domestic like product as a whole, and in isolation from the other evidence about alleged price effects, Panel Report, para. 7.294; and find that Korea's assessment of the alleged fierce competition does not support its finding of causation; and
  - iv. reverse the Panel's error in misapplying the legal standard when it found that the findings under Article 3.2 about volume and price effects are independent of the findings under Article 3.4 about the impact of imports on the domestic industry, Panel Report, paras. 7.329, 7.330, and 7.332; and find that Korea's consideration of volume, price effects, and impact in isolation fundamentally undermined its causation finding.
- c. Japan also requests the Appellate Body to reverse the Panel's error by acting contrary to the standard of review of Article 11 of the DSU when it considered Korea's arguments but failed to consider Japan's rebuttal arguments to various Korean assertions about the reasonable sales price, Panel Report, para. 7.278.

7. With respect to Japan's claim<sup>8</sup> that Korea found causation without an objective examination of the alleged causal relationship, and without objective examination of the lack of correlations among various factors, contrary to the requirements of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

- a. to note that the Panel correctly found what it called Japan's second causation claim to be within its terms of reference, Panel Report, paras. 7.231 - 7.235; and
- b. to find the Panel erred as a matter of law and to reverse the Panel's error of ignoring the lack of correlation in the key volume, price, and profit trends that contradicted the "causal relationship" as required by Articles 3.1 and 3.5, Panel Report, paras. 7.353, 7.356, 7.360; and find that Korea erroneously ignored the lack of correlations that fundamentally undermined any conclusion that an objective examination showed the required "causal relationship".

8. With respect to Japan's claim<sup>9</sup> that Korea failed to inform the interested parties of the essential facts contrary to the requirements of Article 6.9 of the Anti-Dumping Agreement, Japan requests the Appellate Body:

- a. to reverse the Panel's erroneous findings and conclusion that in applying Article 6.2 of the DSU it found all of this claim to be outside the Panel's terms of reference, Panel Report, paras. 7.515 - 7.516, and it refused to address this claim, Panel Report, para. 7.517;
- b. then to conclude that Japan's Panel Request is consistent with Article 6.2 of the DSU and that Japan's claim is within the terms of reference of this dispute; and
- c. then to complete the analysis, and find that Korea failed to inform the interested parties of the fourteen essential facts relating to the volume of dumped imports, price effects, the state of the domestic industry, and alleged causation factors before the issuance of the Korea Trade Commission, Resolution of Final Determination on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (20 January 2015) Investigation No.: 23-2013-5 ("KTC's Final Resolution") and the Office of Trade Investigation, Final Investigation Report on Dumping and Injury to Domestic Industry of Valves for Pneumatic Transmissions from Japan (20 January 2015), Investigation No. 23-2013-5 ("OTI Final Report"), as required by Article 6.9 of the Anti-Dumping Agreement.

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<sup>8</sup> Panel Request, page 2, para. 4.

<sup>9</sup> Panel Request, page 2, para. 10.

In sum, Japan considers that the Panel erred in law in its interpretation and application of Article 6.2 of the DSU with regard to several claims, and improperly refused to address those claims. The Panel also erred in law with its interpretations of Articles 3.1, 3.2, 3.4, 3.5, 4.1, and 6.9. Japan requests that the Appellate Body recommend that Korea bring its measures found to be WTO-inconsistent into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994. Japan also requests that, upon reversal of the Panel's erroneous findings and conclusions identified above and after completing the analysis where indicated, the Appellate Body help the parties resolve this dispute promptly by finding the Korean anti-dumping measures to be contrary to the numerous specific obligations under the Anti-Dumping Agreement identified by Japan in this appeal. Moreover, doing so will help clarify numerous important issues about the obligations on national authorities under the Anti-Dumping Agreement.

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