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UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

REPORT OF THE PANEL

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Argentina – Import Measures	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
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Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
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EC – Bananas III (Mexico)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 803
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
EC – Export Subsidies on Sugar (Brazil)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Brazil*, WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, p. 6793
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Hormones (Canada)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, p. 235
EC – Hormones (US)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, p. 699
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3

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EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, p. 1009
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R, DSR 2011:II, p. 685
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
European Communities – Selected Customs Matters	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX, p. 3915
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
Peru – Agricultural Products	Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R
Philippines – Distilled Spirits	Panel Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/R / WT/DS403/R, adopted 20 January 2012, as modified by Appellate Body Reports WT/DS396/AB/R / WT/DS403/AB/R, DSR 2012:VIII, p. 4271
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151
US – 1916 Act (EC)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Anti-dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
US – Anti-dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-dumping Methodologies (China)	*United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/ DS471, panel composed on 28 August 2014
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Continued Suspension	Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Measures (China)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R

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US – Countervailing Measures on Certain EC Products	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, DSR 2003:I, p. 73
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, p. 5
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
US – Shrimp (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted 2 September 2011, DSR 2011:X, p. 5301
US – Shrimp and Sawblades	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/R and Add.1, adopted 23 July 2012, DSR 2012:XIII, p. 7109
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 [of the DSU]*, WT/DS257/RW, adopted 20 December 2005, upheld by Appellate Body Report WT/DS257/AB/RW, DSR 2005:XXIII, p. 11401
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
US – Softwood Lumber VI (Article 21.5 – Canada),	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, p. 599
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, p. 97
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
BCI Procedures	Additional working procedures of the Panel concerning Business Confidential Information
CONNUM	Control number
DPM	Differential Pricing Methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ERDF	European Regional Development Fund
GATT 1994	General Agreement on Tariffs and Trade 1994
LRWs/Washers	Large Residential Washers
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization
OECD	Organization for Economic Cooperation and Development
R&D	Research and Development
RSTA	Restriction of Special Taxation Act
SCM Agreement	Agreement on Subsidies and Countervailing Measures
T-T	Transaction-to-Transaction Comparison Methodology
USDOC	United States Department of Commerce
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
W-T	Weighted Average-to-Transaction Comparison Methodology
WTO	World Trade Organization
W-W	Weighted Average-to-Weighted Average Methodology

1 INTRODUCTION

1.1 Complaint by Korea

1.1. On 29 August 2013, Korea requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade (GATT 1994), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with regard to the anti-dumping and countervailing measures applied by the United States on Large Residential Washers (LRWs) from the Republic of Korea.[1]

1.2. Consultations were held on 3 October 2013, but failed to resolve the dispute. On 5 December 2013, Korea requested the establishment of a panel.[2]

1.2 Panel establishment and composition

1.3. At its meeting on 22 January 2014, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Korea in document WT/DS464/4, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Korea in document WT/DS464/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 10 June 2014, Korea requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.6. On 20 June 2014, the Director-General accordingly composed the Panel as follows:

Chairperson:	Ms Claudia Orozco
Members:	Mr Mazhar Bangash
	Mr Hanspeter Tschaeni

1.7. Brazil, Canada, China, the European Union, India, Japan, Norway, Saudi Arabia, Thailand, Turkey and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.

[1] See WT/DS464/1.
[2] See WT/DS464/4.
[3] See WT/DSB/M/341.
[4] See WT/DS464/5.

1.3 Panel proceedings

1.3.1 General

1.8. After consultations with the parties, the Panel adopted its Working Procedures[5] and timetable on 3 September 2014. The Panel revised its Working Procedures on 8 October 2014 and the timetable on 12 December 2014.

1.9. The Panel held a first substantive meeting with the parties on 10 and 11 March 2015. A session with the third parties took place on 11 March 2015. The Panel held a second substantive meeting with the parties on 20 and 21 May 2015. On 3 July 2015, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 14 October 2015. The Panel issued its Final Report to the parties on 13 November 2015.

1.3.2 Working Procedures on BCI

1.10. After consultations with the parties, the Panel adopted, on 3 September 2014, additional procedures for the protection of Business Confidential Information (BCI).[6]

1.3.3 China's request for enhanced third party rights

1.11. By letter dated 25 June 2014, China indicated that it is a party to a parallel panel proceeding[7], and requested enhanced third party rights to: (a) receive all submissions of the parties at the time they are submitted to the Panel; (b) have access to any other information submitted to the Panel; (c) be present during the entirety of all meetings of the parties; (d) ask questions of the parties at meetings; and (e) make a short statement at all meetings of the parties. China repeated its request by letter dated 26 November 2014 to the Panel.

1.12. On 12 December 2014, the Panel rejected China's request for enhanced third party rights in the following terms:

> Article 10.2 of the DSU provides that Members may participate in panel proceedings as third parties if they have a "substantial" interest in the matter before the panel. It is well established that panels may grant a third party enhanced rights, provided that such third party's interest in the proceeding extends beyond the "substantial" interest referred to in Article 10.2 of the DSU.
>
> The Panel observes that previous panels have granted enhanced third party rights on the basis of, *inter alia*, the significant economic effect of the measures at issue on certain third parties[8], the importance of trade in the product at issue to certain third parties[9], the significant trade policy impact that the outcome of the case could have on third parties maintaining measures similar to the measures at issue[10], at least one of the parties agreeing that enhanced third party rights should be granted[11], claims that the measures at issue derived from an international treaty to which certain third parties were parties[12], third parties having previously been granted enhanced

[5] See the Panel's Working Procedures, Annex A-1.
[6] See Additional Working Procedures on BCI, Annex A-2.
[7] DS471 *United States – Certain Anti-Dumping Methodologies (China)*. That panel was established on 26 March 2014 and was composed on 28 August 2014.
[8] Panel Reports, *EC – Bananas III*, para. 7.8; and *EC – Tariff Preferences*, Annex A, para. 7. See, also, Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5. (footnote original). "Footnote original" means footnotes to the quoted original text. However, to avoid any confusion, the sequential numbering of these "footnotes original" will follow the numerical order in this Report, rather than the original text.
[9] Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5. (footnote original)
[10] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7. (footnote original)
[11] Panel Report, *EC – Bananas III*, para. 7.8. (footnote original)
[12] Ibid.

rights in related panel proceedings[13], and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.[14]

China asserts that its interest in DS464 extends beyond being merely "substantial" because the DS464 and 471 proceedings are "parallel", or "significantly overlapped".[15] China also asserts that it has an "especially significant interest" in the United States Department of Commerce's (USDOC) use of the methodology at issue in the DS464 proceeding. China contends that it will be "disadvantaged", compared to the United States, in developing arguments in the DS471 proceeding if it cannot "properly appreciate the manner in which issues develop"[16] during the DS464 proceeding.

In citing World Trade Organization (WTO) case law where enhanced third party rights have been granted in the context of parallel proceedings, China refers to the two *EC – Hormones* cases.[17] These two cases were separate proceedings brought by Canada and the United States against the same European measure. Both cases were factually intense, were heard by the same panelists, and involved the use of the same scientific experts. Enhanced third party rights were granted in these parallel proceedings for "practical" reasons[18], to avoid undue duplication. Similar practical considerations do not arise in the present case, particularly since the panelists in DS464 are different from the panelists in DS471.

Regarding China's assertion that there is "significant overlap" between the issues that are likely to arise in DS464 and 471, the Panel notes that similarity of the legal issues between cases has not been a criterion to grant enhanced third party rights to a third party in one case that is also the complainant in another case. Moreover, the Panel notes that China did not request, pursuant to Article 9.3 of the DSU, that the same panelists should serve on both the DS464 and DS471 cases.[19] This would have ensured a harmonized timetable between the cases.

Regarding China's alleged "especially significant interest" in the USDOC's use of the methodology under review by the DS 464 Panel, China refers to the USDOC's use of this methodology in anti-dumping proceedings involving imports from China. China asserts that the USDOC's use of this methodology therefore has a "significant economic impact" on China. The Panel notes that the alleged economic impact of the USDOC's use of the relevant methodology against Chinese imports is what has caused China to bring its own proceeding against this methodology. China will have every right to pursue its own claims – and thereby protect its economic interest – in the DS471 proceeding. Since China is able to defend its interests by bringing its own case, there is no need for China to be granted enhanced third party rights to protect those interests in DS464.

In referring to its "especially significant interest", China seeks to rely on the grant of enhanced third party rights in *EC – Bananas III* and *EC – Tariff Preferences*.[20] Those disputes involved situations in which third parties were the beneficiaries of the EC programs that were being challenged. The third parties in those cases therefore had highly significant economic interests in the panel proceedings that could not be addressed by them bringing separate cases. This is in marked contrast to the circumstances surrounding China's request, given China's ability to defend its own economic interests by bringing its own case against the United States.

[13] Panel Report, *EC – Bananas III*, para. 7.8. (footnote original)
[14] Panel Report, *EC – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada* ("*EC – Hormones (Canada)*"), WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235, para. 8.17. (footnote original)
[15] China's 25 June 2014 request, paras. 3 and 4. (footnote original)
[16] Ibid. para. 10. (footnote original)
[17] Ibid. para. 2, footnote 4. (footnote original)
[18] Panel Report, *EC – Hormones (US)*, para. 8.15. (footnote original)
[19] China did not refer to Article 9.3 when requesting establishment of the DS471 panel. See WT/DSB/M/342 (pp. 23-24) and WT/DSB/M/343, p. 15). (footnote original)
[20] China's 25 June 2014 request, footnote 5. (footnote original)

China further suggests that it will be "disadvantaged", compared to the United States, in developing arguments in the DS471 proceeding if it cannot "properly appreciate the manner in which issues develop"[21] during the DS464 proceeding. This argument is not persuasive, since China's claims in DS471 will be assessed on their merits by panelists who have not participated in the DS464 proceeding. Those panelists will determine for themselves (through questions, and their conduct of the hearings, for example) how the issues in DS471 should be developed. The manner in which issues develop in DS464 is therefore of little consequence.[22] Furthermore, as a regular third party in DS464, China has already received the United States' first written submission in DS464, and therefore has an insight into the nature of the defence being raised by the United States.

Finally, the Panel observes that both parties have expressed their opposition to China's request for enhanced third party rights. The United States has expressed this opposition in two written communications. Korea expressed its opposition orally at the Panel's organizational meeting. China has not provided any reason for us to grant enhanced third party rights over the objections of both parties to the dispute.

1.3.4 The European Union's request concerning the Panel's Working Procedures and the BCI Procedures

1.13. In its third party submission dated 8 December 2014, the European Union requested the Panel to amend certain aspects of its Working Procedures, and raised a number of reservations regarding the Additional working procedures of the Panel concerning business confidential information (BCI Procedures).[23]

1.14. By communication dated 13 February 2015, the Panel rejected the European Union's requests in the following terms:

> 1.1 The European Union asks the Panel to amend its Working Procedures, in order to allow third parties to receive all communications submitted by the parties, be present throughout the hearings and respond to questions addressed to the parties or other third parties. The European Union also raises a number of reservations regarding the BCI Procedures adopted by the Panel.
>
> **1 The Panel's Working Procedures**
>
> **1.1 Introduction**
>
> 1.2 The European Union submits that the Working Procedures adopted by the Panel modify Appendix 3 of the DSU in a manner that risks to diminish the rights of third parties. The European Union requests modifications of the Working Procedures to preserve the rights of third parties as envisaged by the DSU.
>
> 1.3 The European Union submits[24] that the Working Procedures set forth in Appendix 3 of the DSU contemplate two distinguishable stages in a panel proceeding. The European Union states that the first stage involves the parties setting out their case in chief, including a full presentation of claims, facts, evidence and appropriate argument. The second stage involves rebuttals, and the refinement of argument and questions for soliciting explanations. The European Union contends that paragraph 6 of Appendix 3 grants third parties a right to be fully implicated in the first stage and that DSU Articles 10.1 and 10.2 require that third parties have a full view of the cases presented by the parties before presenting their written submissions and exercising

[21] China's 25 June 2014 request, para. 10. (footnote original)
[22] In its second request dated 26 November 2014, China refers to the possibility of the DS464 Panel Report being issued before the DS471 panel completes its work, and taken into account by that panel. To the extent that this Panel's Report is issued before the DS471 panel completes its work, we agree that it may be taken into account by the DS471 panel. However, that panel would still be required by Article 11 of the DSU to make its own objective assessment of the matter before it. (footnote original)
[23] European Union's third party submission, paras. 13 and 14.
[24] Ibid. paras. 3-12. (footnote original)

their right to be heard. The European Union asserts that paragraph 8 of the Panel's Working Procedures modifies the Appendix 3 Working Procedures "by admitting factual assertions and evidence (and associated argument) filed after the first hearing, notably in rebuttals or responses to questions".[25] According to the European Union, this modification "permits to some extent the shifting of fact, evidence and associated argument from the first stage to the second stage", thereby "diminish[ing]"[26] the rights of third parties.

1.4 The European Union requests three changes to the Panel's Working Procedures, so as to "fully preserve"[27] the rights of third parties. First, the European Union requests that third parties receive all submissions by the parties to the Panel, including first submissions, rebuttals, ruling requests and responses thereto, responses to questions and comments thereon and oral statements. Second, the European Union requests that third parties should be present during the entirety of the first and second substantive meetings. Third, the European Union requests that third parties have an opportunity to respond to questions from the Panel to the parties and other third parties. The European Union supports its requests by referring to prior WTO cases "in which appropriate steps"[28] have been taken in relation to third party rights.

1.5 Consistent with Article 12.1 of the DSU, the Panel consulted with the parties regarding the European Union's request. The parties provided written comments regarding this matter on 30 January 2015. Both parties asked the Panel to reject the European Union's request.

1.2 The nature of the European Union's request

1.6 We note that the European Union refers to WTO cases in which "appropriate steps" have been taken to protect third party rights. These are actually cases in which panels granted enhanced third party rights once satisfied that the interest of a third party extended beyond the "substantial" interest envisaged by Article 10.2 of the DSU. However, the European Union does not argue that its interest in the present proceeding extends beyond the "substantial" interest referred to in Article 10.2 of the DSU. Rather, the European Union argues that paragraph 8 of the Working Procedures risks to diminish the rights of third parties, and justifies the rights requested as necessary to preserve the rights of third parties as envisioned by the DSU.

1.3 The rights of third parties

1.7 Before addressing the argument by the European Union, we recall the rights of third parties established in the DSU and Appendix 3. Article 10 establishes a general obligation to fully take into account the interests of the parties to a dispute and those of other Members under a covered agreement. The specific rights of third parties are developed in paragraphs 2 and 3 of Article 10 and paragraph 6 of Appendix 3. Article 10.2 requires a panel to provide an opportunity for third parties to make submissions and present their views to the panel. In turn, the right to present views to the panel is developed in paragraph 6 of Appendix 3 which indicates that third parties shall be invited to a special session of the first substantive meeting of the panel with the parties. Article 10.3 of the DSU mandates that third parties receive the submissions of the parties to the first meeting of the panel.

1.8 These rights are included and developed in paragraphs 15, 16, 17, 18, 20, 21 and 25 (d) of the Panel's Working Procedures. In particular, parties are required to serve on all third parties their written submissions in advance of the first meeting with the Panel; third parties are invited to present written submissions prior to the first substantive meeting of the Panel; and third parties are invited to present their

[25] European Union's third party submission, para. 7. (footnote original)
[26] Ibid. para. 7. (footnote original)
[27] Ibid. para. 4. (footnote original)
[28] Ibid. para. 12. (footnote original)

views orally to the panel during a session of the first substantive meeting of the Panel with the parties.

1.4 The Panel's Working Procedures reflect standard panel practice

1.9 Before considering the European Union's arguments in detail, we note that there is nothing novel about the text of paragraph 8 of the Working Procedures. It is a standard provision of panels' Working Procedures. All Working Procedures publicly available[29] have an identical or virtually identical provision, except in one case.[30] We note that in all these cases, the European Union was either a party or a third party in the dispute. We also note that there is no record in any of these panel Reports of any concern being expressed by the European Union regarding the timeframe for the submission of factual evidence or the rights of third parties.

1.10 The language of paragraph 8 is included in panel Working Procedures in order to regulate the submission of factual evidence. Such discipline is necessary because, as explained below, there is no deadline for the submission of factual evidence provided for in the Working Procedures set forth in Appendix 3 of the DSU.

1.5 Alleged diminishment of third party rights

1.11 With regard to the European Union's assertion that paragraph 8 of the Panel's Working Procedures diminishes the rights of third parties, we recall that the first and second sentences of paragraph 8 provide:

> Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal and answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause.

[29] Panels have not always attached their Working Procedures to their Reports. Panels only recently began to do so systematically. Working Procedures were attached in Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, page A-2; Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, page B-2; Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, page E-2; Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, page A-11; Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, page H-2; Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R/Add.1, page A-4; Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R/Add.1, page A-4; Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, page A-10; Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R and WT/DS386/R, page E-3; *Panel Reports, Philippines – Taxes on Distilled Spirits, WT/DS396/R / WT/DS403/R, page G-8; Panel Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/R /Add.1 and WT/DS401/R /Add.1, page A-2; Panel Report, China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States, WT/DS427/R/Add.1, page C-2; Panel Report, United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam, WT/DS429/R/Add.1, page A-3; Panel Reports, China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/R/Add.1, WT/DS432/R/Add.1* and *WT/DS433/R/Add.1, page A-2; Panel Report, United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, WT/DS436/R/Add.1, page A-2; Panel Report, United States – Countervailing Duty Measures on Certain Products from China, WT/DS437/R/Add.1, page H-2; Reports of the Panel, Argentina – Measures Affecting the Importation of Goods, WT/DS438/R/Add.1, WT/DS444/R/Add.1 and WT/DS445/R/Add.1, page A-1; Panel Report, China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States, WT/DS440/R/Add.1, page A-2; Panel Report, United States – Countervailing and Anti-Dumping Measures on Certain Products from China, WT/DS449/R/Add.1, page A-2; and Panel Report, Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/R/Add.1, page A-1.* (footnote original)

[30] The Working Procedures in this case were based on an Agreement on Procedures between the parties (China and the United States). These Procedures did not include a provision governing the submission of factual evidence. See Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/R/Add.1, p. D-3. (footnote original)

1.12 The European Union's concern arises in respect of the limited exception provided for in paragraph 8 of the Panel's Working Procedures, because it "admit[s] factual assertions and evidence (and associated argument) filed after the first hearing". The European Union considers that all factual evidence and associated argument should be set out in the first stage of the panel process. The European Union considers that third parties are "fully implicated"[31] in this first stage.

1.13 We note that the distinction between the first and second stages of the panel process was drawn by the Appellate Body in *Argentina – Textiles*. We consider it appropriate to be guided by the findings of the Appellate Body in that case. The Appellate Body was reviewing a decision by the panel to admit certain evidence presented by the United States, the complainant, after the deadline for rebuttal submissions. The panel had granted Argentina, the respondent, two weeks to comment on that evidence. The Appellate Body upheld the panel's decision. In doing so, the Appellate Body observed that:

> Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit "rebuttals" by each party of the arguments and evidence submitted by the other parties.[32]

1.14 With respect to the admissibility of factual evidence presented by the United States, the Appellate Body observed that "[t]he Working Procedures in Appendix 3 … do not establish precise deadlines for the presentation of evidence by a party to the dispute."[33] The Appellate Body emphasised that the Working Procedures set forth in Appendix 3 "do not constrain panels with hard and fast rules on deadlines for submitting evidence."[34] We agree. Since there are no rules in the Appendix 3 Working Procedures governing the submission of evidence, there is no basis for the European Union to suggest that the third party rights provided for in that Appendix are somehow tied to, or dependent on, any requirement that factual evidence should be provided by the parties in the first stage of the panel proceeding. Accordingly, there is no basis for the European Union to allege that paragraph 8 of the Panel's Working Procedures somehow "diminishes" the rights of third parties provided for in Appendix 3 of the DSU by allowing – in exceptional circumstances only – the submission of factual evidence by the parties after the first substantive meeting.

1.15 Furthermore, with respect to the European Union's concern that paragraph 8 of the Panel's Working Procedures allows "associated argument" to be submitted in the second stage of the Panel proceeding, we note that the Appellate Body in *Argentina – Textiles* stated that the panel might have considered granting Argentina more than two weeks "to respond to the additional evidence"[35] presented by the United States. Thus, the Appellate Body accepted that the United States could provide factual evidence after the first stage of the panel proceeding, and noted that Argentina should be afforded sufficient time to prepare comments and/or arguments in respect of that evidence. This due process requirement, which dictates that one party should always be entitled to adduce arguments in respect of factual evidence presented by the other party, no matter at what stage of the panel proceeding it is presented, is established in the last sentence of paragraph 8 of the Panel's Working Procedures.

1.16 In addition, we are not persuaded by the European Union's argument that third parties have a right to be "fully implicated" in the first stage of the panel process. We agree with the Appellate Body's statement in *Argentina – Textiles* that the first stage of the panel process includes the panel's first substantive meeting with

[31] European Union's third party submission, para. 5. (footnote original)
[32] Appellate Body Report, *Argentina – Textiles*, para. 79. (footnote original)
[33] Ibid. para. 79. (footnote original)
[34] Ibid. para. 80. (footnote original)
[35] Ibid.

the parties.[36] Paragraph 6 of Appendix 3 of the DSU establishes that third parties only attend a separate third party session of the Panel's first meeting with the parties. Third parties are not present when the complainant presents its case to the Panel (pursuant to Paragraph 5 of the Appendix 3 Working Procedures). It is entirely possible that the parties may present new factual evidence to the Panel at this juncture. For example, the complainant may present new factual evidence to the Panel in response to an argument made in the respondent's first written submission. Contrary to the view expressed by the European Union, the Appendix 3 Working Procedures do not provide for third parties to be "fully implicated" in this exchange.

1.6 Conclusion

For the above reasons, we reject the European Union's allegation that the Panel's Working Procedures risk to "diminish" the rights of third parties. Accordingly, we reject the European Union's request to modify our Working Procedures to provide for fuller third party participation in these panel proceedings.

2 The Panel's BCI Procedures

2.1 Introduction

2.1 The European Union expresses a number of "reservations"[37] regarding the BCI Procedures adopted by the Panel. First, the European Union considers that a Member's right to submit BCI to the Panel should not be conditioned on the provision of an authorising letter from the entity that submitted that information to the investigating authority in the underlying investigation. Second, the European Union considers that a Member may not be required to follow the designation for confidential information used in the underlying investigation. Third, the European Union considers that the designation of information as BCI in panel proceedings is ultimately a matter for the Panel, and may not be absolutely delegated to the investigating authority or any interested party. Accordingly, the European Union considers that the BCI Procedures should contain a challenge clause by which the designation proposed by the party providing the relevant information may be challenged by the other party and third parties.

2.2 Consistent with Article 12.1 of the DSU, the Panel consulted with the parties regarding the issues raised by the European Union. The parties provided written comments regarding this matter on 30 January 2015. Neither party shared the reservations expressed by the European Union.

2.2 Absence of any third party interest, or support from the parties

2.3 The European Union has not argued that the Panel's BCI Procedures have any specific implications for the rights and interests of third parties. Nor has the European Union identified any respect in which the Panel's BCI Procedures have impacted on its participation in the present proceeding.

2.4 Furthermore, in accordance with Article 12.1 of the DSU, the Panel's BCI Procedures were adopted in consultation with the parties. Neither party expressed any concern with the proposed BCI Procedures during those consultations. In the absence

[36] Appellate Body Report, *Argentina – Textiles*, para. 79. There is uncertainty regarding the European Union's understanding of the scope of the first stage of panel proceedings. In para. 5 of its third party submission, the European Union suggests that the first stage of the panel proceeding is limited to the parties' first written submissions: "In the first stage, parties are required to set out their case in chief, including a full presentation of claims, facts, evidence and appropriate argument, in their first written submissions." At para. 7 of its written submission, though, the European Union suggests that the first stage extends to the Panel's first substantive meeting with the parties. Specifically, the European Union complains that the Panel's Working Procedures admit factual assertions, evidence and associated argument "after the first hearing", thereby "shifting … fact, evidence and associated argument from the first stage to the second stage". (footnote original)

[37] European Union's third party submission, paras. 13 and 14. (footnote original)

of any support from the parties for the reservations expressed by the European Union, we see no basis on which we should amend the BCI Procedures at this juncture.

2.3 Conclusion

2.5 For the above reasons, we do not consider that there is any need for us to modify our BCI Procedures in light of the "reservations" raised by the European Union.

2 FACTUAL ASPECTS

2.1. This dispute concerns the definitive anti-dumping and countervailing duties applied by the United States as a result of anti-dumping and countervailing duty investigations conducted by the USDOC concerning imports of LRWs from Korea.

2.2. Korea's claims under the Anti-Dumping Agreement concern certain aspects of the USDOC's approach to the comparison methodology provided for in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement (weighted average to individual export transactions – W-T comparison methodology). Korea challenges certain aspects of the methodologies used by the USDOC to determine whether the conditions for the application of the W-T comparison methodology are met. Specifically, Korea challenges (i) the methodology used to apply the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation (the *Nails II* methodology); (ii) the methodology that replaced the *Nails II* methodology (the Differential Pricing Methodology or the DPM) "as such"; (iii) the DPM "as applied" in the first administrative review of the *Washers* anti-dumping order; and (iv) the ongoing and future application of the DPM in the context of the USDOC's *Washers* anti-dumping proceeding. Korea also challenges the USDOC's use of zeroing in the context of the W-T comparison methodology. Specifically, Korea challenges (i) "as such" the rule or norm pursuant to which the USDOC engages in zeroing; and (ii) zeroing "as applied" in the *Washers* anti-dumping investigation.

2.3. Korea's claims under the SCM Agreement concern the USDOC's determinations that two tax credit subsidy programmes are specific. Korea also raises claims under the SCM Agreement and the GATT 1994 challenging the manner in which the USDOC calculated the amount of subsidy conferred on Samsung under those programmes.

2.1 The measures at issue

2.4. Korea has challenged the following alleged measures:

- Anti-Dumping Measures

  a. Final Determination of Sales at Less Than Fair Value – Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea, *United States Federal Register*, Vol. 77 (26 December 2012), p. 75988.

  b. Issues and Decision Memorandum for the Antidumping Investigation of Large Residential Washers From the Republic of Korea (18 December 2012).

  c. Anti-Dumping Duty Order – Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, *United States Federal Register*, Vol. 78 (15 February 2013), p. 11148.

  d. Any determination in the anti-dumping proceeding entitled Large Residential Washers from the Republic of Korea, including but not limited to the original investigation, preliminary and final determinations in administrative reviews, new shipper reviews, sunset reviews, changed circumstances reviews, and other segments of that proceeding.

  e. The so-called "zeroing" methodology used in anti-dumping proceedings that use the weighted average-to-transaction methodology (W-T) to calculate margins of dumping, and the *Nails II* methodology and DPM used to determine the applicability of Article 2.4.2 of the Anti-Dumping Agreement, which are used pursuant to, *inter alia*, the following United States laws, regulations, administrative procedures and measures:

i. The Tariff Act of 1930, as amended, including in particular, Sections 771(35)(A) and (B) (i.e. 19 U.S.C. Sections 1677(35)(A) and (B)), and 777A(c) and (d) (i.e. 19 U.S.C. Sections 1677f-1(c) and (d)).

ii. The Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, *United States House of Representatives*, Vol. I, No. 103-316.

iii. The implementing regulations of the USDOC, *United States Code of Federal Regulations*, Vol. 19, Part 351, including in particular Sections 351.212 and 351.414.

iv. The predecessor versions of these regulations, including the version found at *United States Code of Federal Regulations*, Vol. 19 (2008), Section 351.414, that the USDOC attempted to withdraw (*United States Federal Register*, Vol. 73 (10 December 2008), p. 74930), but that the U.S. courts have found to still be in effect in US Court of International Trade, Gold East Paper (Jiangsu) Co., Ltd. v. United States, (2013), 918 F. Supp. 2d 1317.

v. The USDOC Import Administration Antidumping Manual, including any amended versions, and including the computer programme(s) to which it refers.

vi. Any other closely connected, subsequent measures that enable or permit the use of zeroing, targeted dumping or differential pricing in anti-dumping investigations, administrative reviews and other segments of anti-dumping proceedings, including the collection of cash deposits and the assessment and liquidation of anti-dumping duties.

- Countervailing Measures

f. Final Countervailing Duty Determination – Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 77 (26 December 2012), p. 75975.

g. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers From the Republic of Korea (18 December 2012).

h. Countervailing Duty Order – Large Residential Washers From the Republic of Korea: Countervailing Duty Order, *United States Federal Register*, Vol. 78 (15 February 2013), p. 11154.

i. Any determination in the countervailing duty proceeding entitled Large Residential Washers from the Republic of Korea, including but not limited to other determinations issued in the initial investigation, preliminary and final determinations in administrative reviews, new shipper reviews, sunset reviews, changed circumstances reviews, and other segments of that proceeding.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. With respect to the anti-dumping measures, Korea requests that the Panel finds that[38]:

a. The USDOC's use of "zeroing" under the W-T comparison methodology in anti-dumping investigations, administrative reviews and other segments of anti-dumping proceedings involving the second sentence of Article 2.4.2 is inconsistent, "as such", with the Anti-Dumping Agreement and the GATT 1994 in the following respects:

i. The use of zeroing invariably results in the USDOC disregarding or artificially setting to zero the results of W-T comparisons when aggregating those results for the purposes of calculating the margin of dumping for the product as a whole and for each individual exporter or foreign producer. For this reason, it is "as such"

[38] See Korea's first written submission, paras. 346-354.

inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, and as a consequence, also "as such" inconsistent with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT;

ii. The use of the zeroing methodology invariably results in the results of intermediate W-T comparisons being disregarded or artificially set to zero, thus increasing the resulting margins of dumping and making an affirmative dumping determination more likely. For this reason, the use of zeroing is "as such" inconsistent with Article 2.4 of the Anti-Dumping Agreement; and

iii. The USDOC systematically levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement. For this reason, the use of zeroing in administrative reviews is "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

b. The USDOC's use of "zeroing" in the original *Washers* determination and in subsequent connected stages of *Washers* is inconsistent with the following provisions of the Anti-Dumping Agreement and the GATT 1994:

i. Article 2.4 and Article 2.4.2 of the Anti-Dumping Agreement, which require that investigating authorities fully take into account the results of intermediate W-T comparisons when calculating the margin of dumping for the product under consideration and for each investigated exporter or foreign producer;

ii. Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, which require that investigating authorities determine the dumping margin for the product as a whole; and

iii. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, which require that investigating authorities levy anti-dumping duties not in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement.

c. The USDOC's methodologies for invoking the second sentence of Article 2.4.2 of the Anti-Dumping Agreement are inconsistent with the obligations set forth in that provision "as applied" in the *Washers* anti-dumping investigation, as ongoing conduct in subsequent connected stages of the *Washers* proceedings, and "as such" in respect of the DPM, in the following respects:

i. Both under the methodology used in the *Washers* anti-dumping investigation and the DPM that has replaced it, the USDOC applies fixed numerical criteria to determine whether there is a "pattern of export prices which differ significantly" among customers, regions or time periods, and categorically rejects the relevance to its inquiry of the commercial context in which the alleged pattern of significant pricing differences arise;

ii. Both under the methodology used in the *Washers* anti-dumping investigation and the DPM that has replaced it, the USDOC provides no explanation as to why the price differences it found cannot be taken into account appropriately by resort to either the average-to-average or transaction-to-transaction methodology; and

iii. Both under the methodology used in the *Washers* anti-dumping investigation and the DPM that has replaced it, the USDOC applies the exception provided for in the second sentence of Article 2.4.2 to transactions that even the USDOC agrees do not meet its own criteria for determining "targeted dumping" or "differential pricing" rather than limiting the exception to those transactions that are found to be targeted or differentially priced.

d. The USDOC's DPM is also inconsistent "as such" with the obligations in Article 2.4.2, because the USDOC does not effectively identify or analyse a "pattern" of prices charged by the exporter to any purchaser, or in any region or time period, as required by both

the second sentence of Article 2.4.2 and the U.S. statute. Rather, the USDOC simply compares each individual price separately with the exporter's other U.S. prices.

e. Furthermore, the USDOC's use of "systemic disregarding" in the calculation of the dumping margin in the DPM is inconsistent with the Anti-Dumping Agreement and the GATT 1994.

f. The United States' measures discussed above are also inconsistent with Article 1 of the Anti-Dumping Agreement.

3.2. With respect to the countervailing measures, Korea requests that the Panel finds that the USDOC acted inconsistently with certain of the United States' obligations under the GATT 1994 and the SCM Agreement in the countervailing duty proceeding entitled *LRWs from the Republic of Korea*, including:

With Respect to RSTA Article 10(1)(3)

a. Article 1.2 and Article 2.1(c) of the SCM Agreement because:

   i. the USDOC erred when it determined that the respondent Samsung received a *de facto* specific subsidy under Article 10(1)(3) of Korea's RSTA, which automatically provided tax credits to all Korean corporate taxpayers that made certain specified types of investments;

   ii. the USDOC incorrectly determined that Samsung received a disproportionately large amount of the tax credits available under Article 10(1)(3) of RSTA; and

   iii. the USDOC failed to take into account the extent of diversification of economic activities within Korea, as well as the length of time during which Article 10(1)(3) of RSTA had been in effect before determining that Samsung had received a disproportionately large amount of the tax credits provided under the Article.

b. Article VI:3 of the GATT 1994 because the USDOC imposed countervailing duties on Samsung attributable to tax credits that it received for investments it made under Article 10(1)(3) of RSTA pertaining to products other than the products subject to investigation, i.e. products other than LRW.

c. Article 1.1 and Article 14 of the SCM Agreement because:

   i. the USDOC erroneously overstated the amount of the financial contribution that the Government of Korea provided and the resulting benefit that it conferred on Samsung when it failed to recognize that the tax credits provided under Article 10(1)(3) of RSTA benefitted products that Samsung manufactured in locations outside Korea; and

   ii. the USDOC did not provide a reasoned and adequate explanation of why it failed to take into account in its benefit calculation the fact that the investments that generated the tax credits provided under Article 10(1)(3) of RSTA benefitted products that Samsung manufactured in locations outside Korea.

d. Article 19.4 of the SCM Agreement because the USDOC levied countervailing duties on imported products in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

With Respect to RSTA Article 26

e. Article 1.2 and Article 2.2 of the SCM Agreement because the USDOC erroneously found that Article 26 of RSTA provided a specific subsidy because it was limited to certain enterprises located within a designated geographical region notwithstanding that the tax credits under Article 26 were generally available throughout Korea.

f. Article VI:3 of the GATT 1994 because the USDOC imposed countervailing duties on Samsung attributable to tax credits that it received for investments it made under Article 26 of RSTA pertaining to products other than the products subject to investigation, i.e. products other than LRW.

g. Article 19.4 of the SCM Agreement because, *inter alia*, the USDOC levied countervailing duties on imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

h. The United States' measures discussed above are also inconsistent with Article 10 and Article 32.1 of the SCM Agreement.

3.3. The United States requests that the Panel reject all of Korea's claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B and C).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, China, the European Union, Japan, Norway, Thailand, Turkey, and Viet Nam are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annex D). India and Saudi Arabia did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 14 October 2015, the Panel submitted its Interim Report to the parties. On 28 October 2015, Korea and the United States each submitted written requests for the review of precise aspects of the Interim Report. On 4 November 2015, both parties submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. Due to changes as a result of our review, certain numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

6.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including those identified by the parties. The Panel is grateful for the assistance of the parties in this regard.

6.1 Anti-dumping claims

6.1.1 Korea's requests for review of precise aspects of the Interim Report

6.1.1.1 Paragraph 7.9 and Paragraph [7.188][39] (paragraphs 7.9 and 7.188 of the Final Report)

6.4. Korea requests the Panel to change the reference to "anti-dumping investigation" in these paragraphs to "anti-dumping proceeding", so as to avoid any confusion about the applicability of Article 2.4.2 to both original investigations and administrative reviews in this dispute.

[39] Korea's request for review of precise aspects of the Interim Report of the Panel referred to paragraph 7.118, which we understand to be a typo on the part of Korea.

6.5. The United States does not object to this request.

6.6. We have decided to make certain editorial changes to paragraphs 7.9 and 7.188 of the Interim Report to avoid possibly prejudging whether or not the second sentence of Article 2.4.2 would apply to administrative reviews.

6.1.1.2 Paragraph 7.11 (paragraph 7.11 of the Final Report)

6.7. Korea requests the Panel to add a footnote to identify the evidentiary basis for its factual statement that the USDOC applied the W-T comparison methodology to all export transactions.

6.8. The United States does not support this request. The United States argues that the proposed footnote does not contain any reference to the record evidence. Moreover, the United States disagrees with Korea that the United States "concedes" that the USDOC applied the W-T comparison methodology to all export transactions.

6.9. We consider it appropriate to include the evidentiary basis for this factual statement. However, we agree with the United States that the footnote proposed by Korea does not identify evidence to support the fact that the USDOC applied the W-T comparison methodology to all export transactions. Accordingly, we refer in a footnote to the Issues and Decision Memorandum in the *Washers* anti-dumping investigation (Exhibit KOR-18, pp. 33-34.) instead.

6.1.1.3 Paragraph 7.12 (paragraph 7.12 of the Final Report)

6.10. Korea requests the Panel to supplement its summary of Korea's arguments on the term "such differences".

6.11. The United States does not support this request. The United States points out that Korea has not proposed a revision to the paragraph. Moreover, according to the United States, the argument Korea seeks to add is presented in Korea's second written submission and not one of Korea's main arguments.

6.12. We have decided to accommodate Korea's request, despite Korea's failure to propose specific text. Furthermore, we do not agree with the United States that arguments presented in the second written submission may not form part of a party's main arguments.

6.1.1.4 Paragraph 7.33 (paragraph 7.33 of the Final Report)

6.13. Korea requests the Panel to clarify in this paragraph that Korea does not argue that an investigating authority must consider the intent of the exporter under the pattern clause.

6.14. The United States does not object to this request. However, to the extent that the Panel agrees to Korea's request, the United States requests the Panel to modify paragraph 7.37 to clarify that the United States' argument was not limited only to the intent of the exporter. According to the United States, it argued, more broadly, that an investigating authority need not consider the *reasons* why export prices differ significantly among different purchasers, regions, or time periods.

6.15. We have decided to accommodate Korea's request. Concerning the counter-request of the United States to modify paragraph 7.37 of the Interim Report, we note that the current text is essentially a verbatim reproduction of the United States' argument to the Panel. Accordingly, there is no reason to make the modification proposed by the United States.

6.1.1.5 Paragraph 7.71 (paragraph 7.71 of the Final Report)

6.16. Korea requests the Panel to include discussion of the context of the term "appropriately" under the explanation clause before turning to the object and purpose of the second sentence of Article 2.4.2, in order to reinforce the Panel's interpretation of the explanation clause.

6.17. The United States does not support Korea's request. The United States notes first that Korea has failed to propose a revision. In addition, the United States does not agree that Korea's proposed addition of further contextual discussion would enhance the clarity of the

paragraph or the Panel's interpretation generally. The United States argues that paragraphs 140-148 of Korea's second written submission do not explain how the terms "explanation" and "cannot" could or should inform, as context, the interpretation of the term "appropriately".

6.18. We have decided not to accommodate Korea's request. In the absence of a proposed revision from Korea, it is not clear to us how Korea's proposed additional discussion of the context of the term "appropriately" would enhance the clarity of our interpretation of that term.

6.1.1.6 Paragraph 7.76 and footnote 130 (paragraph 7.76 and footnote 134 of the Final Report)

6.19. Korea requests the Panel to modify a footnote to supplement the factual support for the fact that the USDOC did not consider the alternative explanations provided by the interested parties in the *Washers* anti-dumping investigation.

6.20. The United States does not support Korea's request, because the proposed footnote, which relates to the USDOC's application of the pattern clause, is not relevant to the discussion of the explanation clause in this paragraph and footnote.

6.21. We have decided not to accommodate Korea's request. As the United States correctly observes, the specific passage from the *Washers* I&D Memorandum which Korea refers to in its request concerns the USDOC's refusal to consider the reasons for the price differences in the context of its application of the pattern clause. It does not concern the USDOC's application of the explanation clause.

6.1.1.7 Paragraph 7.99 (paragraph 7.99 of the Final Report)

6.22. Korea requests the Panel to add a footnote to identify the USDOC documents referred to by the Panel.

6.23. The United States does not object to this request. However, the United States notes that the parenthetical descriptions proposed by Korea do not appear to be neutral.

6.24. We have decided to accommodate Korea's request, taking into account the United States' concern over the neutrality of the description used.

6.1.1.8 Paragraph 7.100 (paragraph 7.100 of the Final Report)

6.25. Korea requests the Panel to correct a factual inaccuracy with regard to the *Xanthan Gum* document discussed in this paragraph and in footnote 190.

6.26. The United States makes a similar request.

6.27. We have corrected the inaccuracy identified by the parties.

6.1.1.9 Paragraph 7.102 (paragraph 7.102 of the Final Report)

6.28. Korea requests the Panel to insert a footnote to clarify the relationship between Exhibits KOR-33 and KOR-67.

6.29. The United States makes no comment on this request.

6.30. We have inserted the footnote as requested by Korea.

6.1.1.10 Paragraph 7.106 (paragraph 7.106 of the Final Report)

6.31. Korea requests the Panel to address the distinction between changes that can be made to the DPM in theory and changes that have been made in fact.

6.32. The United States does not support Korea's request. The United States argues that the points raised by Korea have been addressed by the Panel at, *inter alia*, paragraphs 7.111-7.112 and 7.115 of the Interim Report, and that it would not improve the Report to repeat those discussions at this paragraph.

6.33. We have decided not to accommodate Korea's request. The points raised by Korea are already addressed by the Panel at, *inter alia*, paragraphs 7.111-7.112 and 7.115 of the Interim Report.

6.1.1.11 Paragraph 7.111 (paragraph 7.111 of the Final Report)

6.34. Korea requests the Panel to expand the discussion on the evidentiary issues concerning the DPM.

6.35. The United States does not support Korea's request, because Korea's proposed addition is already addressed in paragraphs 7.115 and 7.106 of the Interim Report.

6.36. We have decided not to accommodate this request. As Korea itself acknowledges in its request, the matter raised by Korea is already addressed by the Panel later on in paragraph 7.115 of the Interim Report.

6.1.1.12 Paragraph 7.112 (paragraph 7.112 of the Final Report)

6.37. Korea suggests that the Panel appears to be addressing Exhibit USA-21 in this paragraph. On this basis, Korea requests the Panel to state clearly that the Panel's discussion in this paragraph relates to the points made by the United States in Exhibit USA-21.

6.38. The United States does not support Korea's request, because the United States submitted Exhibit USA-21 to support a different proposition from the Panel's discussion at this paragraph.

6.39. We have decided not to accommodate Korea's request. In paragraph 7.112 of the Interim Report, we addressed the issue of whether the DPM is of general and prospective application. On the contrary, Exhibit USA-21 relates to the United States' argument that the DPM cannot be found to be inconsistent with Article 2.4.2 "as such" because it does not result in the application of the W-T comparison methodology in all cases. We addressed the latter argument of the United States at paragraphs 7.145 and 7.146 of the Interim Report.

6.1.1.13 Paragraph 7.113 (paragraph 7.113 of the Final Report)

6.40. Korea requests the Panel to add a cross-reference to the point made at paragraph 7.105 of the Interim Report that the actual SAS code in four proceedings over two years is identical. Korea argues that this fact also supports the general and prospective application of the DPM.

6.41. The United States does not support Korea's request. The United States argues that adding the cross-reference would not improve the clarity given that the first sentence of paragraph 7.113 of the Interim Report already refers to the Naschak affidavit and describes Korea's reliance on it.

6.42. We have decided not to accommodate Korea's request, because the first sentence of paragraph 7.113 already refers to the conclusion of the Naschak affidavit on the consistent application of the DPM as enshrined in the SAS code without any material changes.

6.1.1.14 Paragraphs 7.118 and 7.119 (paragraphs 7.118 and 7.119 of the Final Report)

6.43. Korea requests the Panel to clarify the evidentiary basis for its factual statements about the DPM.

6.44. The United States does not support Korea's request, because paragraph 7.118 of the Interim Report does not appear to contain any factual statements or factual findings made by the Panel.

6.45. We do not consider it necessary to make the changes requested by Korea. As Korea itself recognises, the evidentiary basis of our factual statements is discussed in detail in Section 7.4.1 of the Interim Report where we addressed the issue of whether the DPM can be challenged "as such".

6.1.1.15 Paragraph 7.138 and footnotes 256 and 257 (paragraph 7.138 and footnotes 268 and 269 of the Final Report)

6.46. Korea requests the Panel to include in these footnotes additional citations of various evidence supporting the factual statements of the Panel concerning the DPM.

6.47. The United States does not object to Korea's request. However, the United States notes that Korea's description of paragraphs 63-69 of the United States' second written submission is incorrect.

6.48. The evidentiary basis of our factual statements is already discussed in detail in Section 7.4.1 of the Interim Report where we addressed the issue of whether the DPM can be challenged "as such". Nevertheless, in the absence of any opposition from the United States, we have decided to accommodate Korea's request, with the exception of the reference to paragraphs 63-69 of the United States' second written submission.

6.1.1.16 Paragraph 7.149 (paragraph 7.149 of the Final Report)

6.49. Korea requests the Panel to add a citation for the factual statement that the DPM sets to zero any negative comparisons results from the W-W comparison. In addition, Korea requests the Panel to modify the fourth sentence of this paragraph to more accurately reflect Korea's arguments.

6.50. The United States does not support Korea's request, because this paragraph does not appear to set forth factual statements or factual findings made by the Panel.

6.51. This paragraph concerns the summary of Korea's arguments on "systemic disregarding"[40]. Although this paragraph does not set forth our factual finding, we have decided to accommodate Korea's request in order to complete the evidentiary record.

6.1.1.17 Paragraphs 7.171, 7.193 and 7.209 (paragraphs 7.171, 7.193 and 7.209 of the Final Report)

6.52. Concerning paragraph 7.171 of the Interim Report, Korea requests the Panel to make certain factual findings concerning the USDOC's application of the second sentence of Article 2.4.2 in the first administrative review of the *Washers* anti-dumping order. In particular, Korea requests the Panel to confirm that the DPM as applied in the first administrative review of the *Washers* anti-dumping order is the same DPM with the same features as described by the Panel.

6.53. Concerning paragraphs 7.193 and 7.209 of the Interim Report, Korea requests the Panel to make certain factual findings to confirm that the USDOC's application of zeroing in the context of the W-T comparison methodology in the first administrative review of the *Washers* anti-dumping order is the same as the Panel has found more generally.

6.54. The United States does not support Korea's requests. The United States argues that the Panel's decision not to review Korea's "as applied" claims concerning the first administrative review of the *Washers* anti-dumping order is sound. Moreover, since the Panel has determined that it is not necessary for it to address the procedural issue whether the first administrative review of the *Washers* anti-dumping order is within its term of reference, the United States argues that the Panel should not make the factual findings concerning claims or measures that have not been determined to be within its terms of reference. In addition, concerning Korea's proposed modification related to Exhibit KOR-141, the United States argues that since the Panel has determined it not necessary to make a ruling concerning the admissibility of Exhibit KOR-141, it would not be appropriate for the Panel to make factual findings on the basis of Exhibit KOR-141.

[40] We note that Korea originally used the phrase "*systemic* disregarding", rather than "*systematic* disregarding", except in its response to Panel question 4.19 vii, paragraph 132.

6.55. We have decided not to accommodate Korea's requests. There is no basis for us to make factual findings in respect of claims for which we have exercised judicial economy.

6.1.2 United States' requests for review of precise aspects of the Interim Report

6.1.2.1 Paragraphs 1.11 and 1.14 (paragraphs 1.11 and 1.14 of the Final Report)

6.56. The United States requests the Panel to modify these paragraphs in order to place greater weight on (i) the importance of the views of the parties to the dispute; (ii) the greater obligations that would be imposed on the parties than those set out in the DSU; and (iii) derogation from certain rights of the parties under the DSU, when considering third parties' requests for additional procedural rights. The United States argues that the fact that both Korea and the United States agreed that additional third party rights should not be granted provides sufficient basis to decline the request.

6.57. Korea makes no comment on this request.

6.58. We have decided not to accommodate the United States' request. We do not agree with the United States that the parties' objections necessarily provide sufficient basis for the Panel to reject requests for additional third party rights.

6.1.2.2 Paragraph 2.2 (paragraph 2.2 of the Final Report)

6.59. The United States requests the Panel to specify each proceeding by indicating its type, e.g. anti-dumping investigation or countervailing investigation.

6.60. Korea makes no comment on this request.

6.61. We have decided to accommodate this request of the United States by making the necessary changes to this paragraph and paragraphs 7.29, 7.30, 7.44, 7.65, 7.70, 7.74 and 7.173 of the Interim Report.

6.1.2.3 Paragraph 2.4 (paragraph 2.4 of the Final Report)

6.62. The United States requests the Panel to qualify the measures that Korea has challenged in this paragraph with the wording "alleged measures", because the United States disputed that the DPM is a measure challengeable "as such".

6.63. Korea makes no comment on this request.

6.64. We have decided to accommodate the United States' request.

6.1.2.4 Paragraph 7.10, footnote 48 (paragraph 7.10, footnote 54 of the Final Report)

6.65. The United States requests the Panel to make certain changes to the Panel's description of the operation of the *Nails II* methodology in footnote 48 to ensure the accuracy of the Report. In particular, the United States requests the Panel to use the term "standard deviation test" instead of "pattern test" to describe the first step of the *Nails II* methodology. Moreover, the United States requests the Panel to also clarify that the *Nails II* methodology only looks at export sales for which there is an allegation of targeted dumping and that the "gap test" only looks at export prices that pass the "standard deviation test".

6.66. Korea makes no comment on this request.

6.67. We note that in describing the first stage of the *Nails II* methodology, Korea has used the term "pattern test" in its written submissions.[41] On the contrary, the United States has referred the first stage of the *Nails II* methodology as the "standard deviation test" in its written submissions, its responses to the Panel's questions and the *Washers* Final AD I&D Memo (Exhibit KOR-18). In the absence of any comments from Korea, we have decided to accommodate

[41] See, for example, Korea's first written submission, para. 149.

the request of the United States in this respect. For the same reason, we have also changed the reference to "pattern test" under paragraph 7.18 of the Interim Report to "standard deviation test". We have also accommodated the United States' request to clarify other aspects of the description of the *Nails II* methodology.

6.1.2.5 Paragraph 7.14 (paragraph 7.14 of the Final Report)

6.68. The United States requests the Panel to modify the first sentence of this paragraph to accurately reflect the United States' arguments as set out in paragraphs 149 and 150 of its first written submission. The United States contends that it does not argue that the term "pattern of export prices" would necessarily include all export prices in all situations. The United States points out that in the context of the application of the *Nails II* methodology in the *Washers* anti-dumping investigation, all of the export prices examined constituted the "pattern". In certain situations where the DPM is applied, the pattern identified by the USDOC did not include all export prices.

6.69. Korea makes no comment on this request.

6.70. We have decided to partially accommodate the United States' request. As the heading of this section of the Interim Report indicates (i.e. "Claims concerning the USDOC's application of the W-T comparison methodology in the *Washers* investigation"), the Panel's summary of the United States' arguments and its analysis in this paragraph are precisely made in the context of the USDOC's application of the *Nails II* methodology in the *Washers* anti-dumping investigation, and do not concern the DPM. Therefore, it would be inaccurate to delete the reference to "all of the export prices examined" completely, as the United States requested. We have modified the first sentence of this paragraph in the following manner:

> The United States asserts that even if the W-T comparison methodology were only allowed to be applied to pattern transactions, the relevant "pattern of export prices" necessarily includes ~~all export prices, including~~ both lower and higher export prices that "differ significantly" *from each other*. The United States contends that an export price cannot "differ significantly" on its own. The United States asserts that because "difference" is a comparative or relative concept, for something to be different, it must differ from something else. The United States therefore contends that lower export prices, which likely do not differ significantly from one another, cannot form a "pattern of export prices which differ significantly" without reference within that pattern to the higher export prices from which they differ significantly. The United States argues that, in the *Washers* anti-dumping investigation, because the pattern identified by the USDOC comprised of all of the exporter's US sales, the USDOC's application of the W-T comparison methodology to all export sales is not at odds with the Appellate Body's statement in *US – Zeroing (Japan)* that an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.

6.1.2.6 Paragraph 7.28 (paragraph 7.28 of the Final Report)

6.71. For the same reasons given with respect to paragraph 7.14 above, the United States requests the Panel to modify its summary of the United States arguments in this paragraph.

6.72. Korea makes no comment on this request.

6.73. We have decided to accommodate this request of the United States.

6.1.2.7 Paragraph 7.32 (paragraph 7.32 of the Final Report)

6.74. The United States requests the Panel to change the word "exception" to "exceptional comparison methodology" in this paragraph to enhance clarity.

6.75. Korea makes no comment on this request.

6.76. We have decided to accommodate this request of the United States.

6.1.2.8 Paragraph 7.70 (paragraph 7.70 of the Final Report)

6.77. The United States requests the Panel to add the word "meaningfully" before the word "lower" in its summary of the USDOC's application of the explanation clause in the *Washers* anti-dumping investigation. The United States argues that the absence of the word "meaningfully" could be construed as suggesting that the USDOC was looking for *any* difference whereas the USDOC looked for a "meaningful" difference in the margins of dumping in the *Washers* anti-dumping investigation.

6.78. Korea disagrees with the request of the United States. Korea's first concern is that the USDOC used inconsistent terminology in the *Washers* anti-dumping investigation: "material difference" in the preliminary determination and "meaningful difference" in the final determination. Korea's second concern is that the USDOC does not explain what "meaningful" difference means. For this reason, Korea considers it more appropriate not to add the word "meaningful".

6.79. We have decided to accommodate the request of the United States, by adding the wording "'materially' or 'meaningfully'" before the word "lower" in this paragraph. We have also addressed Korea's concerns above by adding a footnote to the effect that in its preliminary and final determinations of the *Washers* anti-dumping investigation, the USDOC did not define or explain the meaning of the terms "material" or "meaningful".

6.1.2.9 Paragraph 7.76 (paragraph 7.76 of the Final Report)

6.80. The United States requests the Panel to insert a footnote to indicate the quoted statement from the United States' response to the Panel's question. The United States also requests the Panel to modify the quoted statement and the third sentence of this paragraph to more accurately reflect its arguments.

6.81. Korea makes no comment on these requests.

6.82. We have decided to accommodate the request of the United States concerning the quoted statement. Concerning the third sentence of this paragraph, we have decided to accommodate the United States' request, albeit not in the exact manner as suggested by the United States.

6.1.2.10 Paragraph 7.100 and footnote 190 (paragraph 7.100, footnote 195 of the Final Report)

6.83. Similar to Korea's request concerning this paragraph, the United States requests the Panel to make certain modification to enhance accuracy.

6.84. Korea makes no comment on this request.

6.85. We have decided to accommodate the United States' request.

6.1.2.11 Paragraph 7.101 (paragraph 7.101 of the Final Report)

6.86. The United States requests the Panel to modify this paragraph to accurately describe the DPM.

6.87. Korea makes no comment on this request.

6.88. We have decided not to accommodate the United States' request. This paragraph accurately reflects the USDOC's description of the DPM in the Post-Preliminary Analysis Memorandum in *Xanthan Gum*. The elements which the United States requests to add to this paragraph are not present in the USDOC's description of the DPM in the text quoted in paragraph 7.100 of the Interim Report.

6.1.2.12 Paragraph 7.130 (paragraph 7.130 of the Final Report)

6.89. The United States requests the Panel to modify the last sentence of this paragraph to enhance clarity.

6.90. Korea makes no comment on this request.

6.91. We have decided to accommodate the United States' request.

6.1.2.13 Paragraph 7.148 *et seq.* (paragraph 7.148 *et seq.* of the Final Report)

6.92. The United States notes that Korea used the term "systemic disregarding" rather than "systematic disregarding" in its submissions. Moreover, the United States requests the Panel to replace the term "systematic disregarding" used by the Panel in this paragraph and elsewhere in the Interim Report (except where reference is made to specific arguments made by Korea or third parties) with a more neutral term for describing the USDOC's approach of not providing any offsets when combining the results of mixed W-W and W-T comparison methodologies. The United States also disagrees that the USDOC's approach when combining the comparison results from mixed comparison methodologies can fairly be characterised as "disregarding".

6.93. Korea disagrees with the suggested change by the United States. Korea contends that the Panel has consistently referred to "systematic disregarding" with quotation marks to indicate that this term is a shorthand reference adopted by Korea. Moreover, Korea argues that this phrase is not unbalanced. Rather, the phrase is descriptive in that the negative results of certain comparisons are in fact being "disregarded" and replaced with something else. Korea further argues that the term "disregarding" and the phrase "systematically disregarding" have been used repeatedly by the Appellate Body in describing the USDOC refusal to consider negative comparison results in determining dumping margins.[42]

6.94. We have decided not to accommodate the United States' request to replace "systemic disregarding" with a more neutral term. First, it would not be unbalanced for us to use this term. We note that in addition to referring to this term with quotation marks, we have also qualified the term with the wording "so-called" to indicate that this term is used only as a shorthand reference. Moreover, in the absence of a proposed more neutral term from the United States, it is not inappropriate for us to use the term "systemic disregarding" as a shorthand reference. However, we have decided to accommodate the United States request to use the term "systemic disregarding" rather than "systematic disregarding".

6.1.2.14 Paragraph 7.150 (paragraph 7.150 of the Final Report)

6.95. The United States requests the Panel to modify the wording of the first sentence of this paragraph to enhance clarity.

6.96. Korea makes no comment on this request.

6.97. We have decided to accommodate the United States' request.

6.1.2.15 Paragraph 7.178 and footnote 311 (paragraph 7.178 and footnote 319 of the Final Report)

6.98. The United States requests the Panel to modify the second sentence of this paragraph to accurately reflect its argument, and to supplement the summary of the United States' arguments related to Korea's zeroing claims.

6.99. Korea makes no comment on these requests.

6.100. We have decided to accommodate the United States' requests.

[42] See, for example, Appellate Body's reports, *US – Zeroing (Japan)*, para. 125; *US – Continued Zeroing*, paras. 286, 314; *US – Zeroing (EC)*, paras. 127, 158.

6.1.2.16 Paragraph 7.196 (paragraph 7.196 of the Final Report)

6.101. The United States requests the Panel to modify the wording in the first sentence of this paragraph to enhance accuracy. According to the United States, the use of zeroing does not artificially *reduce* intermediate W-T comparison results to zero, but in fact *raises* or changes negative margins to zero. The United States therefore requests the Panel to replace the word "reduced" with "raised" or "changed".

6.102. Korea makes no comment on this request.

6.103. While this paragraph reflects accurately Korea's arguments regarding zeroing in the context of the W-T comparison methodology[43], the United States is correct to state that the use of zeroing does not *reduce* to zero any negative results. We have therefore decided to accommodate the United States' request by replacing the phrase "reduced to zero" to "set to zero" in this paragraph and paragraph 3.1 of the Interim Report.

6.2 Subsidies claims

6.2.1 Korea's requests for review of precise aspects of the Interim Report

6.2.1.1 General comment

6.104. Korea asks the Panel to replace the phrase "disproportionate amounts" with the phrase "disproportionately large amounts", to accurately reflect the text of Article 2.1(c).

6.105. The United States does not object to Korea's request.

6.106. We have decided to accommodate the change requested by Korea.

6.2.1.2 Paragraph 7.213 (paragraph 7.213 of the Final Report)

6.107. Korea asks the Panel to replace the phrase "without reference to" in the last sentence with the phrase "without including".

6.108. The United States does not object to Korea's request.

6.109. We have decided to accommodate the change requested by Korea.

6.2.1.3 Paragraphs 7.217, 7.244 (footnote 401), and 7.249 (footnote 410) (paragraphs 7.217, 7.245 (footnote 415), 7.250 (footnote 424) of the Final Report)

6.110. Korea asks the Panel to amend, clarify or expand its description of Korea's arguments.

6.111. The United States does not object to Korea's request in respect of para. 7.217 of the interim Report. Regarding footnote 401, the United States asserts that the material referred to by Korea is irrelevant to the specific point made by the Panel in that footnote. The United States contends that if the Panel nonetheless wishes to include this material at the end of footnote 401, then the Panel should also include a summary of the U.S. position on the relevant issues.

6.112. Regarding footnote 410, the United States suggests that, if the Panel decides to include the material requested by Korea, the insertion should occur after the first sentence of this footnote, as a summary of Korea's position. The United States believes that placing this material after the final sentence, which contains the Panel's evaluation, could give rise to confusion.

6.113. We agree in principle to the changes requested by Korea. With respect to footnote 401, though, we have decided that the additional arguments cited by Korea should be included at the end of paragraph 7.219 of the Interim Report, which describes Korea's main argument against the remand determination. As noted above, the additional arguments alluded to by Korea do not

[43] See Korea's first written submission, paras. 96, 97 and 347.

pertain to the matter addressed in footnote 401. We have also decided to include the U.S. arguments concerning this matter, as requested by the United States.

6.114. Regarding footnote 410, we have decided to accommodate the United States' suggestion to include Korea's text after the first sentence of the footnote.

6.2.1.4 Paragraph 7.[254], footnote 420[44] (paragraph 7.255 of the Final Report)

6.115. Korea asks the Panel to clarify that the United States merely alleged that the USDOC took the two mandatory factors into account.

6.116. The United States denies that the mandatory factors were only allegedly taken into account. The United States contends that it has identified language in the USDOC redetermination confirming that they were taken into account.

6.117. In order to avoid any confusion, we have decided to delete footnote 420 of the Interim Report.

6.2.1.5 Paragraph 7.256 (paragraph 7.257 of the Final Report)

6.118. Korea asks the Panel to include specific arguments made by Korea in this paragraph.

6.119. The United States asserts that paragraph 7.256 does not purport to summarize *in total* Korea's arguments concerning the USDOC's regional specificity findings, but rather provides a road map to the Panel's subsequent analysis, with each sentence ("first," "second", "third," and "fourth") relating to the corresponding section of analysis that follows. The United States asserts that the Panel already provides a summary of Korea's various arguments within each of the relevant sections. The United States also contends that Korea's request for the inclusion of two additional paragraphs immediately after paragraph 7.256 is similarly unwarranted. The United States suggests that the arguments identified by Korea are in any event sufficiently summarized and addressed at section 7.6.3.2 of the interim report.

6.120. Paragraph 7.256 of the Interim Report merely introduces the claims brought by Korea. It is not intended to describe arguments made by Korea in support of those claims. Korea's main arguments are described in subsequent paragraphs of the Report. For this reason, we have decided not to include any additional arguments in this paragraph.

6.2.1.6 Paragraph 7.260 (paragraph 7.261 of the Final Report)

6.121. Korea asks the Panel to delete the second sentence of paragraph 7.260, on the ground that it "may not take into account the full breadth of Korea's arguments regarding Article 2.1(b)".

6.122. The United States asserts that Korea has failed to provide a basis for deleting the second sentence of this paragraph. The United States contends that Korea fails to explain how the second sentence is inaccurate. According to the United States, Korea does not – and cannot – point to any submission in which it provides the discussion or support that the Panel found to be lacking.

6.123. The second sentence of this paragraph states that "Korea does not discuss the relationship between Articles 2.1(b) and 2.2, [or] support its assertion with any analysis of the text of these provisions". At interim review, Korea has not identified any specific arguments pertaining to the relationship between Articles 2.1(b) and 2.2, nor identified any analysis of the text of those provisions. In these circumstances, we have decided not to delete the second sentence of this paragraph.

6.2.1.7 Paragraph 7.261 (paragraph 7.262 of the Final Report)

6.124. Korea suggests that the third sentence of this paragraph does not accurately reflect its arguments, and therefore requests the deletion thereof.

[44] Korea's request for review of precise aspects of the Interim Report of the Panel referred to paragraph 7.253, footnote 420, which we understand to be a typo on the part of Korea.

6.125. The United States does not object to Korea's request.

6.126. Since the precise textual formulation of the third sentence does not feature in any of Korea's submissions to the Panel, we have decided to accommodate Korea's request.

6.2.1.8 Paragraph 7.262 (paragraph 7.263 of the Final Report)

6.127. Korea proposes a number of changes to the Panel's description of its arguments in paragraph 7.262.

6.128. The United States does not support Korea's request to delete and reformulate the third, fourth, and fifth sentences of this paragraph. The United States asserts that Korea fails to explain how these sentences are deficient. According to the United States, the sentences accurately reflect Korea's position at paragraphs 346-356 of its second written submission. The United States does not object to other changes proposed by Korea.

6.129. We have decided to accommodate the request by Korea. The amendments proposed by Korea all reflect arguments made in Korea's submissions to the Panel. Although the current summary of those arguments is not inaccurate, we see no reason not to use a formulation that more closely mirrors the actual arguments made by Korea in its submissions.

6.2.1.9 Paragraph 7.265 (paragraph 7.266 of the Final Report)

6.130. Korea proposes a number of changes to the manner in which the Panel presents Korea's claim in this paragraph. Korea proposes to amend the second sentence, and replace the penultimate and final sentences with a new sentence. Korea also proposes to change the text of footnote 431, by replacing the second sentence with a statement that the United States' interpretation of "enterprise" in this case is not consistent with its practice in free trade agreements.

6.131. The United States contends that Korea fails to explain why the second sentence of this paragraph – which Korea seeks to delete and replace – is inaccurate. In that sentence, the Panel observes that "Korea interprets 'enterprises' as companies or businesses having legal personality." According to the United States, this accurately reflects Korea's statement at paragraph 356 of its second written submission. The United States also opposes the replacement of the penultimate and final sentences of paragraph 7.265. According to the United States, these sentences accurately reflect statements in Korea's submissions. The United States also denies that Korea's requested change would provide a more comprehensive summary of its arguments, as it seeks to replace two sentences with one.

6.132. The United States does not support Korea's request to delete and replace the second sentence of this footnote. According to the United States, the second sentence accurately reflects Korea's argument at paragraph 34 of its response to Panel question No. 5.10. The United States suggests that the language that Korea now seeks to introduce would obscure the meaning of the first sentence, as it would leave unexplained the alleged significance that Korea seeks to draw from definitions contained in U.S. free trade agreements (i.e., that they allegedly do not expressly refer to an entity's facilities).

6.133. We have decided not to make the change proposed by Korea in respect of the second sentence. This sentence reflects the arguments made by Korea at paragraph 356 of its second written submission: "The term 'enterprises' within the meaning of Article 2.2 should be interpreted to mean that the recipient of the subsidy must be a company with legal personality." We have the same view in respect of the penultimate sentence, which reflects an argument made by Korea at paragraph 329 of its first written submission: "RSTA Article 26 tax credits are limited, not to 'certain enterprises located within a designated geographical region', but rather, are limited to certain uses – namely, to investments made outside the overcrowding control region of the Seoul Metropolitan Area."

6.134. Regarding the final sentence, the text simply reflects the Panel's understanding of Korea's position. RSTA Article 26 is entitled Tax Deduction for Facilities Investment. Since the heading of

that provision refers to "Facilities", it is reasonable to understand Korea to argue that RSTA Article 26 concerns the location of facilities, rather than the location of enterprises.

6.135. Regarding footnote 431, we do not consider it appropriate to include the qualification of the United States' argument proposed by Korea. Since we have decided not to evaluate Korea's claim by reference to the practice of the United States in respect of its free trade agreements, there is no basis for us to state whether the interpretation proposed by the United States is or is not consistent with that practice. Nor is there any basis to delete the second sentence, which is based on Korea's assertion at paragraph 34 of its response to Panel question No. 5.10 that "interpreting the term 'enterprise' to refer to facilities is not even consistent with the consistent practice of the United States".

6.2.1.10 Paragraph 7.269, footnote 435 (paragraph 7.270, footnote 453 of the Final Report)

6.136. Korea asks the Panel to amend its description of Korea's handling of a question from the Panel, by replacing the second sentence of footnote 435 with two additional sentences, and deleting the last sentence.

6.137. The United States contends that the second sentence of footnote 435 accurately reflects the fact that Korea's responses did not address the temporal issue that the Panel raised in question No. 5.10 – i.e., whether the Article 2.2 specificity analysis hinges on whether an enterprise receives the subsidy *before* or *after* acquiring new facilities. The United States asserts that likewise, in its comments on the U.S. response to Panel question 5.10, Korea reiterated its assertion that the term "enterprise" does not encompass "facilities," but failed to address the various arguments outlined by the United States with respect to this temporal issue. The United States proposes alternative text to be used in the event that the Panel chooses to amend footnote 435.

6.138. We consider that the second sentence of footnote 435 is an accurate reflection of Korea's reply to Panel question No. 5.10. In its reply, Korea did not address the temporal issue raised by the Panel. Korea instead repeated its view that "facilities" should be distinguished from "enterprises". We have clarified the second sentence by replacing the word "matter" with the phrase "temporal issue". Regarding the last sentence of footnote 435, we have decided to replace it with two sentences that more clearly explain Korea's reaction to Panel question No. 5.10, and its comments on the United States' reply to that question.

6.2.1.11 Paragraphs 7.274 and 7.283 (paragraphs 7.275 and 7.284 of the Final Report)

6.139. Korea asks the Panel to include additional elements in its description of Korea's arguments.

6.140. The United States does not object to Korea's request.

6.141. We have decided to accommodate Korea's request.

6.2.1.12 Paragraph 7.291 (paragraph 7.292 of the Final Report)

6.142. Korea asks the Panel to amend its description of Korea's arguments by deleting the first and third sentences.

6.143. The United States does not support Korea's request to delete the first and third sentences of this paragraph. The United States contends that, when read in context with the surrounding sentences in that paragraph, the first and third sentences accurately reflect Korea's arguments. Nonetheless, if the Panel wishes to amend this paragraph in response to Korea's request, the United States proposes alternative language.

6.144. We agree with Korea that the original formulation of this paragraph may risk misrepresenting Korea's arguments. Rather than deleting entire sentences, though, we consider it more appropriate to amend the text in the manner proposed by the United States. This approach preserves the description of the main elements of Korea's position.

6.2.1.13 Paragraphs 7.301 and 7.302 (paragraphs 7.302 and 7.303 of the Final Report)

6.145. Korea asks the Panel to amend its description of Korea's arguments, and include the argument that the R&D tax credits were enacted to provide an incentive to undertake R&D activities.

6.146. The United States does not support Korea's request to modify these paragraphs. As an initial matter, the United States contends that it is inadequate, in light of Article 15.2 of the DSU, for Korea to simply propose that the Panel make an unspecified "addition" to "reflect" Korea's arguments. The United States also disagrees that these paragraphs warrant revision. The United States observes that Korea does not dispute that the existing text is an accurate rendering of its position. Regarding the additional "incentive" argument referred to by Korea, the United States contends that this argument appears to relate to an issue that is already addressed at paragraph 7.303 of the Interim Report.

6.147. Korea does not specify which additional "incentive" argument it would have the Panel include in these paragraphs. To the extent Korea is referring to the argument made in its reply to Panel question No. 5.2, this argument is already reflected at paragraph 7.303 of the Interim Report. There is therefore no need to include that argument in paragraphs 7.301 and 7.302. If Korea is referring to some other argument, its failure to specify that argument precludes any meaningful intervention by the Panel at this stage.

6.2.2 United States' requests for review of precise aspects of the Interim Report

6.2.2.1 Paragraphs 7.224, 7.277, 7.293, 7.296, 7.311, 7.312, and 7.313 (paragraphs 7.224, 7.278, 7.294, 7.297, 7.312, 7.313, and 7.314 of the Final Report)

6.148. The United States asks the Panel to supplement its description of the United States' arguments.

6.149. Korea does not object to the United States' request.

6.150. We have decided to accommodate the United States' request.

6.2.2.2 Paragraph 7.269 (paragraph 7.270 of the Final Report)

6.151. The United States asks the Panel to include a reference for the definitions of the verb "locate".

6.152. Korea does not object to the United States' request.

6.153. We have decided to accommodate the United States' request.

7 FINDINGS

7.1 Introduction

7.1. Korea has advanced three sets of claims concerning the anti-dumping measures at issue in this case. First, Korea challenges the use of zeroing (i) when applying the W-T comparison methodology "as such", (ii) in the *Washers* anti-dumping investigation, and (iii) in "subsequent connected stages" of the *Washers* proceeding. Second, Korea challenges certain aspects of the methodology used by USDOC in the *Washers* anti-dumping investigation (i.e. the *Nails II* methodology) to determine whether the W-T comparison methodology under the second sentence of Article 2.4.2 should be applied. Third, Korea pursues claims concerning certain aspects of the Differential Pricing Methodology, which replaced *Nails II* methodology as the USDOC's methodology for determining application of the W-T comparison methodology under the second sentence of Article 2.4.2. Some of the factual and legal arguments of the parties regarding these various claims are interlinked or overlapped. To ensure that all of Korea's claims are addressed in respect of the relevant measures, we proceed as follows. In Section 7.2, we review the general principles governing treaty interpretation, the standard of review and the burden of proof. In Section 7.3, we address Korea's claims concerning the application of the W-T comparison methodology in the *Washers* anti-dumping investigation, excluding Korea's claims regarding the use of zeroing. In Section 7.4, we turn to Korea's claims concerning the DPM. In Section 7.5, we

address Korea's "as such" and "as applied" claims concerning the use of zeroing in the context of the W-T comparison methodology. These claims have been brought under a number of provisions of the Anti-Dumping Agreement and GATT 1994. Once we have resolved all issues concerning the relevant anti-dumping measures, we address Korea's claims concerning the countervailing measures in Section 7.6.

7.2 General principles regarding treaty interpretation, the standard of review, and burden of proof

7.2.1 Treaty interpretation

7.2. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[45] It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

7.2.2 Standard of review

7.3. Article 11 of the DSU provides, in relevant part, that:

> [a] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.4. In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute.

7.5. The Appellate Body has explained that where a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.[46] In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has clarified that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[47] At the same time, a panel must not simply defer to the conclusions of the investigating

[45] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

[46] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.

[47] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[48]

7.6. The Appellate Body has clarified a panel's standard of review of the facts pursuant to the above provisions in the following terms:

> It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities.'[49] (footnote omitted)

7.2.3 Burden of proof

7.7. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[50] Therefore, as the complaining party in this proceeding, Korea bears the burden of demonstrating that certain aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[51] Finally, it is generally for each party asserting a fact to provide proof thereof.[52]

7.3 Claims concerning the USDOC's application of the W-T comparison methodology in the *Washers* anti-dumping investigation

7.3.1 Introduction

7.8. Article 2.4.2 of the Anti-Dumping Agreement provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account

[48] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[49] Ibid.
[50] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.
[51] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[52] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.

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

7.9. Article 2.4.2 comprises the comparison methodologies applicable to establish margins of dumping in the investigation phase. The first sentence provides for two comparison methodologies that should "normally" be used to establish margins of dumping. The second sentence provides for a third comparison methodology for establishing the margins of dumping, to be used in exceptional cases only.[53] The second sentence of Article 2.4.2 is divided into three parts. The first part, which we refer to as the "methodology clause", explains that an investigating authority is allowed to use an asymmetrical comparison methodology involving the comparison of a weighted average normal value with "prices of individual export transactions". The second and third parts provide that certain conditions must be met before such asymmetrical comparison may be undertaken. The second part, which we refer to as the "pattern clause", requires the existence of a "pattern of export prices which differ significantly among different purchasers, regions or time periods". The third part, which we refer to as the "explanation clause", requires the investigating authority to explain why "such differences" cannot be taken into account appropriately by the use of a weighted average-to-weighted average (W-W) or transaction-to-transaction (T-T) comparison methodology.

7.10. Korea has advanced claims under each of the three parts of the second sentence concerning the USDOC's application of the *Nails II* methodology[54] in the *Washers* anti-dumping investigation. We begin with Korea's claims concerning the methodology clause. Thereafter, we address Korea's claims concerning the pattern and explanation clauses.

7.3.2 Claim regarding the methodology clause

7.11. This claim concerns the scope of application of the W-T comparison methodology. In the *Washers* anti-dumping investigation, the USDOC applied the W-T comparison methodology to all export transactions, including export transactions falling outside of the relevant patterns.[55] Korea claims that the USDOC acted inconsistently with the second sentence of Article 2.4.2 because, according to Korea, the W-T comparison methodology may only be applied to transactions falling within the relevant patterns.

[53] See Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97; and *US – Zeroing (Japan)*, para. 131.

[54] The *Nails II* methodology is described by Korea at paras. 104-108 of its first written submission and by the United States at paras. 92-95 of its first written submission and paras. 8-31 of its response to the Panel question No. 2.2. The *Nails II* methodology applies a two-stage test for determining the existence of "targeted dumping". Following an allegation of "targeted dumping" by a member of the domestic industry, the "standard deviation test" aims to find whether there are export prices that differ among different purchasers, regions or time periods. The "gap test" aims to address the issue whether observed price differences are significant. Both tests are run on a CONNUM (i.e. model) basis. If a sufficient volume of a respondent's export sales pass both stages of the *Nails II* methodology, then the USDOC considers that there is a "pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

Under the "standard deviation test", the USDOC determines whether the weighted average price to an alleged targeted group in a particular CONNUM is below a benchmark price that equals to one standard deviation below the weighted average mean price in that CONNUM. If the volume of sales below the benchmark price exceeds 33% of volume across all CONNUMs (for the basis being tested, i.e. purchaser, regions or time periods), the USDOC moves on to the second stage of the *Nails II* methodology.

Under the "gap test", where the gap (or difference) between the weighted-average prices of the identified sales to the allegedly targeted group and the next highest weighted-average prices to a non-targeted group exceeded the average gap among the weighted-average prices between the non-targeted groups, these identified sales are considered to have passed the "gap test". The "gap test" is only performed for export sales that passed the "standard deviation test". If the sales passing the "gap test" accounts for more than 5% of the exporting producer's total sales by volume (for the basis being tested, i.e. purchaser, regions or time periods), the USDOC considers that the price differences "significant".

If the "standard deviation test" and the "gap test" are both met, the USDOC evaluates the difference between the weighted-average dumping margin calculated with the W-W comparison methodology (without zeroing) and the weighted-average dumping margin calculated using the W-T comparison methodology (with zeroing) for purposes of the explanation clause of the second sentence of Article 2.4.2. Where there was a meaningful difference between the results of the W-W and the W-T comparison methodologies, the W-T comparison methodology will be applied to all export sales.

[55] See *Washers* Anti-Dumping I&D Memo, (Exhibit KOR-18), pp. 33-34.

7.3.2.1 Main arguments of the parties

7.12. Korea submits[56] that the structure and text of Article 2.4.2 confirm that the W-T comparison methodology may only be applied to those transactions determined to have met the criteria for invocation of that methodology ("pattern transactions"), and not to export transactions falling outside of the relevant pattern ("non-pattern transactions"). In terms of structure, Korea observes that the exceptional W-T comparison methodology "may" be used in certain limited circumstances, whereas a strong preference is expressed for the mandatory application of the W-W or T-T comparison methodologies outside of those circumstances. Korea concludes from this that the W-T comparison methodology should only be applied to those transactions that have justified its use. Regarding text, Korea observes that the Appellate Body in *US – Zeroing (Japan)* understood the phrase "individual export transactions" to refer to the transactions that "fall within the relevant pricing pattern". Korea notes that the Appellate Body also stated that "this universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply." Korea suggests that this interpretation is reinforced by the requirement in the second sentence of Article 2.4.2 to explain why the relevant price differences, pertaining only to the narrower universe of targeted dumping transactions, cannot be taken into account appropriately by using either the W-W or T-T comparison methodology. Korea notes that in the *Washers* anti-dumping investigation the USDOC indicated that the identified pattern "is defined by all of the respondent's U.S. sales". Korea understands the USDOC to suggest that the broad application of the W-T comparison methodology is predicated on its view that the term "pattern" refers to all export sales. Korea contends that this is not a plausible interpretation, since the relevant "pattern" refers only to those export transactions whose prices differ significantly among different purchasers, regions or time periods.

7.13. The United States disagrees[57] with Korea's argument that it follows from the structure of the second sentence of Article 2.4.2 that the scope of application of the W-T comparison methodology should be limited to those transactions that have justified its use. The United States contends that, when the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is further constrained. The United States acknowledges that in *US – Zeroing (Japan)* the Appellate Body read the phrase "individual export transactions" as referring to the transactions that fall within the relevant pricing pattern.[58] The United States notes, though, that the Appellate Body went on to suggest that "in order to unmask targeted dumping, an investigating authority *may* limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[59] Noting the Appellate Body's use of the word "may", the United States asserts that the Appellate Body did not definitively declare in *US – Zeroing (Japan)* that the W-T comparison methodology must only be applied to pattern transactions.

7.14. The United States asserts that even if the W-T comparison methodology were only allowed to be applied to pattern transactions, the relevant "pattern of export prices" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. The United States contends that an export price cannot "differ significantly" on its own. The United States asserts that because "difference" is a comparative or relative concept, for something to be different, it must differ from something else. The United States therefore contends that lower export prices, which likely do not differ significantly from one another, cannot form a "pattern of export prices which differ significantly" without reference within that pattern to the higher export prices from which they differ significantly. The United States argues that, in the *Washers* anti-dumping investigation, because the pattern identified by the USDOC comprised of all of the exporter's US sales, the USDOC's application of the W-T comparison methodology to all export sales is not at odds with the Appellate Body's statement in *US – Zeroing (Japan)* that an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.

[56] Korea's main arguments are set forth at paras. 168-179 of its first written submission.
[57] The United States' main arguments are set forth at paras. 145-153 of its first written submission.
[58] See Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[59] Ibid. (emphasis added)

7.15. The United States submits that Korea's proposed interpretation of Article 2.4.2 is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping".[60] The United States asserts that "targeted dumping" – which is evidenced by lower-priced sales that "differ significantly" from higher-priced sales – is "unmasked" by also applying the W-T comparison methodology to the higher-priced sales.

7.3.2.2 Main arguments of third parties[61]

7.16. Brazil contends[62] that there seems to be considerable uncertainties as to how the W-T comparison methodology should operate in practice. According to Brazil, an interpretation of the second sentence of Article 2.4.2 that would limit the application of the W-T comparison methodology to the transactions that fall within the pattern[63] raises several doubts relative to the practical operation of such understanding.

7.17. China contends[64] that Article 2.4.2 of the Anti-Dumping Agreement is concerned with the establishment of margins of dumping, and that the provision is explicit in stating that such margins are "normally" to be determined on the basis of one or the two symmetrical comparison methodologies. China asserts that the permission to use the alternative W-T comparison methodology is *exceptional*[65], applying only where a relevant price pattern cannot be taken into account *appropriately* through a symmetrical comparison methodology. According to China, this means that the allowance to use the W-T comparison methodology applies only on a limited basis: although an authority must consider the entire universe of sales in order to identify a relevant pricing pattern within that universe, the alternative methodology may be applied only to those sales that comprise the relevant pricing pattern. For export sales that are *not* part of the relevant pricing pattern, Article 2.4.2, second sentence, does not permit departure from the rule, stated in the first sentence, that mandates use of a symmetrical comparison methodology.

7.18. The European Union disagrees [66] with Korea's argument that the final sentence of Article 2.4.2 requires that the existence and amount of targeted dumping, if any, must be calculated only on the basis of the export transactions falling within the pricing pattern. The European Union asserts that this would not comport with the basic objective of the targeted dumping provision, which is to permit an investigating authority to unmask targeted dumping by purchaser, region or time period that would otherwise be concealed. It is not clear to the European Union how this can be achieved if the sole option open to an investigating authority would be to make a calculation only on the basis of the transactions that have passed the standard deviation and gap tests.

7.19. Japan contends[67] that the plain meaning of the second sentence of Article 2.4.2 suggests that the W-T comparison methodology is limited to the "pattern" of export prices which differ significantly among different purchasers, regions, or time periods. According to Japan, the provision does not indicate that the W-T comparison methodology should extend to *all* sales transactions once a pattern is found. Japan also contends that the context of the sentence implies that "individual sales transactions" to be used for comparison are precisely those that fall into the "pattern" discerned by the authorities, and the purpose of the provision to unmask targeted dumping similarly speaks for such understanding. Japan asserts that its interpretation finds strong support in the holding of the Appellate Body in *US – Zeroing (Japan)* that the phrase "individual export transactions" in the second sentence refers to the transactions that fall "within the relevant pricing pattern", and that "an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern".[68] Japan contends that its interpretation is also supported by the context of the first and second sentences of Article 2.4.2. Japan observes that the first sentence provides that the existence of margins of dumping shall "normally" be established through W-W or T-T comparisons. According to

[60] See Appellate Body Reports, *US – Zeroing (Japan)*, para. 135; and *EC – Bed Linen,* para. 62.
[61] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[62] Brazil's third party submission, paras. 30-32.
[63] Ibid. para. 31 (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 135).
[64] China's third party submission, para. 39.
[65] Ibid. (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 131).
[66] European Union's third party submission, para. 47.
[67] Japan's third party submission, paras. 68-70.
[68] Ibid. para. 69 (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 135).

Japan, this makes the W-T comparison methodology an exception, which an investigating authority "may" use in its discretion if it finds a "pattern" and provides an explanation. Japan submits that it follows from the nature of the second sentence of Article 2.4.2 as an exception that the W-T comparison methodology has to be applied in an appropriately limited manner – i.e. to an identified "pattern" – and not to all transactions, which would make the exception the rule as it would allow proceeding in the same manner as for W-W or T-T comparisons.

7.20. Viet Nam agrees[69] with Korea that, assuming the W-T comparison methodology can be used, it can only be applied to the transactions found to "differ significantly", that is, within the pattern. Viet Nam contends that the two "normal[]" methodologies should be applied to transactions outside the pattern.

7.3.2.3 Evaluation by the Panel

7.21. Korea's scope claim raises the issue of whether the W-T comparison methodology may be applied to all export transactions, or only to transactions that constitute the relevant pattern (pattern transactions). Korea's claim requires us to determine whether the "prices of individual export transactions" used in the W-T comparison provided for in the first part of the second sentence are the same transactions as those comprising the "pattern of export prices which differ significantly among different purchasers, regions or time periods" referred to in the second part of that sentence. Our interpretive analysis suggests that they are.

7.22. We consider that the term "individual" in the first part of the second sentence indicates that the W-T comparison will not involve all export transactions. Rather, the W-T comparison will only involve certain export transactions identified individually. The only textual basis for individual identification of export transactions to be used in the W-T comparison is that they form the pattern referred to in the second part of the second sentence, i.e. those export transactions with prices that differ significantly (by purchaser, region or time period). The second sentence provides no other basis for identifying which "individual" export transactions should be included in the W-T comparison.

7.23. Application of the W-T comparison methodology to pattern transactions only is further supported by the third part of the second sentence, which requires the investigating authority to explain why "such differences" cannot be taken into account appropriately by one of the symmetrical comparison methodologies. The phrase "such differences" refers back to the significant price differences displayed by the pattern transactions referred to in the second part of the second sentence. This textual connection between the second and third parts of the second sentence suggests that the third part requires an explanation why it would not be appropriate to apply the W-W or T-T comparison methodology to *pattern* transactions. In our view, such explanation relates to pattern transactions precisely because only those pattern transactions should be subject to a W-T comparison.

7.24. Our reading of the text of the second sentence is further supported by contextual considerations. We observe that, according to the first sentence of Article 2.4.2, a margin of dumping should "normally" be established using either the W-W or T-T symmetrical comparison methodologies. In such "normal" cases, there is no determination that certain transactions form part of "a pattern of export prices which differ significantly among different purchasers, regions or time periods". All export transactions are effectively non-pattern transactions, and all such transactions are assessed using either the W-W or T-T comparison methodology. In exceptional cases where the W-T comparison methodology applies, a sub-set of export transactions is set aside for specific consideration. The exceptional nature of this comparison methodology suggests that something different from the first sentence should be undertaken, i.e. assessment of only the pattern transactions set aside for specific consideration.

7.25. Further support can be found in the statement of the Appellate Body in *US – Zeroing (Japan)* that:

> [t]he emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers,

[69] Viet Nam's third party statement, para. 19.

> regions or time periods". The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply.[70]

7.26. Our reading of the text of the second sentence of Article 2.4.2 is also supported by its object and purpose. There is broad agreement that the object and purpose of the second sentence of Article 2.4.2 is to enable investigating authorities to "unmask" so-called "targeted dumping". This view has been expressed by the parties[71], all but one of the third parties[72] and, as we explain below, the Appellate Body. This understanding of the object and purpose of the second sentence is also confirmed[73] by negotiating history, which shows that "the issue at stake [when negotiating the second sentence of Article 2.4.2] was masked, selective dumping".[74]

7.27. The Appellate Body stated in the abovementioned *US – Zeroing (Japan)* case that the second sentence of Article 2.4.2 provides an asymmetrical comparison methodology to address a "pattern of 'targeted' dumping".[75] The Appellate Body then referred to the notion of "unmasking" such "targeted dumping". In particular, the Appellate Body stated that "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."[76] The last statement by the Appellate Body could be read in two ways.[77] First – and this is the reading proposed by the United States – the Appellate Body could be stating that an authority is allowed to ("may") limit the scope of application of the W-T comparison methodology to pattern transactions, but it is not required to do so (and may therefore apply the W-T comparison methodology to all export transactions). Second, the Appellate Body could be understood to suggest that, given that the object and purpose of the second sentence is to unmask "targeted dumping", the authority is able to ("may") restrict the application of the W-T comparison methodology to pattern transactions only, since it is those pattern transactions that are indicative of targeted dumping. We favour the second reading, because the first reading would be at odds with the Appellate Body's statement *in the preceding sentence* (set forth in the extract above) that the universe of transactions subject to the W-T comparison methodology would "necessarily" be more limited than the universe of transactions to which the symmetrical comparison methodologies in the first sentence of

[70] Appellate Body Report, *US – Zeroing (Japan)*, para. 135. A similar statement was made by the Appellate Body in *US – Softwood Lumber V (Article 21.5)*, fn 166.

[71] Korea's first written submission, para. 153. Korea asserts that the "exception" in the second sentence of Article 2.4.2 "was created to address the situation where an exporter's dumping is 'targeted' in the sense that the exporter makes dumped prices to a subset of the market, and 'masks' any dumping in that subset by selling at higher, non-dumped prices in its other U.S. sales". We agree with Korea's understanding of the term "targeted dumping". The United States has not proposed any alternative understanding. See also United States' first written submission, para. 45.

[72] See, for example, para. 20 of Brazil's third party submission, para. 19 of Canada's oral statement, para. 20 of China's third party submission, para. 38 of the European Union's third party submission, para. 6 of Japan's oral statement, para. 8 of Norway's oral statement, para. 4 of Thailand's oral statement, para. 12 of Turkey's oral statement. Viet Nam's response to Panel question No. 1.1(i) indicates that Viet Nam does not associate the second sentence of Article 2.4.2 with "targeted dumping".

[73] Article 32 of the Vienna Convention allows recourse to the preparatory work of the treaty in order *inter alia* to confirm the meaning resulting from the application of Article 31.

[74] Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989, MTN.GNG/NG8/13 (15 November 1989), (Exhibit USA-18), p. 11.

[75] Appellate Body Report, *US – Zeroing (Japan)*, para. 131. The Appellate Body also explained in *EC – Bed Linen* that the second sentence of Article 2.4.2 "allows Members, in structuring their anti-dumping investigations, to address three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods" (Appellate Body Report, *EC – Bed Linen*, para. 62).

[76] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

[77] Korea's second written submission, para. 178. Korea suggests that the Appellate Body's use of the term "may" was not referring to the scope of application of the W-T comparison methodology at all, but was rather referring back to the phrase "may be compared" at the beginning of the second sentence. (Korea asserts that the scope of the W-T comparison methodology was only addressed by the Appellate Body in the preceding sentences of its findings). This argument is not convincing since, immediately after using the word "may", the Appellate Body referred explicitly to an authority "limit[ing] the application of the W-T comparison methodology to …".

Article 2.4.2 would apply. The term "necessarily" excludes the possibility that the W-T comparison methodology might in certain circumstances also apply to non-pattern transactions. This reading is supported by the exceptional nature of the W-T comparison methodology.

7.28. We note the United States' argument that a "pattern" necessarily includes lower export prices that differ from higher export prices, and thus all export transactions may be included in the relevant pattern. However, as we explain below[78], a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations". We also explain that, in the context of the second sentence, the relevant form or sequence is determined by reference to purchasers, regions or time periods. If particular prices are observed to differ by purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period. The price differences are "regular" and "intelligible" because they pertain only to a particular purchaser, region or time period.[79] Once those prices are identified, they constitute the relevant "pattern". Although those prices are identified by reference to other prices pertaining to other purchasers, regions or time periods, those other prices are not part of the relevant "pattern" (just as a floral pattern on a garment is concerned with the flowers printed against a backdrop, rather than the backdrop itself).[80]

7.29. For the above reasons, we find that the W-T comparison methodology should only be applied to transactions that constitute the "pattern of export prices which differ significantly among different purchasers, regions or time periods". In the *Washers* anti-dumping investigation, the USDOC applied the W-T comparison methodology to all transactions, including transactions other than those constituting the patterns of transactions that the USDOC had determined to exist. In doing so, the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

7.3.3 Claim regarding the pattern clause

7.30. This claim concerns the USDOC's application of the pattern clause, i.e. the requirement to establish the existence of a "pattern of export prices which differ significantly among different purchasers, regions or time periods". Korea challenges the manner in which the USDOC determined the existence of a "pattern of export prices which differ significantly" among purchasers, regions or time periods in the *Washers* anti-dumping investigation. Korea contends that the USDOC applied purely quantitative criteria in determining the existence of "patterns of export prices which differ significantly", without any qualitative assessment of the reasons for the relevant price differences. Korea asserts that an investigating authority must qualitatively assess why prices differ, and whether such differences reflect what can reasonably be inferred as targeting conduct.

7.3.3.1 Main arguments of the parties

7.31. Korea submits[81] that the ordinary meaning of the terms "pattern" and "significantly" precludes resort to purely quantitative criteria when determining whether there is a pattern of export prices that differ significantly. Korea asserts that each of these terms carries qualitative connotations (that were ignored by the USDOC's purely quantitative tests), such that the second sentence requires an examination of "why", not just "how big".

7.32. Korea asserts that the word "pattern" means that there must be some intelligible and predictable repetition or form that can be discerned, qualitatively, from the sample of prices at issue. Korea contends that the qualitative connotation of the word "pattern" does not allow for random variation, but rather requires a particular design or purpose, namely targeting conduct.

[78] See para. 7.45. below.

[79] We accept Korea's argument that, to be "intelligible" the price differences must have some relationship to one another (Korea's first written submission, para. 132). This relationship exists when the significantly differing prices relate to the same purchaser, region or time period.

[80] This is consistent with the statement by the Appellate Body in *US – Zeroing (Japan)* that the universe of transactions that fall within the relevant pricing pattern "would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply".

[81] Korea's main arguments are set forth at paras. 130-153 of its first written submission.

Korea submits that, to be "intelligible" or to "serve to govern the execution of something"[82], the pattern must be meaningful to the purpose of what is being undertaken – namely determining whether use of the exceptional comparison methodology set forth in the second sentence of Article 2.4.2 is justified.

7.33. Korea contends that this understanding is reinforced by the requirement in Article 2.4.2 that the prices differ "significantly". According to Korea, this term conveys both quantitative and qualitative aspects. Korea contends that the qualitative meaning of "significant" means that the relevant price differences must have meaning or purpose, rather than reflecting random price variation or normal commercial factors. Korea contends that the price differences must be more than merely "large" in order to justify the application of the second sentence of Article 2.4.2. According to Korea, an authority cannot find differences to be "significant" based solely on quantitative criteria with no consideration at all of the qualitative factual context – the reasons why prices might be differing.[83] Korea asserts that a qualitative assessment of the relevant price differences is necessary in order to avoid finding that price differences constitute targeted dumping, even though they are caused entirely by exogenous factors or normal commercial conditions.

7.34. The United States disagrees[84] with Korea's argument that the words "pattern" and "significantly" require an investigating authority to examine, qualitatively, the design, meaning, or purpose underlying the significant differences in export prices. The United States notes that the parties agree that a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations". The United States agrees with Korea's contention that a "pattern" cannot simply be the result of random price variation. However, the United States rejects Korea's argument that there must be some *predictable* repetition or form that can be discerned. The United States notes that an anti-dumping investigation is concerned exclusively with sales during the period of investigation, which necessarily is in the past. According to the United States, nothing in the "pattern clause" or anywhere else in Article 2.4.2 of the Anti-Dumping Agreement relates to predicting future sales.

7.35. Regarding the term "significantly", the United States agrees with Korea's contention that the Appellate Body has suggested that the term "significant" can have both quantitative and qualitative dimensions. The United States does not agree, though, that the price differences that trigger the application of the W-T comparison methodology must be something other than merely "large" quantitative differences. The United States suggests that Korea's understanding would read the quantitative dimension out of the term "significantly". The United States asserts that this would be inconsistent with the ordinary meaning of the term "significantly" in its context, and also with the Appellate Body's guidance in *US – Large Civil Aircraft (2nd Complaint)*.

7.36. In the context of the requirement to identify "a pattern of export prices which differ significantly", the United States asserts that a qualitative analysis would be employed to assess *how* the export prices differ from each other, in the sense of whether that difference qualitatively is notable or important, and thus is "significant". The United States contends that under Korea's notion of a qualitative analysis, the investigating authority would rather ask *why* the export prices are different. The United States suggests that Korea's references to commercial reasons, market explanations, or other exogenous factors all go to why differences may exist between export prices. The United States suggests that these issues would not provide information about how the export prices are different, and whether the observed differences are "significant".

7.37. The United States also contends that Korea's argument concerning the need to demonstrate that dumping is targeted confuses the "pattern of export prices which differ significantly", which is described in the text of the "pattern clause" in the second sentence of Article 2.4.2, with the intention of an exporter to "target" its dumping and "mask" that dumping. The United States asserts that the drafting of the "pattern clause" is passive and not active, such that the

[82] Korea's first written submission, para. 131(referring to the dictionary meaning of the Spanish term "pauta" as "[i]nstrumento o norma que sirve para gobernarse en la ejecución de algo" (an instrument or norm that serves to govern the execution of something) (Exhibit KOR-37).

[83] Korea's oral statement at the second meeting of the Panel, para. 26. However, Korea does not argue that an investigating authority must consider the intent of the exporter. See also Korea's second written submission, para. 89.

[84] The main arguments of the United States are set forth at paras. 55-99 of its first written submission.

investigating authority is charged with finding whether a pattern of export prices exists, not with finding that an exporter has intentionally patterned its export prices to target and mask dumping.

7.3.3.2 Main arguments of third parties[85]

7.38. Canada submits[86] that the ordinary meaning of the word pattern implies a qualitative element.

7.39. China shares Korea's concern[87] that the USDOC appears to have failed to consider relevant qualitative explanations for price variations. China asserts that the use of the W-T comparison methodology is conditioned on identification of a "*pattern*" of "prices which differ *significantly*". The mere existence of time-based, or similar, price variations cannot in itself be revealing of "significant" differences. For China, the fact that "significance" has meaning in both quantitative and qualitative terms is a strong indicator that an investigating authority must consider *both* such dimensions whenever it seeks to determine the existence of a "pattern of export prices which differ significantly". China disagrees with the United States as they have asserted that it is sufficient to explore *either* dimension by showing either that price differences are "numerically large" or, alternatively, that even numerically small differences remain "important" in the context of a particular market.

7.40. The European Union argues[88] that the terms "pattern" and "significantly" can be understood quantitatively. The European Union agrees with the United States' understanding of the more limited sense in which that term might be understood qualitatively. The European Union asserts that in a normal anti-dumping calculation, that does not involve any determination of targeted dumping, an investigating authority is not required to assess the reason for which dumping is occurring. Rather, the determination of the existence and amount of dumping is based on an objective assessment of the data. The European Union understands that the situation should be no different under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

7.41. Japan argues[89] that the question of how significant a difference of export prices is, or in other words what the standard of being "large" is, cannot be answered unless one places relevant numerical variations in an appropriate context and assesses their meaning.

7.42. Turkey does not support the interpretation that a "pattern of significant difference" should be necessarily an outcome of a specific intent. Turkey does not agree that usual commercial practices are perfectly plausible if the differing export prices display a pattern in line with the expected results of these practices. Turkey argues that neither the text of Article 2.4.2 nor WTO jurisprudence makes it possible to conclude that the "usual commercial" practices are defences to permit the act of targeted dumping.[90]

7.43. Viet Nam agrees with Korea[91] that the United States' methodology inappropriately creates the possibility that random, relatively minor and commercially entirely commonplace price fluctuations will be characterized as a "pattern" of prices that "differ significantly". Beyond all technicalities of the second sentence of Article 2.4.2, it cannot be that the Anti-Dumping Agreement entitles WTO Members to burden exporters with higher anti-dumping duties simply because they follow standard business practices.

7.3.3.3 Evaluation by the Panel

7.44. Korea submits that in the *Washers* anti-dumping investigation the USDOC acted inconsistently with the pattern clause because it found a "pattern of export prices which differ significantly" among purchasers, regions or time periods based "solely on quantitative criteria with no consideration at all of the qualitative factual context – the reasons why prices might be

[85] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[86] Canada's third party submission, para. 22.
[87] China's third party submission, paras. 14-22.
[88] European Union's third party submission, para. 40.
[89] Japan's third party submission, para. 31.
[90] Turkey's third party oral statement, para. 8.
[91] Viet Nam's third party statement, paras. 16 and 17.

differing".[92] According to Korea, the second sentence "requires an examination of 'why', not just 'how big'".[93]

7.45. Korea's claim is based on its interpretation of the terms "pattern" and "significant". The parties agree that a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations".[94] We accept that this definition accords with the ordinary meaning of the term "pattern" as used in the second sentence of Article 2.4.2. The parties also agree that random price variation does not constitute a "pattern".[95] Again, we agree.

7.46. The parties disagree on whether a "pattern" of price differences may be discerned without exploring the reasons for those price differences. We note that the text of Article 2.4.2 contains no requirement to consider such reasons. Further, the fact that prices differ in a regular and intelligible form may be discerned through a simple examination of the relevant numerical price values. In the context of the second sentence, the relevant form or sequence is determined by reference to purchasers, regions or time periods. If particular prices are observed to differ in respect of a particular purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period. The price differences are "regular" and "intelligible" because they pertain only to that particular purchaser, region or time period. This is consistent with Korea's argument that, in order to be "intelligible", the relevant price differences "must have some relationship to each other so that this form can be discerned".[96] The relationship results from the fact that the price differences pertain to a given purchaser, region or time period.

7.47. Korea argues that "to be 'intelligible' or to 'serve to govern the execution of something', the pattern must be meaningful to the purpose of what is being undertaken"[97], i.e. "targeting conduct".[98] We disagree. First, a form or sequence of price differences may be "intelligible" in the context of the second sentence if there is regularity to that form or sequence that may be detected in respect of a particular purchaser, region or time period. Although the term "intelligible" excludes random price variation, it does not require consideration of the purpose of the price variations. A regular series of price variation relating to a particular purchaser, region or time period may be detected on the basis of an objective assessment of the data, even if one does not know the reason for, or purpose behind, such variation.

7.48. Nor do we consider that an authority must assess the reasons for price differences in order to determine whether those price differences are "significant" within the meaning of the second sentence. In the context of the second sentence, we consider that the term "significant" should be understood to mean "important, notable; consequential".[99] This was the definition applied by the Appellate Body in *US – Tyres*[100] and *US – Large Civil Aircraft (2nd Complaint)*[101], and by the panel in *US – Upland Cotton*.[102] Korea distinguishes "significant" from "large". Korea suggests that even a numerically "large" price difference will not be "significant" if the difference is "simply the natural and completely expected reactions to normal commercial considerations".[103] Korea contends that there is nothing "notable" about a price difference that results from normal commercial considerations, such as when prices are lowered during a well-known holiday season sale period.[104] We disagree. We consider that an authority might properly find that certain prices differ "significantly" if those prices are notably greater – in purely numerical terms – than other prices, irrespective of the reasons for those differences. The price difference is noteworthy because it

[92] Korea's oral statement at the second meeting of the Panel, para. 26.
[93] Ibid.
[94] Korea refers at para. 86 of its first written submission to *OxfordDictionaries.com*, Oxford University Press, accessed 18 September 2014 <http://www.oxforddictionaries.com/us/definition/american_english/pattern> (Exhibit KOR-21). The United States refers to the same dictionary definition at para. 59 of its first written submission.
[95] United States' first written submission, para. 73; Korea's first written submission, paras. 132-133.
[96] Korea's first written submission, para. 132.
[97] Ibid. para. 132.
[98] Ibid. para. 133.
[99] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, (Exhibit KOR-23), p. 2860.
[100] Appellate Body Report, *US – Tyres*, para. 176.
[101] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1272.
[102] Panel Report, *US – Upland Cotton*, para. 7.1325.
[103] Korea's second written submission, para. 87.
[104] Korea's response to Panel question 2.1, para. 36.

stands out, and it stands out because of its size, or scale, rather than the reasons behind it.[105] However, as discussed in section 7.3.4.4 below, the reasons behind the significant price differences may be relevant in the context of the explanation clause.

7.49. In certain factual circumstances, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances. Thus, a relatively minor numerical difference between two large prices may not be "significant", whereas the same numerical difference between two much smaller prices may well be "significant". In addition, a small price difference in a price-competitive market may be "significant". However, this aspect of significance pertains to *how* the relevant prices differ, not *why* they differ. We find support for this approach in the report of the panel in *US – Upland Cotton*, concerning the meaning of the phrase "significant price suppression" in Article 6.3(c) of the SCM Agreement. That panel found that:

> [I]t is the degree of price suppression or depression itself that must be "significant" (i.e. important, notable or consequential) under Article 6.3(c) of the SCM Agreement. *In determining whether the price suppression is "significant", it may be relevant to look at the degree of the price suppression or depression in the context of the prices that have been affected – that is, at the degree of significance of suppression or depression.*
>
> Such significance may be manifest in a number of ways. *The "significance" of any degree of price suppression may vary from case to case, depending upon the factual circumstances, and may not solely depend upon a given level of numeric significance. Other considerations, including the nature of the "same market" and the product under consideration may also enter into such an assessment, as appropriate in a given case.*
>
> We cannot believe that what may be significant in a market for upland cotton would necessarily also be applicable or relevant to a market for a very different product. We consider that, for a basic and widely traded commodity, such as upland cotton, a relatively small decrease or suppression of prices could be significant because, for example, profit margins may ordinarily be narrow, product homogeneity means that sales are price sensitive or because of the sheer size of the market in terms of the amount of revenue involved in large volumes traded on the markets experiencing the price suppression.[106] (emphasis added; footnotes omitted)

7.50. We agree with the *US – Upland Cotton* panel that certain factual circumstances regarding the product and/or market may be relevant to the assessment of whether a difference is "significant". We also note that the *US – Upland Cotton* panel did not refer to the underlying reasons for price suppression or depression as being relevant to the potential significance of the degree of price suppression or depression.

7.51. We also find support in the statement by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* that the assessment of the significance of lost sales has both "quantitative and qualitative dimensions".[107] Regarding the qualitative dimension, the Appellate Body referred to the "highly price-competitive" nature of the market, and the "strategic importance of securing a sale from a particular customer". However, there was no suggestion by the Appellate Body that the "qualitative dimension" of the significance of lost sales extends to consideration of the reasons for those lost sales.

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[105] We find support for this approach in *China – GOES*, where the Appellate Body stated that a determination of "significant price undercutting" requires a comparison between the price of subject imports and the price of like domestic products: "authorities must consider whether there has been a significant price undercutting by the dumped or subsidized imports as compared with the price of a like domestic product" (Appellate Body Report, *China – GOES*, para. 241). The Appellate Body was not specifically interpreting the term "significant" in this context. However, the fact that the Appellate Body considered that an authority could determine the existence of "significant price undercutting" simply by comparing two prices suggests that the concept of significance may properly be assessed on a purely numerical basis. Just as significant price undercutting may be established by comparing the numerical values of domestic and import prices, significant price differences may be established in the context of the second sentence by comparing the numerical prices to one purchaser, region or time period with the numerical prices to other purchasers, regions or time periods.

[106] The Appellate Body upheld the panel's approach at para. 427 of its report.

[107] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1272.

7.52. For the above reasons, we reject Korea's claim that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation by determining the existence of a "pattern of export prices which differ significantly" among purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences.

7.3.4 Claims regarding the explanation clause

7.53. The third part of the second sentence of Article 2.4.2 requires an authority to provide an explanation "as to why [the pattern of significant price] differences cannot be taken into account appropriately by the use of a [W-W] or [T-T] comparison". Korea claims that the USDOC failed to comply with this explanation clause in the *Washers* anti-dumping investigation.

7.3.4.1 Explanation provided by the USDOC in the *Washers* anti-dumping investigation

7.54. The USDOC provided similar explanations pursuant to the explanation clause in both its preliminary and final determinations in the *Washers* anti-dumping investigation. In its preliminary determination, the USDOC determined:

> For both LG and Samsung, we find that these [pricing] differences cannot be taken into account using the average-to-average methodology because the average-to-average methodology conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Therefore, for the preliminary determination, we find that the standard average-to-average methodology does not take into account LG's and Samsung's price differences because the alternative average-to-transaction methodology yields a material difference in the margin. Accordingly, for this preliminary determination we applied the average-to-transaction methodology to all U.S. sales made by LG and Samsung. In applying this methodology, consistent with our practice, we did not offset negative comparison results with positive comparison results.[108]

7.55. In its final determination, the USDOC determined:

> In this investigation, we find for both LG and Samsung, based on the petitioner's targeted dumping allegations, that a pattern of EPs or CEPs for comparable merchandise that differs significantly among purchasers, regions or time periods exists. Further, our analysis shows that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method for both respondents. We therefore have applied the average-to-transaction method for LG and Samsung in this final determination.[109]

7.56. Thus, the USDOC's explanation is based on a combination of two factors. First, that the averaging used in the W-W comparison methodology "conceals differences" between the export prices. Second, that there is a "meaningful difference" between the margin of dumping calculated using the W-W comparison methodology and the margin of dumping calculated using the W-T comparison methodology. There is no reference to the T-T comparison methodology in the explanation provided by the USDOC.

7.3.4.2 Main arguments of the parties

7.57. Korea submits[110] that the term "appropriate(ly)" under the explanation clause requires a qualitative assessment of the objective circumstances of a particular industry. Korea suggests that

[108] *Washers* Anti-Dumping Preliminary Determination, (Exhibit KOR-32), p. 46395. See also LG AD Preliminary Calculation Memo, (Exhibit KOR-45), pp. 3 and 4; and Samsung AD Preliminary Calculation Memo, (Exhibit KOR-46), p. 3.

[109] *Washers* Anti-Dumping I&D Memo, (Exhibit KOR-18), p. 20. See also Samsung AD Final Calculation Memo, (Exhibit KOR-41) (BCI), p. 2; and LG AD Final Calculation Memo, (Exhibit KOR-42) (BCI), p. 2.

[110] Korea's main arguments are set forth at paras. 154-167 of its first written submission.

the W-W or T-T comparison methodologies can appropriately take account of price differences in certain circumstances, particularly when those differences are commercially reasonable.[111] Korea asserts that the authority must explain, with reference to the existence of the pattern and the significance of the price differences within that pattern, why the W-W or T-T comparison methodologies cannot take appropriate account of those price differences. Korea contends that the explanation clause excludes the application of the W-T comparison methodology if there is any way in which the W-W or T-T comparison methodologies can produce a dumping margin calculation in which the pattern of significantly differing prices can be taken into account appropriately.

7.58. Korea submits that the USDOC failed to "make clear" and "give details" of the reason or purpose of the failure or impossibility to take into account appropriately the relevant pattern using either the W-W or T-T comparison methodology. Korea asserts that the USDOC merely observed that there was a "material difference" between the margins of dumping calculated using the W-W comparison methodology without zeroing and W-T comparison methodology with zeroing, and then concluded that the use of the W-W comparison methodology was not appropriate. Korea contends that the existence of a "material difference" merely relates to inherent aspects of the W-W comparison methodology that cannot provide the explanation required by the second sentence of Article 2.4.2. Otherwise, according to Korea, the use of the W-T comparison methodology would have been automatically authorized as soon as a pattern of significantly different prices was found, without any obligation to explain. Korea further asserts that the USDOC's reasoning does not amount to the explanation required by Article 2.4.2, but is rather a measure of the impact of zeroing on the calculation of dumping margins. Korea suggests that if the USDOC's approach would be accepted, it would render the explanation clause *inutile*, because the use of zeroing will virtually always produce higher margins. Korea also submits that there is no explanation by the USDOC as to why the T-T comparison methodology cannot take into account appropriately the pattern of significantly differing prices.

7.59. According to the United States[112], the "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. The United States suggests that a relatively brief and not particularly detailed explanation may suffice when, for example, it is readily apparent from a comparison of the results of the application of one of the normal comparison methodologies and the results of the application of the alternative comparison methodology that using one of the normal comparison methodologies would lead to the "masking" of dumping to a material or meaningful degree. The United States asserts that the difference between applying the W-W and W-T comparison methodologies was meaningful in the *Washers* anti-dumping investigation in the sense that it was relatively large and, in the case of Samsung, the difference resulted in a change from a determination of no dumping to an affirmative determination of dumping.

7.60. The United States disagrees with Korea's argument that the explanation should include some qualitative assessment of the reasons for the relevant price differences. The United States does not consider that the explanation need have any connection to the issues of "pattern" and "significance". The United States does not consider that the term "appropriately" introduces any such qualitative assessment into the pattern clause.[113] The United States also rejects Korea's argument that because it is in the very nature of the W-W comparison methodology that, through the use of averaging, it will "conceal" the differences between individual prices, it logically follows that this inherent aspect of the W-W comparison methodology itself cannot provide the required "explanation" as to why that methodology cannot take into account the pattern of lower priced sales found to exist. The United States recalls that the Appellate Body has stated that the second sentence of Article 2.4.2 allows the use of the W-T comparison methodology to "unmask targeted dumping".[114] The United States asserts that it is therefore logical for an investigating authority, in providing the requisite explanation, to examine the extent to which dumping would be masked by

[111] Korea's response to Panel question No. 2.12, para. 99.
[112] The main arguments of the United States are set forth at paras. 100-144 of its first written submission.
[113] United States' second written submission, para. 75.
[114] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

one of the normal comparison methodologies.[115] The United States contends that while it is inherent in the W-W comparison methodology that differences between individual prices may be concealed, it will not necessarily always be the case that "targeted dumping" will be "masked" by this "very nature" of that comparison methodology such that the W-W comparison methodology cannot account for such differences appropriately. The United States suggests, for example, that differing export prices may all be above normal value, so that both the W-W and W-T comparison methodologies would lead to a finding of no dumping. Alternatively, the United States suggests that it may be the case that all of the export prices are below normal value, and thus no "masking" of dumping is occurring, and the weighted average dumping margin calculated under both the W-W and W-T comparison methodologies would be the same. The United States suggests that, apart from these two cases, it may also be the case that the amount of "masking" or the amount of dumping found is relatively small. The United States contends that when there is a pattern of export prices that differ significantly, and the export prices that are lower are below normal value while the export prices that are higher are above normal value, the "inherent aspect of the [average-to-average] comparison methodology itself" does indeed "provide the required 'explanation' as to why that methodology cannot take into account the pattern of lower priced sales found to exist".[116] The United States submits that it is unclear what, other than this "inherent aspect" of the W-W comparison methodology, would provide the requisite explanation.

7.61. The United States does not disagree with Korea's assertion that the comparison undertaken by the USDOC is a measure of the impact of zeroing on the calculation of the dumping margins under those two methodologies, when applied to all of an exporter's sales, not merely to those found to constitute a pattern of significantly difference prices. The United States submits that this is an acknowledgement by Korea that the results of the comparisons would be mathematically equivalent without zeroing under the W-T comparison methodology.

7.62. The United States disagrees with Korea's argument that the USDOC should also have explained why the T-T comparison methodology could not "take into account appropriately the pattern of significantly different prices". The United States refers to the Appellate Body's statement in *US – Softwood Lumber V (Article 21.5 - Canada)* that the W-W and T-T comparison methodologies "fulfil the same function", and are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two".[117] The United States also refers to the Appellate Body's statement in that case that it would be illogical if these two comparison methodologies were to yield "results that are systematically different". The United States contends that, logically, if the W-W and T-T comparison methodologies yield systematically similar results, then there would be no purpose in requiring an investigating authority to explain why a pattern of export prices that differ significantly cannot be taken into account appropriately by the T-T comparison methodology, when the investigating authority already has explained why the pattern of export prices that differ significantly cannot be taken into account appropriately by the W-W comparison methodology. The United States also observes the Appellate Body's statement that "[a]n investigating authority may choose between the two [comparison methodologies in the first sentence of Article 2.4.2] depending on which is most suitable for the particular investigation."[118] The United States asserts that a T-T comparison methodology may be particularly unsuitable, and could be quite burdensome, when there are a large number of sales transactions in both the home market and the export market. The United States asserts that nothing in the first sentence of Article 2.4.2 requires an investigating authority to apply both comparison methodologies in the course of a single anti-dumping investigation. The United States contends that the initial choice between the W-W and T-T comparison methodologies is reflected in the use of the word "or" in the explanation clause.

7.3.4.3 Main arguments of third parties[119]

7.63. Brazil argues[120] that if the investigating authority proceeds to use the W-T comparison methodology, there must be other reasons to have recourse to this method beyond purely mathematical differences in the amount of dumping, which are the consequence of the intrinsic

[115] United States' second written submission, para. 81.
[116] United States' first written submission, para. 133.
[117] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.
[118] Ibid.
[119] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[120] Brazil's third party submission, paras. 25-27.

characteristics and of the operation of each of the methods. Brazil understands that investigating authorities have an obligation to give details on why the regular tools already afforded to them by the Anti-Dumping Agreement were not sufficient to enable the use of one of the symmetrical methods.

7.64. Canada asserts [121] that the United States does not explain its recourse to the W-T comparison methodology. Canada contends that instead it compares the dumping margins that would be obtained by using the W-W comparison methodology to those that would be obtained by using the W-T comparison methodology. This "meaningful difference test" only demonstrates that using the two methodologies yields a different result, not that the difference in export prices cannot be taken into account by one of the symmetrical methodologies.

7.65. In China's view [122], the requirement of an explanation under Article 2.4.2 is a crucial discipline upon use of the exceptional W-T comparison methodology. China submits that the explanation must have genuine explanatory value, making it clear "why" relevant "differences cannot be taken into account appropriately" using a symmetrical comparison methodology. [123] China notes that the explanation provided by the USDOC in the *Washers* anti-dumping investigation was incomplete: it centres on the idea that averaging somehow "conceals" targeted dumping, providing no analysis as to why the averaging of prices has this effect. Rather, USDOC's reference to averaging resurrects the US assertion – repeatedly rejected in WTO zeroing cases – that dumping may be understood as a *transaction-specific* concept, meaning that *average* values including *all* transactions are to be avoided in favour of "denying offsets" (zeroing) where specific export transaction prices exceed normal value. China also believes that the USDOC has failed to address the T-T comparison methodology. China asserts that under Article 2.4.2, an investigating authority must provide an explanation "as to why [the relevant] differences cannot be taken into account appropriately by use of a weighted average-to-weighted average or transaction-to-transaction comparison". The use of the disjunctive "or" in this phrase signals that *both* methodologies must be considered and rejected, because if one of these methodologies *can* "take into account appropriately" the relevant pricing pattern, then the conditions for use of the exceptional W-T comparison methodology are not met. This is confirmed by the fact that the symmetrical methodologies "shall normally" be used. In China's view, there are cases in which the T-T comparison methodology could appropriately take into account a relevant pricing pattern. For instance, in a case involving allegations of significant differences in pricing among *time periods*, the T-T comparison methodology may appropriately take those differences into account because it is the methodology that gives most particular effect to the requirement under Article 2.4 that comparisons of export price and normal value are "made at as nearly as possible the same time". In this way, the T-T comparison methodology may have utility in dealing with seasonal price variations in a manner that ensures a "fair comparison".

7.66. The European Union refers [124] to the examples set by Korea to illustrate why the use of the W-T comparison methodology would be inappropriate to conclude that they do not explain nor demonstrate their argument. Insofar as Korea is arguing that the explanation must extend to the reasons it refers to in its submission, the European Union agrees with the United States that the Panel should reject that claim. Specifically, with respect to Korea's first example of seasonal prices, Korea does not explain or demonstrate that the patterns of export prices found to exist in the measure at issue are the result of seasonal pricing. Nor does Korea explain and demonstrate that they are the result of discounting during key holiday seasons (Korea's second example). With respect to Korea's third example (quantities), the European Union observes that this is one of the differences that Article 2.4 expressly requires must be given due allowance, and yet Korea does not appear to be developing any claim or argument with respect to that specific obligation. Finally, with respect to Korea's fourth example, the European Union notes that Korea does not explain or demonstrate that the patterns of export prices found to exist in the measure at issue are the result of changes in costs of production. However, the European Union agrees with Korea that the explanations in the measure at issue make no reference to the possible use of the T-T comparison methodology. The European Union submits that the consistency of the measure at issue with the final sentence of Article 2.4.2 of the Anti-Dumping Agreement should be assessed in that light.

[121] Canada's third party submission, paras. 28-30.
[122] China's third party submission, paras. 28-35.
[123] Ibid. para. 33 (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 131).
[124] European Union's third party submission, paras. 53-55.

7.67. Japan agrees with Korea[125] that the meaning of "explanation" and "why" in the second sentence of Article 2.4.2 must be interpreted to mean that an investigating authority must provide clear and detailed reasons for or the purpose of the inability or impossibility to take into account appropriately a pattern of significantly different export prices by the use of a W-W or T-T comparison. Japan asserts that the United States' argument renders the "explanation" requirement of the second sentence of Article 2.4.2 practically ineffective as it is obvious that the calculation results of the W-T comparison methodology and of the W-W comparison methodology will differ if one allows zeroing for the former and prohibits it for the latter. Japan considers that the "explanation" is also insufficient for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement as it merely rests on a difference in dumping margins achieved by the W-W or W-T comparison methodologies, without making clear or giving details of the reasons or purposes of the inability or impossibility to take into account appropriately a pattern of significantly different export prices among the three types of category, i.e. purchasers, regions or time periods, by the use of the W-W comparison methodology. Japan considers that the USDOC's mechanical methodology for finding a "pattern" does not allow any assessment whether the export prices within the "pattern" deviate from the normal pricing behaviour. Japan sees no inherent "appropriate" reason to distinguish an exporter's pricing with respect to a certain limited universe of the market of the importing country that is a mere reaction to the market situation of the importing country from its pricing with respect to the rest of the same market, which is also a mere reaction to the market situation. In such a scenario, variations seen in export prices do not pertain to exporters' behaviour to mask dumping, and therefore, Japan sees no reason why such price differences could not be taken into account appropriately by W-W or T-T comparisons.

7.68. Turkey understands[126] that the explanation of why normal methodologies cannot be used should be in such a context that it should not deprive the interested parties from using their right of presenting evidence they consider relevant in respect of the question. Thus, Turkey asserts that the base of the test controlling the adequacy of the explanation should be Article 6.1 of the Anti-Dumping Agreement.

7.69. Viet Nam argues[127] that the United States' practice reduces to an empty formality the requirement to provide an "explanation" as to why the two "normally" applicable methodologies cannot be used. Viet Nam supports its argument with three reasons: first, the United States fails to provide any explanation with respect to the T-T comparison methodology. Second, the explanation that the W-W comparison methodology "conceals" certain price differences is, as Korea argues, merely a description of what any averaging process entails by its very essence. Finally, saying that the W-T comparison methodology with zeroing yields a higher margin than the W-W comparison methodology without zeroing is not an explanation why price differences "cannot be taken into account appropriately" by the W-W comparison methodology. When zeroing is applied the margins of dumping will always be higher than if zeroing is not applied because of the absence of any offset for the margin by which export prices exceed normal value. Recourse to the third methodology cannot be driven, or justified, by the fact that the application of zeroing will always result in the highest possible dumping margin. Viet Nam concludes that nothing in Article 2.4.2 supports such an interpretation.

7.3.4.4 Evaluation by the Panel

7.70. The explanation clause in the second sentence of Article 2.4.2 requires an explanation as to why the significant price differences cannot be taken into account appropriately by the use of the W-W or T-T comparison methodologies. We must consider whether the USDOC complied with that requirement when it determined in the *Washers* anti-dumping investigation that the relevant export price differences could not be taken into account "appropriately" by the W-W comparison methodology because (a) the averaging in that methodology conceals price differences and (b) the margin of dumping calculated using that methodology was "'materially' or 'meaningfully'"[128] lower than the margin calculated using the W-T comparison methodology. We must also consider whether the USDOC was required to provide an explanation in respect of both the W-W and the

[125] Japan's third party submission, paras. 57-64.
[126] Turkey's third party statement, para. 9.
[127] Viet Nam's third party statement, para. 18.
[128] We note that the USDOC used inconsistent terminology in the *Washers* anti-dumping investigation: "material difference" in the preliminary determination and "meaningful difference" in the final determination. The USDOC did not define or explain the meaning of the terms "material" or "meaningful".

T-T comparison methodologies, or whether it was sufficient to provide an explanation only in respect of the W-W comparison methodology.

7.3.4.4.1 The assessment of appropriateness

7.71. Although the second sentence of Article 2.4.2 provides that the W-T comparison methodology can only be applied when the authority explains that the W-W or T-T comparison methodologies cannot take "appropriate" account of the relevant price differences, the text of the second sentence does not provide any guidance for determining "appropriateness" in this context. In considering the ordinary meaning of the term "appropriately", we observe that both parties[129] rely on the statement by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that:

> [R]elevant dictionary definitions of the term "appropriate" include "proper", "fitting" and "specially suitable (*for, to*)". These definitions suggest that what is "appropriate" is not an autonomous or absolute standard, but rather something that must be assessed by reference or in relation to something else. They suggest some core norm — "proper", "fitting", "suitable" — and at the same time adaptation to particular circumstances.[130] (footnote omitted)

We shall be guided by the Appellate Body's understanding of the ordinary meaning of the term "appropriate" in evaluating Korea's claim. We note in particular that the term "appropriately" should not be understood to suggest any autonomous or absolute standard, but rather suggests that the potential application of the W-W or T-T comparison methodology should be assessed by reference or in relation to something else, with proper consideration of attendant factual circumstances.

7.72. The second sentence of Article 2.4.2 does not explicitly identify any reference point for assessing appropriateness. It is therefore reasonable to refer to the object and purpose of the second sentence in this context. As explained elsewhere in this Report[131], the object and purpose of the second sentence concerns the unmasking of targeted dumping.[132] We have also observed, with reference to the findings of the Appellate Body in *US – Zeroing (Japan)*, that the existence of a pattern of export prices which differ significantly among different purchasers, regions or time periods is indicative of targeted dumping.[133] Since the use of either the W-W or T-T comparison methodology may result in that targeted dumping being hidden[134], it is appropriate for an authority to use the W-T comparison methodology in order to avoid it being hidden. However, this does not mean that the W-T comparison methodology may be applied simply because of the existence of a pattern of export prices which differ significantly among different purchasers, regions or time periods. If this were the case, there would have been no need to include the explanation clause in the second sentence of Article 2.4.2.

7.73. In our view, the explanation clause is needed because there may be factors other than targeted dumping that may cause export prices to differ – even significantly – among different purchasers, regions or time periods.[135] Price differences caused by factors other than targeted dumping may "normally" be taken into account appropriately by one of the "normal" comparison methodologies provided for in the first sentence of Article 2.4.2. Bearing in mind the object and

[129] United States' first written submission, para. 108; Korea's response to Panel question No. 2.14, para. 97.

[130] Appellate Body, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552 (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 106).

[131] See para. 7.26. above.

[132] Appellate Body Report, *EC – Bed Linen*, para. 62. We recall that the Appellate Body explained in *EC – Bed Linen* that the phrase "targeted dumping" refers to "dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods". We agree that dumping must be "targeted" by the exporter in order to constitute "targeted dumping".

[133] See para. 7.27. above.

[134] Korea's second written submission, para. 27. We note that Korea acknowledges that "possible hidden dumping [may be] masked by the use of averages in the W-W comparisons".

[135] There is no disagreement between the parties on this issue. The United States asserts that "[t]here could be many reasons that would explain why export prices might differ among different purchasers, regions, or time periods" (United States' response to Panel question No. 4.17, para. 57). Korea asserts that "[t]here are many reasons for price differences" (Korea's response to Panel question No. 4.17, para. 83).

purpose of the second sentence, the use of the W-T comparison methodology should be reserved for exceptional[136]cases where it is necessary to unmask a pattern of significant price differences that constitute targeted dumping. A pattern of export prices which differ significantly among purchasers, regions or time periods is merely indicative of targeted dumping. It is not determinative of targeted dumping. Thus, even after establishing the existence of a pattern, an investigating authority must still analyse the prevailing factual circumstances in order to consider the possibility that something other than targeted dumping is responsible for these relevant price differences. The authority's analysis of the prevailing factual circumstances must then be explained, before the authority is entitled to depart from one of the normal comparison methodologies provided for in the first sentence of Article 2.4.2.

7.74. The USDOC referred to the averaging effect of the W-W comparison methodology as a reason why use of that methodology was not appropriate in the *Washers* anti-dumping investigation. We disagree, for it is in the very nature of the W-W comparison methodology that, through the use of averaging, it will "conceal" the differences between individual export prices. Notwithstanding this inherent aspect of the W-W comparison methodology, and notwithstanding the prevalence of export price differentials, the first sentence provides that the W-W comparison methodology shall normally be used. Accordingly, we do not consider that the masking effect inherent in the W-W comparison methodology itself provides an "explanation" as to why that methodology cannot take into account the relevant pattern of price differences.

7.75. The United States asserts that the USDOC properly took into account the particular factual circumstances of the *Washers* anti-dumping investigation when it compared the margin of dumping calculated using the W-W comparison methodology with the margin of dumping calculated using the W-T comparison methodology. The United States asserts that this revealed the amount of dumping that would be masked by use of a normal comparison methodology, consistent with the object and purpose of the second sentence.[137] We disagree that an authority is entitled to only consider such difference in margin, since the use of the second sentence may result in a higher margin of dumping even in cases where the pattern of significantly differing export prices has nothing to do with targeting conduct by the exporter. For example, take a hypothetical scenario in which both domestic and export prices are $20 at the beginning of the period of investigation and fall to $10 during the last one of that period as a result of a decline in costs. Under the W-W comparison methodology, the average price in both markets would be $15, and there would be no dumping. Under the second sentence, assuming the export transactions during the last month of the period of investigation were found to constitute "a pattern of export prices which differ significantly among different … time periods", the $10 export price at the end of the period of investigation would be compared with the $15 average domestic price over the entire period, thereby increasing the likelihood of a finding of dumping. We do not consider that the use of the W-T comparison methodology would be appropriate in this hypothetical scenario, even though there will be an increase in the margin of dumping resulting from application of the W-T comparison methodology, since an objective assessment of the facts suggests that the drop in export price at the end of the period of investigation – which occurs at the same time as a similar drop in domestic price – is a reflection of the drop in costs, rather than targeted dumping. Bearing in mind the object and purpose of the second sentence, there is no reason why one of the normal comparison methodologies could not take appropriate account of these price differences.

7.76. The appropriateness standard set forth in the explanation clause requires an authority to examine these factual circumstances, in order to avoid the second sentence being applied in factual circumstances that have nothing to do with targeted dumping. The United States accepts that "if the evidence were to show that prices in both the domestic market and the export market dropped at nearly the same time and in nearly the same amount, and there was a causal relationship connecting the price decline with the cost decline, that could lead an investigating authority to conclude that one of the 'normal' comparison methodologies could take into account the observed 'pattern' of export prices 'appropriately'".[138] This statement suggests that the United States acknowledges the need for an investigating authority to examine the attendant factual circumstances "presented by the interested parties"[139] in order to avoid the second

[136] See Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97; and *US – Zeroing (Japan)*, para. 131.

[137] United States' second written submission, para. 81.

[138] United States' response to Panel question No. 4.3, para. 22.

[139] Ibid.

sentence being applied in factual circumstances that have nothing to do with targeted dumping. In the *Washers* anti-dumping investigation, the USDOC failed to consider whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping. The USDOC instead focused on the difference between the margin of dumping calculated using the W-W comparison methodology and the margin calculated using the W-T comparison methodology.[140]

7.77. For the above reasons, we find that the USDOC acted inconsistently with the explanation clause of the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation. We emphasise that we are not finding that the factual circumstances of the *Washers* anti-dumping investigation indicate that the relevant price differences were caused by something other than targeted dumping. We are simply finding that the USDOC's failure to consider this possibility is inconsistent with the requirements of the explanation clause.

7.3.4.4.2 Whether it is necessary to address both the W-W and T-T comparison methodologies

7.78. Korea submits that the USDOC acted inconsistently with the explanation clause in the *Washers* anti-dumping investigation by failing to explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology. Korea observes that the USDOC only provided an explanation in respect of the W-W comparison methodology.

7.79. Beginning with the text of the explanation clause, we note that an explanation is required of why "a" W-W "or" T-T "comparison" cannot take into account appropriately the relevant price differences. The indefinite Article ("a") combined with the disjunctive ("or"), coupled with the use of the term "comparison" in the singular, together suggest that the requisite explanation need only be provided in respect of one type of comparison, be it W-W "or" T-T.

7.80. Furthermore, considering the broader context of the explanation clause, we note that the Appellate Body has found that "[a]n investigating authority may choose between the two [comparison methodologies in the first sentence of Article 2.4.2] depending on which is most suitable for the particular investigation."[141] The choice between the two normal methodologies provided for in the first sentence would likely be made *before* the application of the second sentence is considered, in light of, for example, the number of domestic and export transactions involved, differences between the domestic and export models, and other factors concerning the complexity of the comparison. If an authority were to opt for the W-W comparison methodology to avoid an overly burdensome comparison process, but then ascertain the existence of significant price differences by purchaser, region or time period, it would seem anomalous for that authority to then have to incur the burden of reverting to the T-T comparison methodology in the context of the explanation clause, before being able to apply the W-T comparison methodology. Korea contends that "[t]he authority has discretion to choose between them in the first instance, but then must again consider both comparison methods before turning to a W-T comparison as the exceptional method".[142] We disagree with the latter part of Korea's contention, since the initial discretion of an investigating authority to choose between the W-W and T-T comparison methodologies would be undermined by Korea's approach to the explanation clause.

7.81. Accordingly, we reject Korea's claim that the USDOC acted inconsistently with the explanation clause by failing to explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology.

[140] See Letter from Warren Connelly to Ms Rebecca M. Blank regarding Antidumping Duty Investigation on Large Residential Washers from the Republic of Korea: Opposition of Samsung to Whirlpool's Targeted Dumping Allegation (July, 2012), (Exhibit KOR-68); and United States Department of Commerce, Case Brief of LG Electronics, Inc. and LG Electronics USA, Inc, Investigation No. A-580-868 (2012), (Exhibit KOR-83). The USDOC's application of the explanation clause was restricted to a statement that the averaging in that methodology conceals price differences, and a finding that the margin of dumping calculated using that methodology was lower than the margin calculated using the W-T comparison methodology. The USDOC failed to address in this context the respondents' denials that they were engaged in targeted dumping.

[141] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.

[142] Korea's response to Panel question No. 2.16(i), para. 113.

7.3.5 Additional issues concerning the USDOC's application of the W-T comparison methodology in the *Washers* anti-dumping investigation

7.82. At paragraph 102 of its second written submission, Korea asserts that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation by "calculat[ing] standard deviations based on average export prices, not the actual 'export prices' themselves". At paragraph 103 of its second written submission, Korea alleges an inconsistency regarding the USDOC's use of allegedly biased standard deviations based on average, rather than actual, prices. At paragraphs 111 to 117 of its second written submission, Korea refers to an alleged inconsistency regarding the "sufficiency test" allegedly applied by USDOC in the *Washers* anti-dumping investigation. These alleged inconsistencies were not included in Korea's first written submission, even though paragraph 6 of the Panel's Working Procedures provides that "[b]efore the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments". As a result, we must consider the appropriateness of making findings in respect of these allegations.

7.83. Korea contends that the abovementioned allegations of inconsistency pertain to a claim articulated in its first written submission that "the USDOC improperly finds a 'pattern' based on unreasonable mechanical rules".[143] Korea refers in this regard to paragraphs 127 and 349 of its first written submission. We find no reference to any such claim in those parts of Korea's first written submission. Instead, both of those paragraphs refer in relevant part to a claim that "USDOC applies fixed numerical criteria" to determine whether there is a pattern, and "categorically rejects the relevance … of the commercial context". Korea's Request for Establishment of a panel identifies two separate claims that are relevant to the present discussion. First, Korea claims that "[t]he failure of the USDOC to consider legitimate commercial reasons and market explanations for any patterns of differing prices is clearly inconsistent with the meanings of 'pattern' and 'differ significantly'".[144] Second, Korea claims that "[t]he mechanical rules used by the USDOC to define 'patterns' of differing prices that 'differ significantly' are statistically unsound and produce economically irrational results".[145] We are in no doubt that the first claim is the one referenced in relevant part at paragraphs 127 and 349 of Korea's first written submission, concerning the relevance of the "commercial context". This is also the claim that we have addressed in section 7.3.3 above. There is no reference to the second claim (concerning "statistically unsound" and "unreasonable mechanical rules" that "produce economically irrational results") anywhere in Korea's first written submission, nor any indication of any arguments that might support such claim. Thus, although the second claim is covered by the Panel's terms of reference (as defined by Korea's Request for Establishment of a panel), Korea failed to pursue that claim in its first written submission.[146]

7.84. Furthermore, even if the relevant allegations could somehow be treated as arguments pertaining to the claim that was pursued in Korea's first written submission (concerning the USDOC's failure to consider the "commercial context"), there is no doubt that such arguments were not included in Korea's first written submission, contrary to the requirement of paragraph 6 of the Panel's Working Procedures. Korea contends that the relevant allegations could not have been included in its first written submission because they rebut arguments made subsequently by the United States.[147] Concerning the allegations of WTO-inconsistency in respect of the USDOC's use of standard deviations and average export prices, Korea contends that these allegations respond to the United States' assertion that the USDOC had applied the *Nails II* methodology "as a rigorous and holistic analysis".[148] Regarding the sufficiency test, Korea contends that the Panel should address this argument because the issue of the sufficiency test was raised by the

[143] Korea's response to Panel question No. 4.21(i), para. 144.
[144] Document WT/DS464/4, Section III.3.
[145] Ibid. Section III.4.
[146] Korea's second written submission, para. 101. We also observe that Korea introduced a number of "respects" in which the USDOC allegedly violated the pattern clause. The first two "respects" concern the standard deviation and use of average export price issues (see Korea's second written submission, paras. 102 and 103). The third "respect" refers to the USDOC's failure to "consider the reasons for price differences" (Korea's second written submission, para. 104). This third element concerns the first claim described above, regarding the relevance of the "commercial context". This structure of Korea's second written submission confirms our understanding that the relevant allegations of WTO-inconsistency do not pertain to the first claim outlined above.
[147] Korea's response to Panel question No. 4.21(ii), paras. 147 and 151.
[148] Ibid. para. 147 (referring to United States' first written submission, para. 96).

United States as a rebuttal to Korea's argument about the USDOC's application of the *Nails II* methodology in the *Washers* anti-dumping investigation.[149] Korea refers in this regard to the United States' response to Panel question No. 2.2, in which the United States asserted that "the USDOC considers, on a case by case basis, whether the volume of export sales which pass the *Nails II* methodology constitutes a sufficient volume of sales as compared to all sales made by the exporter during the period of investigation".[150]

7.85. We accept that rebuttal arguments need not be included in a party's first written submission. In our view, though, the relevant allegations of WTO-inconsistency are more realistically treated as arguments in support of the second claim outlined above (concerning "statistically unsound" and "unreasonable mechanical rules" that "produce economically irrational results") than as arguments rebutting arguments made by the United States in defence of the first claim outlined above (concerning the relevance of the "commercial context"). The subject-matter of the relevant arguments relates far more closely to Korea's statistical claim than to Korea's "commercial context" claim. Furthermore, we would not normally expect rebuttal arguments to form the basis for specific allegations of WTO-inconsistency, as is the case with the allegations of WTO-inconsistency at issue.[151]

7.86. In any event, it is well established that panels are not required to address all arguments made by the parties.[152] We do not consider it necessary to address the United States' general assertion that the USDOC conducted a "rigorous and holistic analysis" in applying the *Nails II* methodology in resolving Korea's claim that the USDOC failed to consider the "commercial context" in establishing the existence of a pattern of transactions. The United States' assertion is very general and therefore not relevant to our evaluation of Korea's claim. Accordingly, there is no need for us to address Korea's alleged rebuttal of the United States' general assertion.

7.87. The same is true for the sufficiency issue. The United States' assertion regarding the USDOC's application of a sufficiency test was part of the United States' response to a request by the Panel to explain how it had determined the existence of a pattern in the *Washers* anti-dumping investigation. We do not consider it necessary to consider the United States' explanation regarding the USDOC's application of a sufficiency test in evaluating Korea's claim that the USDOC failed to consider the "commercial context" in establishing the existence of a pattern of transactions.[153] For this reason, it is not necessary for us to address Korea's alleged rebuttal of this explanation.

7.88. For the above reasons, we decline to make any findings regarding the abovementioned allegations of WTO-inconsistency set forth in paragraphs 102, 103 and 111-117 of Korea's second written submission.

7.4 Claims concerning the DPM

7.89. We now consider Korea's claims concerning the DPM, which has replaced the *Nails II* methodology since the *Xanthan Gum* anti-dumping investigation in March 2013.[154] Korea challenges the DPM both "as such", and "as applied" in the first administrative review of the *Washers* anti-dumping order.[155] To the extent that the same three alleged errors concerning the

[149] Korea's response to Panel question No. 4.21(ii), para. 146.

[150] United States' response to Panel question No. 2.2, para. 27.

[151] Korea's second written submission, introductory statement, para. 101. Regarding the standard deviation and use of average export price issues, Korea identified these as two specific inconsistencies with the "pattern" clause that the USDOC "acted inconsistently with the 'pattern' clause in the following specific respects". Regarding the sufficiency issue, Korea asserted that "[a]n implicit finding of an unexplained test is not enough to satisfy the obligations of the second sentence of Article 2.4.2" (Korea's second written submission, para. 116). Furthermore, the relevant sub-section of Korea's second written submission is entitled "Inconsistencies in the *Washers* original investigation" (Korea's second written submission, Section III.A.5).

[152] See, for example, Appellate Body Report, *US – Carbon Steel*, para. 4.233.

[153] Korea's response to Panel question No. 4.21(ii), para. 146. Korea suggests that the issue of the USDOC's sufficiency test pertains to the "reasonable[ness]" of the *Nails II* methodology. However, there is no claim concerning the reasonableness of the *Nails II* methodology in these proceedings.

[154] *Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China:* Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. and Shandong Fufeng Fermentation Co., Ltd. (March 4, 2013) (Xanthan Gum I&D Memorandum), (Exhibit KOR-33).

[155] Korea's opening statement at the first meeting of the Panel, para. 46; Korea's response to Panel question No. 1.3, para. 19; Korea's second written submission, para. 73.

Nails II methodology applied in the *Washers* anti-dumping investigation are repeated in the application of the DPM in subsequent connected reviews, Korea also challenges them as ongoing conduct.[156] Korea indicates that the key point of its multiple challenges is to establish the WTO-inconsistency of the DPM as the underlying measure.[157] Korea indicates that its preference is for the Panel to address its claims concerning the DPM "as such".[158]

7.90. The United States disagrees that the DPM is a measure that may be challenged "as such".[159] The United States further argues that even if the DPM may be challenged "as such", it cannot be found to be inconsistent with Article 2.4.2 "as such" because it does not necessarily result in a breach of Article 2.4.2.[160] The United States asserts that the DPM cannot be challenged "as applied" in the present case, because the first administrative review of the *Washers* anti-dumping order has not yet been finalised, and it is not within the Panel's terms of reference.[161] As regards Korea's ongoing conduct claim, the United States argues that the purported ongoing conduct measure is not within the Panel's terms of reference, as it consists of an indeterminate number of future anti-dumping measures for which no final action had been taken at the time of Korea's panel request.[162] Moreover, the United States asserts that the facts in this dispute do not support the conclusion that the challenged practices "would likely continue to be applied in successive proceedings."[163]

7.91. We will first address the issue whether the DPM may be challenged "as such". If we find that the DPM may be challenged "as such", we will then proceed to examine the substance of Korea's claims regarding that measure. After that, we will address Korea's "as applied" and "ongoing conduct" claims.

7.4.1 Whether the DPM is a measure that may be challenged "as such"

7.4.1.1 Main arguments of the parties

7.4.1.1.1 Korea

7.92. Korea submits that the DPM is a rule or norm of general and prospective application that may be challenged in WTO dispute settlement proceedings. Korea asserts that the USDOC has described the nature of the DPM in writing.[164] Referring to the jurisprudence of the Appellate Body in *US – Zeroing (EC)*, Korea contends that even if the DPM is not considered to be expressed in the form of a written document, it may be challenged as an unwritten rule or norm if the complaining Member demonstrates (i) that the alleged "rule or norm" is attributable to the responding Member; (ii) its precise content; and (iii) that it has general and prospective application.[165] Korea asserts that there can be no dispute that the DPM is attributable to the United States. Korea also asserts that the precise content of the DPM, as reflected in its systematic application since the *Xanthan Gum* anti-dumping investigation, is invariable.[166] Korea asserts that the DPM also constitutes a rule or norm of general and prospective application. Korea argues in this regard that, since the DPM was first applied in an original investigation on 4 March 2013, and in an administrative review on 22 March 2013, the USDOC now applies it in all newly initiated anti-dumping investigations and administrative reviews.[167] Korea provides the Panel with a summary of 138 determinations where

[156] Korea's first written submission, paras. 180-181.
[157] Korea's second written submission, paras. 200-206; Korea's response to Panel question No. 4.22, paras. 153 and 157.
[158] Korea's second written submission, para. 233.
[159] United States' first written submission, paras. 269-319.
[160] Ibid. paras. 282-290.
[161] United States' response to Panel question 2.3, paras. 33, 35; United States' response to Panel question No. 2.8, para. 61; United States' response to Panel question No. 2.18, para. 84; United States' response to Panel question No. 2.21, para. 95; United States' Second written submission, para. 160.
[162] United States' first written submission, para. 323.
[163] Ibid. para. 324, referring to Appellate Body Report, *US – Continued Zeroing*, para. 191.
[164] Korea's first written submission, para. 184.
[165] Ibid. para. 185.
[166] Ibid. para. 186.
[167] Ibid. para. 187.

the DPM is applied (Exhibit KOR-95)[168], the Generic SAS Code which embodies the DPM (Exhibit KOR-24)[169], and an "expert opinion" (Exhibit KOR-94) which describes the precise content and the general and prospective application of the DPM.[170] Korea also asserts that the USDOC has made it clear that it will continue using the DPM going forward. According to Korea, the USDOC has stated that "[t]he Department is now using a 'differential pricing' analysis instead of the targeted dumping analysis"[171], and that it has "switched to a differential pricing analysis for preliminary results issued after March 4 [of 2013]".[172]

7.4.1.1.2 United States

7.93. The United States argues that Korea has failed to demonstrate that the DPM exists as a measure that may be challenged "as such".[173] The United States asserts that the evidence adduced by Korea is little more than a "string of cases or repeated action".[174] Such evidence contrasts sharply with the evidence put forward before the panel in *US – Zeroing (EC)*, and is insufficient to meet the "high threshold" as set out by the Appellate Body in that case.[175] The United States points out that there exist instances wherein the USDOC has not applied the DPM. For example, in the *Washers* anti-dumping investigation the *Nails II* methodology was applied.[176] Furthermore, the United States argues that the USDOC's Request for Comments shows that the USDOC "is seeking comments to further develop and/or refine its differential pricing analysis".[177] The United States adds that the Generic SAS Code submitted by Korea does not support its argument that the DPM is a measure consisting of a rule or norm of general and prospective application, because that Code is not permanent or fixed, and may be changed depending on the particular situation in a given proceeding.[178] With regards to Korea's summary of the 138 proceedings where the USDOC used the DPM in order to determine whether to use the W-T comparison methodology, the United States argues that the summary does not establish the content of the determinations or that the USDOC applied one and the same DPM in each of the 138 determinations.[179] In the view of the United States, even if Korea were to provide the Panel with actual public documentation pertaining to the 138 determinations, that would not suffice. What is needed is a "close examination of the records of the determinations".[180] The United States further points out that several elements of Korea's summary are misleading. First, the figure of 138 proceedings includes 32 preliminary determinations where the USDOC has not rendered final determinations.[181] Second, there are a few cases where the USDOC did not apply the DPM because it applied adverse facts available to a respondent, or the USDOC lacked sufficient data to apply the DPM.[182] The United States asserts that the USDOC is not applying the same DPM in case after case.[183] Finally, the United States challenges the impartiality of Korea's "expert", on the basis that

[168] List of USDOC Proceedings Applying Differential Pricing Methodology, (Exhibit KOR-95), has been updated until 12 April 2015 by Updated List of USDOC Proceedings Applying Differential Pricing Methodology, (Exhibit KOR-123), which provides an updated list of USDOC determinations applying the DPM through 12 April 2015 (see Korea's second written submission, para. 216).

[169] Korea's first written submission, para. 187 (referring to Generic SAS Code, (Exhibit KOR-24)).

[170] Korea's opening statement at the first meeting of the Panel, para. 38; and second written submission, para. 215.

[171] *Citric Acid and Certain Citrate Salts from Canada*, Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 Fed. Reg. 34338 (USDOC June 7, 2013), I&D Memorandum (Citric Acid I&D Memorandum), (Exhibit KOR-52), p. 2.

[172] *Fresh Garlic from the People's Republic of China*, Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 Fed. Reg. 36168 (USDOC June 17, 2013), I&D Memorandum, (Fresh Garlic I&D Memorandum), (Exhibit KOR-54), p. 10.

[173] United States' first written submission, para. 270.

[174] United States' second written submission, para. 150 (citing Appellate Body Report, *US – Zeroing (EC)*, para. 204).

[175] United States' first written submission, paras. 270-273.

[176] Ibid. para. 274.

[177] Ibid. para. 278 (quoting from the Differential Pricing Analysis Request for Comments (Request for Comments), (Exhibit KOR-25)).

[178] Ibid. paras. 279-281.

[179] United States' response to Panel question No. 2.30, para. 123.

[180] Ibid. para. 123.

[181] Ibid. para. 124.

[182] Ibid. para. 125.

[183] Ibid. para. 123.

she works for one of the law firms representing Korea in this dispute, and one of the respondents in the *Washers* proceedings before the USDOC.[184]

7.4.1.2 Main arguments of the third parties[185]

7.94. Brazil argues that the distinction between "as such" and "as applied" claims was a jurisprudential development to facilitate the understanding of the nature of a measure at issue. There is no limitation on the types of measures that may be challenged. According to Brazil, the criteria set out in *US – Zeroing (EC)* must be assessed on a case-by-case basis, taking into consideration not only the characteristics and the nature of the measure that is being challenged but also the period of time that the measure has been in place.[186] Furthermore, recognizing the value of "as such" claims in protecting the security and predictability to conduct future trade, Brazil considers it would be important and of systemic relevance to avoid reaching a situation similar to what WTO Members faced in the "zeroing" saga until very recently in the WTO.[187]

7.95. China submits that care is necessary in approaching the novel issues raised by Korea's challenges to both the *Nails II* methodology and the DPM. China argues that the Panel should be mindful not to go beyond the issues that are squarely before it, because elements of these methodologies not challenged in this case are, or may well be, the subject of distinct proceedings.[188]

7.96. The European Union argues that since the DPM was not applied in the *Washers* anti-dumping investigation, the Panel does not have before it the confidential documents (such as the Programme Log and Output for each exporter) that would explain precisely what was done. The European Union asserts that the Panel is therefore unable to make findings about either the existence or precise content of the DPM.[189]

7.4.1.3 Evaluation by the Panel

7.97. Korea first claims that the DPM is a rule or norm of general and prospective application, which is expressed in the form of a written document.[190] As discussed below, the DPM has been described by USDOC in a series of documents. However, Korea has not identified a single document which establishes, normatively, the content of the DPM, that the DPM is the means for applying the second sentence of Article 2.4.2, or that the DPM must be applied in all anti-dumping proceedings. Accordingly, we do not consider that the DPM may be considered as a rule or norm expressed in the form of a written document. Korea asserts that, even if the DPM is considered not to be expressed in the form of a written document, it still can be challenged "as such". In *US – Zeroing (EC)*, the Appellate Body stated that rules or norms may be challenged "as such" even if they are not expressed in the form of a written instrument.[191] The Appellate Body cautioned that, when a challenge is brought against a rule or norm that is not expressed in the form of a written document, "the very existence of the challenged 'rule or norm' may be uncertain", and its existence shall not be lightly assumed.[192] The Appellate Body articulated the following legal standard for assessing whether a complainant has proven the existence of an unwritten rule or norm of general and prospective application:

> In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or

[184] See United States' second written submission, para. 147.
[185] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[186] Brazil's third party oral statement, para. 12.
[187] Ibid. para. 14.
[188] China's third party submission, para. 5.
[189] European Union's third party submission, para. 60.
[190] Korea's first written submission, para. 184.
[191] Appellate Body Report, *US – Zeroing (EC)*, para. 193.
[192] Ibid. para. 196.

> norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.[193]

7.98. This legal standard has been applied by panels considering "as such" challenges in *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)*, *US – Shrimp (Viet Nam), US – Shrimp (Viet Nam II)*[194], and *Argentina – Import Measures.*[195] This standard was confirmed by the Appellate Body in *Argentina – Import Measures*.[196] Accordingly, in assessing whether the evidence presented by Korea is sufficient to prove the existence of the DPM as a measure that can be challenged "as such", we will be guided by the legal standard developed by the Appellate Body in *US – Zeroing (EC)*.[197] We will consider, in particular, whether Korea has provided sufficient evidence to clearly establish (i) that the DPM is "attributable to" the United States, (ii) the precise content of the DPM, and (iii) that the DPM has general and prospective application. We will address each of these elements in turn.

7.4.1.3.1 Attribution of the DPM to the United States

7.99. Korea asserts that there can be no dispute that the DPM is attributable to the United States.[198] The United States does not contest this. As will be explained below, the USDOC has adopted a deliberate policy of using the DPM to govern the application of the W-T comparison methodology since March 2013. Furthermore, the precise content of the DPM can be ascertained on the basis of USDOC documents.[199] Accordingly, we conclude that the DPM is attributable to the United States.

7.4.1.3.2 The precise content of the DPM

7.100. Concerning the precise content of the DPM, Korea refers to a number of USDOC memoranda pertaining to particular anti-dumping proceedings.[200] These memoranda contain statements confirming that the USDOC applied the DPM in those proceedings. They also contain a detailed description of the nature and content of the DPM applied by the USDOC in those proceedings. For example, the Post-Preliminary Analysis Memorandum in *Xanthan Gum from the People's Republic of China* describes the DPM in the following terms:

> The differential pricing analysis used in this post-preliminary analysis evaluates all purchasers, regions, and time periods to determine whether a pattern of significant price differences exists. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the customer codes reported by Fufeng. Regions are defined using the reported destination code (i.e. zip code) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the period of investigation being examined based upon the reported date of sale. For purposes of analyzing sales transactions by customer, region and time period, comparable merchandise is considered using the product control number and any characteristics of the sales, other than purchaser, region and time period, that the Department uses in making comparisons between export price (or constructed export price) and normal value for the individual dumping margins.

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[193] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[194] Panel Reports, *US – Zeroing (Japan)*, paras. 7.47-7.59; *US – Stainless Steel (Mexico)*, paras. 7.28-7.42 and 7.84-7.97; *US – Shrimp (Viet Nam)*, paras. 7.110-7.111; and *US – Shrimp II* (Viet Nam), paras. 7.29-7.56.
[195] Panel Report, *Argentina – Import Measures*, paras. 6.319-6.342.
[196] Appellate Body Report, *Argentina – Import Measures*, para. 5.107.
[197] The parties agree that this is the appropriate legal standard to be applied in the present case.
[198] Korea's first written submission, para. 186.
[199] See Exhibits KOR-24, KOR-25, KOR-33, KOR-67, KOR-52, and KOR-94.
[200] Korea's first written submission, para. 184. See also, Exhibits KOR-33, KOR-52, KOR-54 and KOR-67.

> In the first stage of the differential pricing analysis used here, the "Cohen's *d* test" is applied. The Cohen's *d* test is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group. First, for comparable merchandise, the Cohen's *d* test is applied when the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group account for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's *d* coefficient is calculated to evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's *d* test: small, medium or large. Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. The difference was considered significant if the calculated Cohen's *d* coefficient is equal to or exceeds the large (i.e. 0.8) threshold.
>
> Next, a ratio test assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66 percent or more of the value of total sales, then the identified pattern of export prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method. If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support consideration of an alternative to the average-to-average method.
>
> If both tests in the first stage (i.e. the Cohen's *d* test and the ratio test) demonstrate the existence of a pattern of export prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, we examine whether using only the average-to-average method can appropriately account for such significant price differences. In considering this question, the Department tests whether using an alternative method, based on the results of the ratio test described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average to- average method only. If the difference between the two calculations is meaningful, this demonstrates that the average-to-average method cannot account for price differences such as those observed in this analysis, and, therefore, an alternative method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if 1) there is a 25 percent relative change in the weighted-average dumping margin between the average-to-average method and the alternative method, or 2) the resulting weighted-average dumping margin moves across the *de minimis* threshold.[201]

7.101. The description above clearly identifies three main components of the DPM: (i) the Cohen's *d* test, (ii) the ratio test, and (iii) the "meaningful difference" test. The Cohen's *d* test considers whether price differences exhibited among different purchasers, regions, or time periods are significant. The ratio test assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. Finally, the "meaningful difference" test examines whether using only the W-W comparison methodology can appropriately account for such significant price differences.

7.102. The Issues and Decision Memoranda in *Citric Acid and Certain Citrate Salts from Canada* (Exhibit KOR-52), *Fresh Garlic from the People's Republic of China* (Exhibit KOR-54) and *Xanthan*

[201] *Xanthan Gum* Post-Preliminary Analysis Memorandum, (Exhibit KOR-33), pp. 3-5.

*Gum from the People's Republic of China (*Exhibit KOR-67)[202] also describe the nature and content of the DPM applied by the USDOC in those proceedings in largely identical terms. The substantive content of the DPM in each of these Issues and Decision memoranda is identical: (i) the Cohen's *d* test, (ii) the ratio test, and (iii) the "meaningful difference" test. These Issues and Decision Memoranda constitute evidence of the precise content of the DPM as applied by the USDOC in general.

7.103. Korea also refers to the fact that the USDOC sought comments on the DPM in the form of a Request for Comments on the DPM (Exhibit KOR-25). Korea asserts that the USDOC's summary of the DPM in the Request for Comments establishes the precise content of the DPM as a measure. We agree, for the USDOC's Request for Comments on the DPM describes the application of the DPM in terms almost identical to those in the abovementioned Issues and Decision Memoranda, referring in particular to (i) the Cohen's *d* test, (ii) the ratio test, and (iii) the "meaningful difference" test.

7.104. In addition, Korea provides further details of the precise content of the DPM through an opinion of a practitioner on the USDOC's Generic SAS Code.[203] Korea refers in this regard to an affidavit from Ms Anya Naschak[204], an International Trade Analyst with the law firm representing Korea before this Panel, and formerly an analyst with the USDOC (Exhibit KOR-94).[205] In her affidavit, Ms Naschak describes in detail how the Generic SAS Code implements the DPM.[206] In particular, Ms Naschak identifies the following eight separate "steps" in the Generic SAS Code:

> Step 1: Calculate the average weighted mean price for a particular product model (i.e. CONNUM) in the tested group (i.e. customer, region or time) (for example, Model 8 for the first quarter of the year (1Q).
>
> Step 2: Calculate the average weighted mean price for the remainder of the test group (not including those transactions being tested) (that is, for example, the average weighted mean price for Model 8 for all other quarters (2Q, 3Q and 4Q).
>
> Step 3: Calculate the standard deviation for all transactions for the particular model (e.g. Model 8) (including those being tested), and also calculate the Cohen's *d* test for all model (CONNUM)-basis (time, customer or region) pricing.
>
> Step 4: Insert the results of Step 1, Step 2 and Step 3 into Commerce's differential pricing test.
>
> Step 5: Determine all CONNUM-basis pricing that have a Cohen's *d* result more than the absolute value of 0.8 (in other words, more than +0.8 or less than -0.8), and then flag all individual sales transaction in those CONNUMs accordingly (e.g. "Pass" or "No Pass" based on the results).

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[202] The USDOC announced the new policy in March 2013 in the in the *Xanthan Gum* Post-Preliminary Analysis Memorandum (Exhibit KOR-33), and then finalized its application in the *Xanthan Gum* case in June 2013 in the Issues and Decision Memorandum issued in conjunction with the final determination (Exhibit KOR-67).

[203] The Generic SAS Code is a standard computer code that is used by the USDOC to calculate dumping margins in anti-dumping investigation and reviews. It is publicly available from the USDOC website (see Anti-Dumping Margin Calculation Programs, Targeted Dumping Macros (Generic SAS Code), USDOC website accessed 18 September 2014 <http://enforcement.trade.gov/sas/programs/amcp.html> (Exhibit KOR-24); see Korea's response to Panel question No. 1.3, paras. 29-30).

[204] Korea's response to Panel question No. 1.3, para. 31.

[205] The United States argues that Ms Naschak's affidavit cannot be viewed as "evidence" from an impartial or independent source, because Ms Naschak works for one of the law firms representing Korea in this dispute and one of the respondents in the proceedings before the USDOC. In our view, the fact that Ms Naschak works for one of the law firms representing Korea in this dispute and one of the respondents in the proceedings before the USDOC is not in itself a reason for us to exclude her affidavit. This is particularly so in light of the fact that the United States has not contested the relevance and correctness of any substantive elements of Ms Naschak's affidavit, and the credentials of Ms Naschak as an expert. Moreover, we note that in *US – Shrimp II (Viet Nam)*, the panel took into account, *inter alia*, an affidavit by Ms Naschak in relation to the USDOC's use of zeroing in three administrative reviews (see Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.44).

[206] Affidavit of Ms Anya Naschak, (Exhibit KOR-94), paras. 17-26.

> Step 6: Determine percentage of the total U.S. sales transactions (by value) that meet Step 5.
>
> Step 7: Calculate overall AD margin three ways: (a) not applying [the W-T comparison methodology], (b) applying [the W-T comparison methodology] to only those U.S. sales transactions included in Step 5 and (c) applying [the W-T comparison methodology] to all U.S. sales transactions (regardless of whether they are or are not included in Step 5).
>
> Step 8: Determine whether the results of Step 7 result in a "meaningful difference" in the margin, defined as either (a) crossing the *de minimus* threshold; or (b) resulting in a 25% relative change in the margin between applying [the W-T comparison methodology] and not.[207]

7.105. In her affidavit, Ms Naschak also explains that the DPM is enshrined in the Generic SAS Code's "Macros Program", which is not subject to changes by individual case analysts handling anti-dumping investigations and reviews. Based on her personal involvement and analysis of the Generic SAS Code as applied in four USDOC preliminary and final determinations over a two-year time span from March 2013 to March 2015[208], Ms Naschak confirms that the SAS code used to apply the DPM in each of these cases was identical in all material respects. Her affidavit also directs our attention to certain actual SAS code language that was utilized in the abovementioned proceedings. That code language was identical in each case, and identical to the Generic SAS Code. We observe that the relevant Generic SAS Code confirms the description of the DPM in the abovementioned Issues and Decisions Memoranda and the USDOC's Request for Comments. In particular, Steps 1-5 above correspond to the Cohen's *d* test; Steps 6 and 7 correspond to the ratio test; Step 8 corresponds to the "meaningful difference" test.

7.106. The United States argues that the Generic SAS Code does not support Korea's argument that the DPM is a measure consisting of a rule or norm of general and prospective application, because this Generic SAS Code is not permanent or fixed, and may be changed depending on the particular situation in a given proceeding. However, in response to our question regarding the type of changes to the DPM that can be made by government officials handling an anti-dumping investigation or review, the United States referred only to possible modifications concerning the default group definitions (i.e. how purchasers, regions and time periods are defined), where such changes can be or have been made.[209] The United States did not indicate that changes could have been made regarding the Cohen's *d* test, the ratio test, or the "meaningful difference" test.

7.107. Based on a careful review of the entirety of the evidence above, we consider that the description of the DPM contained therein is precise and complete. The evidence explains in detail the methods applied to determine the existence of a "pattern of export prices which differs significantly among different purchasers, regions or time periods", and whether the identified pattern of significant price differences cannot be appropriately taken into account by the W-W or T-T comparison methodologies. The evidence also demonstrates that the DPM is applied in a consistent manner. The three main components of the DPM, namely (i) the Cohen's *d* test, (ii) the

[207] Affidavit of Ms Anya Naschak, (Exhibit KOR-94), para. 22.

[208] These are (1) *Xanthan Gum from China* (final determination dated May 28, 2013); (2) *Diffusion-Annealed Nickel-Plated Steel from Japan* (final determination April 3, 2014); (3) *Frozen Warmwater Shrimp from Vietnam* (final determination September 19, 2014); and (4) *Washers from Korea* (preliminary results March 2, 2015).

[209] United States' response to Panel question No. 4.26, paras. 106 and 108. We observe that this feature of the DPM is not challenged by Korea. The United States refers to an administrative review of the anti-dumping duty order on seamless refined copper pipe and tube from China, in which the USDOC changed the default definition of time period from quarterly to monthly upon determining that a respondent's export pricing was tied to a published monthly index for copper prices on the London Metals Exchange during a period of significant volatility for copper prices. See *Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 Fed. Reg. 23,324 (April 28, 2014), (Exhibit USA-96); and accompanying Issues and Decision Memorandum, comment 6, (Exhibit USA-97), p. 13. In an administrative review of the anti-dumping duty order on pasta from Italy, the USDOC also changed its default setting for consolidated customer code to individual customer code upon determining that a respondent maintained distinct price lists and rebates for each sub-entity that was part of a larger consolidated company. See *Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 Fed. Reg. 8,604 (February 18, 2015), (Exhibit USA-98), and accompanying Issues and Decision Memorandum, comment 4, (Exhibit USA-99), p. 5.

ratio test, and (iii) the "meaningful difference" test, feature throughout the evidence supplied by Korea, and are described in virtually identical terms on each occasion. These main components were also included in the United States' own description of the DPM applied in the first administrative review of the *Washers* anti-dumping duty order.[210] Furthermore, the United States has not contested any aspect of Korea's description of the DPM as being imprecise or incorrect.

7.108. Accordingly, we conclude that Korea has established the precise content of the DPM.

7.4.1.3.3 General and prospective application of the DPM

7.109. The abovementioned Issues and Decision Memoranda contain statements indicating that the USDOC has adopted a policy choice of applying the DPM since 4 March 2013. For example, the USDOC stated shortly after that date that "[t]he Department is now using a 'differential pricing' analysis instead of the targeted dumping analysis"[211], and that it has "switched to a differential pricing analysis for preliminary results issued after March 4".[212] Furthermore, in its Request for Comments on the DPM, the USDOC states clearly that:

> [T]he Department is developing a new approach for determining whether application of such a comparison method is appropriate in a particular segment of a proceeding pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act. The new approach is referred to as the "differential pricing" analysis, as a more precise characterization of the purpose and application of section 777A(d)(1)(B) of the Act.[213]

7.110. We take particular note of the USDOC's reference to the DPM as the "new approach" for determining whether to apply the W-T comparison methodology. This indicates that the USDOC has adopted a policy choice of applying the DPM, going beyond the simple repetition of the application of that methodology in isolated cases. As previous panels have done[214], we consider such policy statements as evidence of the general and prospective nature of the DPM.

7.111. Korea also relies on a summary of 138 instances in which the DPM has been applied in anti-dumping proceedings since 4 March 2013. The United States argues that Korea must provide a "close examination of the records of the determinations"[215] to discharge its burden of proof that one and the same DPM was applied in all of these cases. Although we agree with the United States that the burden of proving the general and prospective application of the DPM rests on Korea, we find the United States' approach to be unduly restrictive and burdensome.[216] We note that Korea offered, at the first meeting of the Panel, to provide all public documentation pertaining to the USDOC's application of the DPM in 138 anti-dumping proceedings.[217] We do not consider that such an exercise is warranted or necessary in the present dispute. We observe that the summary of the relevant proceedings provided by Korea contains most, if not all, pertinent information relevant to the issue before the Panel: whether the DPM was applied in the determinations, the results of the application of the Cohen's *d* and the ratio tests, the outcome of the "meaningful difference" test, and the final comparison methodology applied by the USDOC in each of these determinations. The summary provided by Korea confirms that the DPM was applied in all of these determinations,

[210] United States' response to Panel question No. 2.3, paras. 44-58. Referring to the *Washers* AD Administrative Review Preliminary Decision Memo and the Preliminary LG AD Review Calculation Memo, the United States described the way in which the USDOC used the Cohen's *d* test to consider whether price differences exhibited among different purchasers, regions or time periods are significant, and the way in which the USDOC used the ratio test to determine whether the "pattern" clause of the second sentence of Article 2.4.2 was satisfied. The United States' description confirms the content of the DPM as described in the other evidence, and reflects the application of the DPM to a particular set of facts.

[211] Citric Acid I&D Memorandum, (Exhibit KOR-52).

[212] Fresh Garlic I&D Memorandum, (Exhibit KOR-54).

[213] Request for Comments, (Exhibit KOR-25), p. 26722.

[214] See Panel Reports, *US – Zeroing (Japan)*, para. 7.52; *US – Stainless Steel (Mexico)*, paras. 7.40 and 7.95; and *US – Shrimp (Viet Nam)*, para. 7.112.

[215] United States' response to Panel question No. 2.30, para. 123.

[216] The United States has not challenged any of these summaries.

[217] Korea's opening oral statement at the first meeting of the Panel, para. 41.

except where its application was not necessary given that the USDOC applied adverse facts available or where there were insufficient comparable sales data.[218]

7.112. The United States also argues that certain aspects of the summary of the proceedings provided by Korea are misleading. First, the United States refers to the fact that 32 out of the 138 determinations are preliminary determinations for which the final determinations are not published yet. However, the preliminary nature of these determinations does not change the fact that the DPM has been applied systematically in all proceedings initiated after 4 March 2013. Second, the fact that the DPM was not applied when the USDOC applied adverse facts available, or when there was not sufficient data to apply the DPM, should not be determinative. The United States does not contest that the USDOC applied the DPM in all cases where the potential application of the W-T comparison methodology could have been considered. Nor has the United States suggested that the USDOC would have used some methodology other than the DPM for applying the second sentence of Article 2.4.2, in cases where facts available were used, or where the relevant data was not available.

7.113. Korea also relies on the affidavit of Ms Naschak that the DPM is "a well-defined policy enshrined in the SAS Code that is being applied consistently and without any material change in every antidumping proceeding before the USDOC".[219] We recall that the United States argues that the Generic SAS Code submitted by Korea does not support the general and prospective application of the DPM because it may be changed depending on the particular situation in a given proceeding. However, while not identifying any material change to the DPM, the United States only emphasized in general terms the "continuing evolution of the USDOC's approach to determining whether to apply the alternative, average-to-transaction comparison methodology" as evidenced by its request for comments and the possibility for interested parties to make comments on the DPM in the first administrative review of the *Washers* anti-dumping duty order.[220]

7.114. Finally, we note that the United States argues for an "appropriately broad view" of the evidence by taking into account all methodologies historically used to determine whether or not to resort to the W-T comparison methodology, including those that were applied before the DPM was introduced, such as the *Nails II* methodology.[221] We are not persuaded by this broad view proposed by the United States. As mentioned above, the United States itself refers to the DPM as the "new approach" to determining whether the W-T comparison methodology should be applied. We have also found that the precise content of this "new approach" to applying the second sentence of Article 2.4.2 can be ascertained, as distinct from other methodologies previously used by the USDOC when applying the second sentence of Article 2.4.2. Therefore, our analysis shall focus on the DPM itself, as distinct from other methodologies previously applied by the USDOC for the application of the second sentence of Article 2.4.2.

7.115. We recall the Appellate Body's statement in *US – Zeroing (EC)* that a panel should not lightly assume the existence of a rule or norm constituting a measure of general and prospective application, particularly where the rule or norm at issue is not expressed in written form. In our view, the entirety of the evidence discussed above meets the high threshold referred to by the Appellate Body. It clearly demonstrates that the USDOC's application of the DPM represents a policy choice that extends well beyond the mere repetition of the methodology in certain specific cases. Furthermore, in its response to our question, the United States could not identify any investigation or review initiated after 4 March 2013 where, in determining whether to apply the W-T comparison methodology, the USDOC applied some methodology other than the DPM.[222]

7.116. For the above reasons, we are satisfied that the DPM has general and prospective application.

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[218] The Cohen's *d* test component of the DPM is applied when the test and comparison groups of data each have at least two observations and when the sales quantity for the comparison group account for at least 5% of the total sales quantity of the comparable merchandise. See para. 7.100. above.

[219] Affidavit of Ms Anya Naschak, (Exhibit KOR-94), para. 33. See also Korea's response to Panel question No. 1.3, para. 31.

[220] United States' response to Panel question No. 4.26, paras. 109 and 110.

[221] United States' response to Panel question No. 2.30, para. 122.

[222] United States' response to Panel question No. 4.27. The United States refers to two instances where group definitions have been changed, and several instances where the *Nails II* methodology has been used in administrative reviews initiated *before*, but completed after the final determinations were published in *Xanthan Gum* on 4 June 2013.

7.4.1.3.4 Conclusion

7.117. In light of the above, we conclude that the evidence advanced by Korea supports a finding that Korea has clearly established (i) that the DPM is attributable to the United States, (ii) the precise content of the DPM, and (iii) that the DPM has general and prospective application. Accordingly, we conclude that the DPM is a measure that may be challenged "as such".

7.4.2 Claims concerning the WTO-consistency of the DPM "as such"

7.4.2.1 The alleged inconsistencies concerning the DPM

7.118. Korea claims that the DPM is inconsistent with the second sentence of Article 2.4.2 in five aspects[223]:

a. the DPM applies fixed numerical criteria to determine whether there is a "pattern", and categorically rejects the relevance to its inquiry of the commercial context in which the alleged "pattern" arises;

b. the DPM fails to provide any adequate explanation as to why the significant price differences cannot be taken into account appropriately by using the W-W or T-T comparison methodology[224];

c. the DPM applies the exceptional comparison methodology to transactions that do not meet its own criteria for determining "differential pricing"[225];

d. the DPM does not identify a "pattern" of significant price differences among different purchasers, regions or time periods, but simply compares each individual transaction with the exporter's other export prices ;

e. the DPM sets any negative W-W comparison result to zero when aggregating the two intermediate dumping calculations when applying a mixed comparison methodology[226].

7.119. Regarding aspects a. to c. in the paragraph above, Korea essentially makes the same legal arguments that it makes with respect to the application of the *Nails II* methodology in the *Washers* anti-dumping investigation.[227] Equally, the United States responds in similar terms to its response to Korea's claims regarding the *Washers* anti-dumping investigation.[228] We refer to our findings in section 7.3 above, which apply *mutatis mutandis* in the context of the DPM. For the same reasons, we find that:

a. the DPM is not inconsistent "as such" with the second sentence of Article 2.4.2 by determining the existence of "a pattern of export prices which differ significantly" among

[223] Korea's first written submission, para. 128; Korea's response to Panel question No. 4.22, paras. 154-156.

[224] As mentioned above at para. 7.100. , the "meaningful difference" test is one of the three main components of the DPM. Under this test, the USDOC concludes that the W-W comparison methodology cannot appropriately take into account the observed pattern of significantly different prices where the respondent's dumping margin using the W-W comparison methodology and the W-T comparison methodology yields a "meaningful difference". The USDOC defines "meaningful" as a 25% relative change in the weighted-average dumping margin between the W-W and W-T comparison methodologies where both rates are above *de minimis*, or the resulting weighted-average dumping margin moves across the *de minimis* threshold. The DPM does not address at all why the T-T comparison methodology cannot take into account appropriately the pattern of significantly differing prices found to exist. See Korea's first written submission, para. 197. We recall that the United States does not contest any aspect of Korea's description of the DPM, including the "meaningful difference" test that is used to apply the explanation clause.

[225] As mentioned above at para. 7.100. , the USDOC applies the W-T comparison methodology to all export transactions when the result of the ratio test is above 66%.

[226] We recall that where the result of the ratio test is between 33% and 66%, the DPM will lead to the application of a mixed comparison methodology.

[227] Korea's first written submission, paras. 190-200; Korea's response to Panel question No. 4.22, para. 155.

[228] United States' first written submission, paras. 293-311.

purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences;

b. the DPM is inconsistent "as such" with the explanation clause of the second sentence of Article 2.4.2 because, in applying the "meaningful difference" test, the DPM focuses on the difference between the margin of dumping calculated with the W-W comparison methodology and the margin calculated using the W-T comparison methodology or the mixed comparison methodology. The DPM fails to provide for any consideration of whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping. However, the DPM is not inconsistent with the explanation clause when, after the USDOC concludes that the W-W comparison methodology cannot appropriately take into account the observed pattern of significantly different prices, the DPM does not require the USDOC to also consider whether the relevant price differences could be taken into account appropriately by the T-T comparison methodology;

c. the DPM is inconsistent with the second sentence of Article 2.4.2 because it applies the W-T comparison methodology to all transactions where the value of transactions to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66% or more of the value of total sales, including transactions falling outside the "pattern[s] of export prices which differ significantly among different purchasers, regions or time periods".

7.120. Having considered Korea's claims under aspects a. to c. above, we move to address Korea's claims under aspects d. and e.

7.4.2.2 Whether the DPM aggregates random, unrelated price differences

7.4.2.2.1 Main arguments of the parties

7.4.2.2.1.1 Korea

7.121. Korea claims that the DPM is inconsistent with the pattern clause, because the DPM aggregates random, unrelated price differences, without properly identifying "a pattern of export prices which differ significantly among different purchasers, regions or time periods".[229] According to Korea, the pattern clause requires that a pattern be established among different purchasers, regions or time periods as distinct categories, in the sense that the pattern must be discernible:

a. as between one purchaser and all other purchasers; or

b. as between one region and all other regions; or

c. as between one time period and all other time periods.[230]

7.122. Korea argues that the DPM does nothing more than measure the amount of price variation that can be found within an exporter's sales by aggregating random, unrelated price differences of every possible type and combination.[231] By doing this, the DPM does not identify a meaningful pattern which can serve as the basis to apply the W-T comparison methodology.[232] Korea identifies three distinct respects in which the DPM fails to identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods".[233] Korea refers to these as vertical variation[234], horizontal variation[235] and cross-category variation[236], respectively.

7.123. Concerning the vertical variation aspect, Korea argues that the DPM does not analyse whether export prices differ at the level of particular purchasers, regions or time periods. Instead,

[229] Korea's first written submission, paras. 201-202.
[230] Ibid. para. 210.
[231] Ibid. paras. 202 and 213; second written submission, para. 121.
[232] Korea's first written submission, paras. 213 and 216.
[233] Ibid. para. 203.
[234] Ibid. paras. 217-221.
[235] Ibid. paras. 222-226.
[236] Ibid. paras. 227-233.

the analysis of price variation takes place at the level of individual models (i.e. control number (CONNUM[237])) without ever determining whether export prices differ among different purchasers, regions or time periods.[238] Korea argues that the reference to "a pattern of export prices" in the second sentence of Article 2.4.2 should be understood to refer to a pattern of export prices for the product under investigation, not to a pattern that is discerned from the export prices for only certain models and sub-types of the product under investigation.[239]

7.124. In Korea's view, the USDOC is entitled to analyse price variation at the level of individual models, as an intermediate step, to ensure that the analysis is based on export prices for comparable transactions. However, the USDOC must take into account the price variation, or lack thereof, for all models in order to reach an ultimate determination whether there is a pattern. Otherwise the USDOC may incorrectly identify a "pattern" when in fact the export prices do not differ in any significant respect.[240]

7.125. Concerning the horizontal variation aspect, Korea argues that the DPM aggregates price variation across all purchasers (or regions or time periods, as the case may be) to establish a "pattern", where no one of these purchasers (or regions or time periods, as the case may be), on its own, has a sufficient amount of "passed" price variation to meet the 33% threshold that the USDOC uses to identify a "pattern".[241] Korea contends that this renders the DPM incapable of evaluating whether the export prices to a particular purchaser, region or time period must be distinct from the prices to all other purchasers, regions or time periods, respectively.[242] Korea argues that this practice is incompatible with the meaning of "a pattern of prices which differ significantly among different purchasers, regions or time periods".

7.126. Furthermore, Korea argues that to exhibit a "pattern", the price differences must follow some sort of discernible sequence and may not reflect random or spurious price fluctuations.[243] Using a hypothetical example of the DPM, Korea contends that the aggregation of "passed" transactions which spread across different purchasers, and which can be either too high or too low, amounts to random or spurious price fluctuations lacking any meaningful pattern.[244]

7.127. Concerning the cross-category variation aspect, Korea asserts that by aggregating price variation among purchasers, regions and time periods, the DPM undertakes an "apples and oranges" analysis of unrelated price variation.[245] Korea asserts that this is inconsistent with the ordinary meaning of the second sentence, which plainly contemplates that purchasers, regions and time periods are three distinct categories – not categories that can be added together to identify a "pattern".[246]

7.4.2.2.1.2 United States

7.128. The United States argues that the USDOC's previous *Nails II* methodology focused only on lower-priced export sales. However, Article 2.4.2 does not require the "targeted dumping" approach to the "pattern" analysis.[247] The United States contends that the DPM seeks to identify a "pattern", rather than a "target". The terms "targeting" or "targeted dumping" are not present in Article 2.4.2, and are just one example of a "pattern", which is expressly provided for in Article 2.4.2.[248] Therefore, the conceptual framework of the DPM, which looks for export prices

[237] The panel in *US – Zeroing (EC)* described the USDOC's use of CONNUM as follows:

The investigating authority, as well as determining the overall product scope of the proceeding (also referred to as subject product or subject merchandise), will, in applying the weighted average-to-weighted average comparison method, identify those sales of sub-products in the United States considered "comparable", and will include such sales in an "averaging group". An averaging group consists of merchandise that is identical or virtually identical in all physical characteristics. Each category of sub-product within the subject merchandise is assigned a control number, or CONNUM. (Panel Report, *US – Zeroing (EC),* para. 2.3).

[238] Korea's first written submission, paras. 203 and 216.
[239] Ibid. para. 219.
[240] Ibid. para. 221.
[241] Ibid. paras. 222-223.
[242] Ibid. para. 224.
[243] Ibid. para. 224.
[244] Ibid. para. 226.
[245] Ibid. paras. 203 and 222-233.
[246] Ibid. para. 230.
[247] United States' second written submission, para. 166.
[248] Ibid. para. 165.

which are either significantly higher or significantly lower, is consistent with the terms of the pattern clause of the second sentence of Article 2.4.2.[249] According to the United States, the DPM reflects an approach that hews closely to the text of the second sentence of Article 2.4.2.[250] The United States contends that normal values and dumping are not relevant to the question of the existence of a "pattern" of export prices which differ significantly because either lower-priced or higher priced export sales may be less than normal value, and either lower-priced or higher priced export sales may be more than normal value. A "pattern" of export prices which differ significantly does not provide evidence of dumping or the masking of dumping. Rather, it only establishes that conditions exist in the export market in which "masked dumping" could occur.[251]

7.129. Concerning the vertical variation aspect, the United States maintains that Korea's arguments are based on a flawed legal premise. According to the United States, the second sentence of Article 2.4.2 requires the identification of a "pattern" rather than a "target". Nothing in the "pattern clause" requires the investigating authority to find that all of the export sales to one particular purchaser (or region or time period) *as a whole* differ significantly from those to other purchasers (or regions or time periods).[252] The United States agrees with Korea that the "pattern" shall be determined for the product under investigation as a whole and that the analysis of the price variation at the level of individual model is a necessary intermediate step. The United States points out that that is exactly why the USDOC has aggregated the results of the model-specific comparisons in the ratio test to ensure that the "pattern" identified is for the product under investigation as a whole, and is based on the exporter's overall pricing behaviour in the U.S. market.[253]

7.130. Concerning the horizontal variation aspect, the United States denies that the USDOC improperly combines price variation across different purchasers (or regions or time periods). The United States argues that there is no textual support in Article 2.4.2 for Korea's contention that there must be a significant difference between the export prices to one purchaser and the export prices to all other purchasers. According to the United States, the use of the word "among" in the "pattern clause" under Article 2.4.2 contemplates a holistic analysis of the exporter's pricing behaviour for the product as a whole.[254]

7.131. Concerning the cross-category variation aspect, the United States argues that nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 suggests that the significant export price differences among purchasers (or regions or time periods) cannot be cumulated with the significant differences in export prices among other categories when assessing whether there exists "a pattern of export prices which differ significantly among purchasers, regions or time periods".[255] The United States contends that by aggregating the results across the three categories, the USDOC was not undertaking an "apples and oranges" analysis of unrelated price variation, but considering the pricing behaviour of the exporter in the Unites States market as a whole.[256] The United States further asserts that Korea's approach that a "pattern" of significant price differences must be established for one purchaser against all other purchasers is inconsistent with the Appellate Body's guidance that a dumping margin must be exporter-specific and determined for the product as a whole.[257]

7.4.2.2.2 Main arguments of the third parties[258]

7.132. Brazil argues that not all "pattern(s) of export prices that differ significantly" matter for the purpose of resorting to the W-T comparison methodology. Brazil contends that any decision about the existence of "a pattern of export prices which differ significantly" for the purpose of the second sentence of Article 2.4.2 must be based on criteria of analysis coherent with the object and purpose of the Anti-Dumping Agreement.

[249] United States' second written submission, para. 167.
[250] Ibid. para. 170.
[251] Ibid. para. 168.
[252] Ibid. para. 179.
[253] Ibid. paras. 180-181.
[254] Ibid. paras. 184-185.
[255] Ibid. para. 186.
[256] Ibid. para. 187.
[257] Ibid. para. 188.
[258] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.

7.133. Canada argues that the use of the disjunctive "or" in the term "among purchasers, regions or time periods" means that the three categories are distinct.[259] Canada contends that by aggregating the results of comparisons of export prices to purchasers, regions and time periods, the USDOC ignores the requirement that a pattern of significantly different export prices must be identified with respect to one of these categories.[260]

7.134. China argues that the question whether export prices "differ significantly" in any of the three categories so as to form a relevant pricing "pattern" must be answered by examining the differences severally within the categories of purchaser, region or time period and not by combining unrelated price differences across different purchasers, regions or time periods.[261]

7.135. With respect to the alleged vertical variation problem, the European Union asserts that a targeted dumping determination must ultimately be made with respect to the product as a whole (in relation to a particular exporter). With respect to the alleged horizontal variation problem, the European Union considers that adjacent regions, related purchasers and adjacent time periods may be considered as one and cumulated for the purpose of establishing a "pattern" of export prices which differ significantly. With respect to the alleged cross-category variation problem, the European Union finds it difficult to understand the justification for combining data that are not generated on the basis of equivalent parameters.[262]

7.136. Japan disagrees with the United States' understanding that a pattern within the meaning of the second sentence of Article 2.4.2 includes both lower and higher prices that differ significantly from each other.[263] Japan notes that the Appellate Body has clarified that the role of the second sentence of Article 2.4.2 is to "enable investigating authorities to capture pricing patterns constituting 'targeted dumping'" and "unmask" such targeted dumping.[264] Japan argues that the DPM cannot identify targeted dumping with "a disorderly mixture of higher and lower prices across all purchasers, regions and time periods as well as across different models".[265] Japan further argues that simply extracting and aggregating unrelated variation in export prices among various models across different purchasers, regions and time periods without contextualizing or interpreting such variation into a discernible form or sequence, is very different from identifying a pattern as defined in terms of different purchasers, regions or time periods.[266]

7.137. Viet Nam shares the concerns expressed by Korea over the vertical variation, horizontal variation and cross-category variation issues.[267]

7.4.2.2.3 Evaluation by the Panel

7.138. The DPM analyses any given export transaction in three different ways (by purchaser, region and time period respectively) in order to identify six possible types of price variation that the USDOC considers to pass the Cohen's *d* test: 1) prices that are too high (i.e. where the Cohen's *d* coefficient is greater than 0.8) to a particular purchaser; 2) prices that are too low (i.e. where the Cohen's *d* coefficient is lower than -0.8) to a particular purchaser; 3) prices that are too high to a particular region; 4) prices that are too low to a particular region; 5) prices that are too high during a particular time period; and 6) prices that are too low during a particular time period.[268] In assessing the extent of the significant price variation by using the ratio test, the USDOC aggregates the value of these six different types of price variation, and measures this aggregated value against the total value of export sales. If the aggregated value is more than 33%

[259] Canada's third party submission, para. 26.
[260] Canada's third party oral statement, para. 6.
[261] China's third party submission, para. 25.
[262] European Union's third party submission, paras. 73-76.
[263] Japan's third party submission, para. 40.
[264] Ibid. (citing Appellate Body Reports, *US – Stainless Steel (Mexico)*, para. 127; and *US – Zeroing (Japan)*, para. 133).
[265] Japan's third party submission, para. 39.
[266] Ibid. para. 26.
[267] Viet Nam's third party oral statement, para. 15.
[268] Unlike the *Nails II* methodology, the USDOC applies the DPM automatically, without the need for specific allegation from the domestic industry of targeted dumping to a particular purchaser, region or during a particular period of time.

of the total value of export sales, the USDOC considers a pattern to exist.[269] Korea argues that the DPM merely measures the amount of the price variation, instead of identifying a "pattern".[270] Korea further identifies three respects in which the DPM fails to identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods":

a. By analysing price variation only at the level of individual models of the product concerned, the DPM does not analyse whether export prices differ significantly at the level of particular purchasers, regions or time periods (the so-called "vertical variation" issue);

b. By aggregating price variation across all purchasers (or across regions or across time periods), the DPM does not analyse whether export prices differ among different purchasers, regions or time periods (the so-called "horizontal variation" issue);

c. By aggregating price variation among the three different categories, the DPM undertakes an "apples and oranges" analysis of unrelated price variation (the so-called "cross-category variation" issue).[271]

7.139. The recurring theme of the alleged vertical, horizontal and cross-category variation issues identified by Korea is that the DPM does not identify a "pattern" for a particular purchaser, region or time period.[272]

7.140. Korea argues that the pattern must be identified among different purchasers, regions or time periods as distinct categories, in the sense that the "pattern" must be discernible from price differences as between one purchaser and all other purchasers, or as between one region and all other regions, or as between one time period and all other time periods. In contrast, the United States asserts that identifying a "pattern" for the exporter and product as a whole among different purchasers, regions and time periods requires examining the exporter's export sales holistically and in the aggregate, across the categories. Moreover, the parties disagree on whether a "pattern" consists of a subset of prices found to differ significantly among different purchasers, regions or time periods, or consists of all of the exporter's export sales.

7.141. According to the second sentence of Article 2.4.2, one of the conditions for applying the W-T comparison methodology is the identification of "a pattern of export prices which differ significantly among different purchasers, regions or time periods". In our view, the phrase "among different purchasers, regions or time periods" determines the question of how the relevant "pattern" must be identified. The use of the disjunctive "or" in this phrase is significant, as its ordinary meaning indicates that a "pattern" can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods. This excludes the possibility of establishing a "pattern" *across* the three categories cumulatively. We find support for this approach in the Appellate Body's previous clarification that there are "three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods".[273] The Appellate Body did not identify any other types of "targeted" dumping.

7.142. We also emphasise the use of the word "among" in the second sentence of Article 2.4.2. According to its dictionary meaning, the word "among" is "used when you are mentioning a

[269] See para. 7.100. above, which provides a description of the DPM; Exhibit KOR-25, where the USDOC summarizes the DPM similarly; and United States' response to Panel question 2.3, paras. 49-57, where the United States summarizes the DPM.

[270] Korea's first written submission, para. 202; second written submission, para. 121.

[271] Korea's first written submission, para. 203.

[272] We note that Korea itself also views the vertical, horizontal and cross-category variation problems as three distinct aspects of the overarching failure of the DPM to identify the necessary pattern for resorting to the W-T comparison methodology. Korea considers the vertical, horizontal and cross-category variation problems as the "three respects in which the differential pricing methodology fails to identify a 'pattern'" (Korea's first written submission, para. 203). Korea also argues that "[w]hat these three flaws reflect is the fact that no aspect of the differential pricing methodology seeks to identify a pattern of export prices which differ significantly among different purchasers, regions or time periods, as the second sentence requires" (Korea's first written submission, para. 235).

[273] Appellate Body Report, *EC – Bed Linen*, para. 62. We are mindful of the fact that the terms "target" or "targeted dumping" are not used in the second sentence of Article 2.4.2. However, it is a generally held view as confirmed by the Appellate Body that the second sentence of Article 2.4.2 is intended to allow authorities to unmask targeted dumping.

particular person or thing *in relation to the rest of the group they belong to*".[274] The use of the word "among" thus emphasises membership of a group, and the notion of belonging to that group. We are of the view that something belongs to a group when it shares certain common characteristics with the other members of that group, or has some form of relationship with them. As a result, a "pattern" of significant price differences "among" different purchasers must be found in the price variation within a group of purchasers, as between one or more particular purchasers in relation to all other purchasers of the same group. The same is true for a "pattern" of significant price differences "among" different regions or time periods.

7.143. With the above analysis in mind, we find the United States' approach of identifying one single pattern by aggregating six different types of price variation to be inconsistent with the text of the second sentence of Article 2.4.2. This approach effectively identifies a "pattern" of export prices *across* different categories (purchasers, regions or time periods), rather than "among" the constituents of each category, as we understand the second sentence of Article 2.4.2 to require.[275] We are also not persuaded by the United States' argument that identifying "*a* pattern" in the singular form requires examining the exporter's export sales holistically and in the aggregate. To the contrary, we consider that the use of the singular word "*a* pattern" is simply to indicate that the finding of a pattern within any of the three categories could potentially be a sufficient basis for the application of the W-T comparison methodology.

7.144. Furthermore, it follows from the definition of "pattern" that price variation within a "pattern" must pertain to the same parameters. Otherwise, no "regular and intelligible form or sequence"[276] may be discerned from the group of price variation. For this reason, prices that are too high and prices that are too low do not belong to the same pattern: high prices differ significantly from all other prices because they are higher than them; low prices differ significantly from all other prices because they are lower than them. The characteristic for establishing the degree of price variation is therefore not the same.

7.145. The United States argues that the DPM does not necessarily result in a breach of the second sentence of Article 2.4.2 because the application of the DPM only resulted in the application of the W-T comparison methodology "in approximately 20-30% of instances".[277] In response, Korea argues that it has shown that the DPM will necessarily result in breaches of Article 2.4.2 in certain circumstances. Korea asserts that the fact that, in some factual situations, the WTO-inconsistent features of the DPM may not be applied does not make them WTO-consistent, or save them from review of WTO consistency. Korea draws an analogy with the WTO case law concerning the United States' zeroing methodology. Korea argues that, under the United States' theory, the zeroing methodology could never have been found to be WTO-inconsistent "as such" because it did not result in zeroing in cases where there were no export producers' prices above the normal value.[278]

7.146. We recall that the DPM is a methodology for determining whether the W-T comparison methodology should be applied in a particular situation. Where the conditions of the DPM are fulfilled, its application will necessarily result in the application of the W-T comparison methodology. On the other hand, where the conditions of the DPM are not fulfilled, the W-T comparison methodology will not be applied. The fact that the application of the DPM only results in the application of the W-T comparison methodology in certain situations[279] does not prevent a finding that the DPM is inconsistent "as such". By its structure and design, the DPM will necessarily result in a breach of the second sentence of Article 2.4.2 in certain circumstances. We find the analogy that Korea draws with the treatment of the zeroing methodology by previous panels and

[274] McMillanDictionary.com, accessed on 23 September 2015 <http://www.macmillandictionary.com/dictionary/british/among>

[275] The United States itself uses the words "among" and "across" interchangeably. The United States argues that "[u]sing purchaser-specific weighted averages allows the investigating authority to disregard price variation within the sales to each purchaser and focus on meaningful price variation among (i.e. across) the purchasers" (United States' second written submission, para. 27). Use of the term "across" in this context is not an accurate reflection of the text of the second sentence of Article 2.4.2.

[276] See para. 7.45. above.

[277] United States' first written submission, paras. 287 and 289.

[278] Korea's second written submission, para. 220.

[279] We recall that where more than 33% of the transactions by value pass the Cohen's *d* test and where the meaningful difference test is satisfied, the DPM will lead to the application of the W-T comparison methodology (above 66%) or a mixed comparison methodology (33% to 66%).

the Appellate Body to be highly relevant in this regard. Even though the application of the zeroing methodology will not have any impact where *all* export prices are less than normal value, the Appellate Body nevertheless found the zeroing methodology to be WTO-inconsistent "as such". This is because the zeroing methodology will result in WTO-inconsistent zeroing in cases where certain export prices are greater than normal value. For the same reason, we agree with Korea that the fact that the DPM will not result in the application of the W-T comparison methodology in some factual situations does not mean that it cannot be found to be WTO-inconsistent "as such". It suffices that there are certain factual situations in which the DPM will result in the application of the W-T comparison methodology, in breach of the second sentence of Article 2.4.2.[280]

7.147. For the above reasons, we conclude that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish "a pattern of export prices which differ significantly among different purchasers, regions or time periods".

7.4.2.3 "Systemic disregarding"

7.148. We now turn to Korea's "as such" claims against the USDOC's use of "systemic disregarding" in the context of the DPM, whereby, when the W-T comparison methodology for pattern transactions is combined with the use of the W-W or T-T comparison methodology for non-pattern transactions, any negative amount of dumping resulting from the W-W or T-T comparison methodology is set to zero.[281] Korea has brought these claims under the second sentence of Article 2.4.2, and Article 2.4.

7.4.2.3.1 Claims against "systemic disregarding" under the second sentence of Article 2.4.2

7.4.2.3.1.1 Main arguments of the parties

7.149. Korea observes that in certain situations, the DPM provides for a combined methodology wherein the W-W comparison methodology is applied to non-pattern transactions, and the W-T comparison methodology to pattern transactions. Where a negative amount of dumping is determined for non-pattern transactions, the DPM sets such amount to zero, so that it does not

[280] We note that the United States asserts that the Panel should follow the analysis of the Appellate Body in *US – Carbon Steel (India)* in connection with India's "as such" claim, where the Appellate Body essentially applied the mandatory/discretionary distinction. In response to the Panel's written questions, the United States confirms that, in referring to the analysis of the Appellate Body in *US – Carbon Steel (India)*, it is suggesting that the Panel apply the mandatory/discretionary distinction that has been relied upon by the Appellate Body and panels previously when addressing "as such" claims against alleged rules or norms of general and prospective application (See United States' response to Panel questions Nos. 4.23 and 4.24, para. 100). The United States, however, has not made any submission on how this mandatory/discretionary distinction should be applied in the present dispute. We recall that the Appellate Body has specifically confirmed that "as such" challenges can be brought against non-mandatory measures (See Appellate Body Report, *Argentina – Import Measures*, para. 5.106). Our finding above is therefore consistent with the Appellate Body's approach.

[281] We note that the United States asserts that Korea fails to present a *prima facie* case of an "as such" inconsistency for the two additional aspects of the DPM (namely, (i) the DPM does not identify a pattern but merely aggregates random, unrelated price differences; (ii) the "systemic disregarding" issue) by basing its arguments exclusively on hypothetical scenarios that are entirely the invention of Korea, without making reference to any actual evidence that any of its concerns have actually manifested themselves in any actual application of the DPM. We note that United States does not dispute that Korea sufficiently identifies the DPM as the measure at issue and the basic import of the aspects being challenged. Nor does the United States dispute that Korea sufficiently identifies the second sentence of Article 2.4.2 as the relevant provision, and the basis of the claimed inconsistency of the five aspects of the DPM with the second sentence of Article 2.4.2. Instead, the United States emphasized on the lack of sufficient evidence on the actual manifestation of the alleged inconsistencies in the actual *application* of the DPM. We disagree with the United States. In our view, having established that the DPM is challengeable "as such", the Panel reviews the DPM independently from the application of the DPM in specific cases, just like a written rule or norm. As the Appellate Body confirmed, written rules or norms can be challenged as such "independently of whether or how those rules or norms are applied in particular instances" (see Appellate Body Report, *US – 1916 Act (EC)*, paras. 60-61). Therefore the United States' argument that Korea has not established a *prima facie* case for the additional aspects of the DPM is without foundation.

offset any amount of positive dumping established in respect of pattern transactions.[282] Korea contends that such "systemic disregarding" is "essentially a new form of zeroing" and is inconsistent with Articles 2.4 and 2.4.2 at the same time.[283] More specifically, Korea argues that the systemic disregarding inflates the dumping margin, and is contrary to the concept of establishing a single margin of dumping per exporter for the "product as a whole".[284]

7.150. The United States argues that, because the use of zeroing in the context of the application of the W-T comparison methodology to all sales is permissible, there is no basis for finding that "systemic disregarding" is impermissible.[285] The United States asserts that it is necessary to "zero" the negative W-W subset results for non-pattern transactions to ensure that the W-T subset results for pattern transactions are not masked or offset by the W-W subset results. Otherwise, the purpose of the asymmetrical comparison methodology, which is to "unmask" dumping, would be thwarted.[286]

7.4.2.3.1.2 Main arguments of third parties[287]

7.151. Brazil submits that the practice of "systemic disregarding" shares the same rationale as that of "zeroing" inasmuch as it zeros a negative result in the W-W comparison subset that could be used to offset the positive result found in the W-T subset, and inflates the dumping margin.[288] Brazil argues that if the practice of "systemic disregarding" is found to be like "zeroing", it would also not be consistent with the fair comparison requirement of Article 2.4.[289]

7.152. China agrees with Korea[290] that the "systemic disregarding" of intermediate results is not permissible. China contends that a manipulation of data in this way fails to have regard "to the results of *all* those comparisons"[291] and thereby fails to establish a margin of dumping for the product as a whole.

7.153. The European Union contends[292] that the investigating authority must have the possibility of applying an appropriate methodology in order to address the targeted dumping, which can only mean that high priced export transactions would not be allowed to offset the dumping amount.

7.4.2.3.1.3 Evaluation by the Panel

7.154. The second sentence enables an investigating authority to apply the W-T comparison methodology in order to focus on the evidence of dumping in respect of pattern transactions, and to ensure that any evidence of dumping with regard to those transactions is not masked by non-dumping in respect of transactions falling outside of that pattern. The United States asserts that "systemic disregarding" is needed in order to prevent such masking.

7.155. In order to address the question before us, we will first review the intent of the comparison methodology established in the second sentence of Article 2.4.2. We note that the W-T comparison methodology is an exceptional and an alternative comparison methodology to the normally applicable methodologies provided in the first sentence of Article 2.4.2. As explained below, it appears that the second sentence of Article 2.4.2 read in light of Articles 2.1, 2.4 and 6.10 of the Anti-Dumping Agreement and the findings of the Appellate Body involves two exceptions to the normally applicable comparison methodologies: first, the scope of transactions to be taken into account to establish dumping and, second, the method of calculating the margin of dumping.

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[282] See Korea's first written submission, para. 239; Exhibit KOR-24, pp. 70-71; Exhibit KOR-100, p. 93 (p. 186 of pdf file) of the programming language titled "The SAS System"; Exhibit KOR-100, p. 124 (p. 324 of the pdf file) of the "U.S. Sales Margin Program"; Exhibit KOR-141, pp. 28-29. The United States does not dispute this fact. See United States' second written submission, para. 198.

[283] Korea's second written submission, para. 198.

[284] Ibid. para. 195.

[285] United States' second written submission, para. 195.

[286] Ibid. para. 198.

[287] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.

[288] Brazil's third party oral statement, para. 16.

[289] Ibid. para. 18.

[290] China's third party submission, para. 81.

[291] Ibid. (citing Appellate Body Report, *US – Softwood Lumber V*, para. 98 (original emphasis)).

[292] European Union's third party submission, para. 47.

7.156. Concerning the scope, we recall our analysis in paragraphs 7.22. to 7.27. that the second sentence limits the application of the W-T comparison methodology to pattern transactions. As explained therein, the meaning of the text of the second sentence is confirmed by its context; in particular, being an exception it must refer to a subset of the universe of all transactions.[293] Moreover, since the object and purpose of the exceptional comparison methodology is to address the situation of a pattern of significantly differing prices, this methodology requires that the amount of dumping be established from the transactions that form the pattern. Consequently, the text and structure of Article 2.4.2 envisage that, as a general rule, an investigating authority is required to take into account all export transactions and compare them to normal value and, as an exception, limit the comparison of normal value to pattern transactions.

7.157. With regards to the calculation of the margins of dumping, and given the relation of Article 2.4.2 with Articles 2.1, 2.4 and 6.10, it appears that the exceptional comparison methodology requires the investigating authority to (i) establish intermediary results on the basis of comparing the weighted average normal value to each of the individual transactions that form the pattern, (ii) aggregate the intermediary results to determine the amount of dumping that may exist (without zeroing[294]), and (iii) express the margin of dumping as a percentage of the export price for the exporter or foreign producer concerned. The latter requires the investigating authority to include the totality of the evidence of dumping from pattern transactions in the numerator and the totality of the exports of that exporter in the denominator of the equation.

7.158. The Appellate Body has found[295] that the determination of a margin of dumping is subject to certain "fundamental disciplines" or "concepts" that apply in all anti-dumping proceedings. The Appellate Body has identified four such fundamental concepts: (a) the concepts of "dumping" and "margins of dumping" pertain to a "product" and to an exporter or foreign producer; (b) "dumping" and "dumping margins" must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer. The Appellate Body has also stated that:

> In order to assess properly the pricing behaviour of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation and, if so, by which margin, it is obviously necessary to take into account the prices of all the export transactions of that exporter or foreign producer.[296]

7.159. In addition, the Appellate Body in *US – Zeroing (Japan)* explained, specifically in respect of the second sentence of Article 2.4.2, that:

> The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods". The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply.[297]

7.160. We note that, at first glance, there appears to be some tension between (a) the Appellate Body's understanding of the limited scope of application of the W-T comparison methodology and (b) its reference to the "fundamental discipline" that "dumping" and "margins of dumping" pertain

[293] We recall the statement of the Appellate Body in *US – Zeroing (Japan)* that the universe of transactions that fall within the relevant pricing pattern "would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply". See para. 7.25. above.

[294] See our discussion in Section 7.5 below.

[295] Appellate Body Report, *US – Zeroing (Japan)*, paras. 108-114.

[296] Ibid. para. 111.

[297] Ibid. para. 135. We observe that a similar statement was made by the Appellate Body in footnote 166 of its report on *US – Softwood Lumber V (Article 21.5)*.

to an exporter or foreign producer, and to the "product" (as a whole[298]), taking into account all export transactions of the exporter or foreign producer concerned. However, it seems to us that this tension is dissipated by two aspects of the text and structure of Articles 2.1, 2.4.2 and 6.10 of the Anti-Dumping Agreement. First, in the context of the second sentence of Article 2.4.2, when an investigating authority determines the margin of dumping for an individual exporter or foreign producer, the investigating authority is entitled to have particular regard, and therefore limit its analysis to the pricing behaviour of the exporter or foreign producer in respect of the transactions that form "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Second, regardless of the methodology applied, Articles 2.1 and 6.10 of the Anti-Dumping Agreement require that the margin of dumping be established for the product as a whole for the individual exporter or foreign producer concerned. Consequently, while the net amount of dumping may be established from considering the evidence of dumping in pattern transactions (in its entirety, as explained above), the calculation of the margin as a percentage of the exports of that exporter or foreign producer must reflect the price of its total exports. It follows that, while the numerator may be established from the evidence of dumping in pattern transactions, the denominator of the equation has to reflect the value of total exports of the individual exporter or foreign producer concerned.

7.161. With this understanding of Article 2.4.2, we now turn to Korea's claim against the USDOC's use of "systemic disregarding". The so-called "systemic disregarding" arises in the specific situation where the DPM combines the results of applying the W-T comparison methodology in respect of pattern transactions with the results of applying the W-W comparison methodology in respect of non-pattern transactions. One might take the view, consistent with the focus of the second sentence being on the pricing behaviour in respect of pattern transactions, that the combined application of the W-T and W-W (or T-T) comparison methodologies is not envisaged by that provision. However, since Korea has not advanced any claim to this effect, there is no need for us to rule on this matter. For present purposes, therefore, we will assume that the combined application of methodologies is not excluded. If methodologies are combined, one must consider how the results of the combined methodologies should be aggregated. It is in this context that the issue of "systemic disregarding" arises.[299]

7.162. As noted previously, the second sentence of Article 2.4.2 is designed to enable an investigating authority to focus on pattern transactions to unmask targeted dumping that would otherwise be masked by an absence of dumping in respect of non-pattern transactions. Because it is an exceptional comparison methodology, the application of the W-T comparison methodology under the second sentence is subject to stringent conditions. In a situation where an authority chooses to apply the W-T comparison methodology to pattern transactions and the W-W (or T-T) comparison methodology to non-pattern transactions, we see no utility in allowing an investigating authority to use the W-T comparison methodology to zoom in and have particular regard to the exporter's pricing behaviour in respect of pattern transactions, after ensuring compliance with the relevant conditions, if the authority is subsequently required to zoom out from that specific pricing behaviour and give full effect to the exporter's pricing behaviour in respect of non-pattern transactions when making its overall determination of dumping. After allowing an authority to unmask dumping in respect of pattern transactions, it makes no sense to require that authority to then *re-mask* such dumping by providing offsets for negative dumping in respect of non-pattern transactions. Such offsets would be at odds with the object and purpose of the second sentence.

7.163. Korea contends that the failure to provide offsets in respect of negative dumping for non-pattern transactions is "essentially a new form of zeroing".[300] Korea cautions that "the Appellate Body has made it clear that 'dumping' for the product as a whole must properly reflect

[298] Appellate Body Report, *US – Zeroing (Japan)*, para. 151.

[299] In cases where the non-pattern transactions are dumped, aggregating the result of the W-W comparison methodology (without zeroing) for non-pattern transactions with the result of the W-T comparison methodology (without zeroing) for pattern transactions would lead to the same margin of dumping as if the W-W methodology were applied (without zeroing) to all transactions. The potential for the margin of dumping to change only arises when the non-pattern transactions (assessed using the W-W methodology, without zeroing) are not dumped, and when that amount of negative dumping is "systematically disregarded" upon aggregation with the results of the W-T methodology. If "systemic disregarding" is applied, the results of combining the application of the W-T methodology to pattern transactions and the W-W methodology to non-pattern transactions would be equivalent to a simple application of the W-T methodology (without zeroing) to pattern transactions.

[300] Korea's second written submission, para. 198.

all positive and negative margins".[301] We disagree that the Appellate Body's rulings against the practice of zeroing in the context of the first sentence of Article 2.4.2 mean that "systemic disregarding" should also be condemned if the W-W and W-T comparison methodologies are combined. The determination of dumping for the product as a whole in the context of the first sentence requires an authority to have regard to the exporter's pricing behaviour as a whole, in respect of all export transactions. In contrast, as explained, the determination of dumping for the product as a whole in the context of the exceptional methodology is different, in the sense that the second sentence enables an authority to focus on, and have particular regard to, the exporter's pricing behaviour in respect of pattern transactions while taking into account the totality of its exports when calculating the margin as a percentage of exports.[302] If an authority chooses to apply different methodologies for pattern and non-pattern transactions respectively, "systemic disregarding" enables an investigating authority to reveal any dumping in respect of pattern transactions that would otherwise be masked by the negative dumping in respect of non-pattern transactions.

7.164. The exclusion of "systemic disregarding" would also lead to mathematical equivalence with the results of a straightforward application of the W-W comparison methodology to all transactions.[303] Korea asserts that an authority could avoid mathematical equivalence by conducting a "granular analysis" of the domestic and export transactions involved in the W-T comparison. Thus, Korea observes that "when implementing the second sentence, the investigating authority has discretion to undertake a more detailed calculation of weighted-average prices for normal value and a more detailed approach to price adjustments".[304]

7.165. Korea contends that the use of different weighted average normal values, one for the application of the W-T comparison methodology to pattern transactions and a different one for the W-W comparison methodology for non-pattern transactions, would be allowed. Korea contends that "the normal value appropriate for one of the Article 2.4.2 methodologies may be different from the normal value appropriate for another Article 2.4.2 methodology".[305] However, Korea has not identified any textual basis in Article 2.4.2 for concluding that the "normal value established on a weighted average basis" referred to in the second sentence should differ, within the same anti-dumping proceeding, from the "weighted average normal value" referred to in the first sentence. Nor do we consider that any textual basis exists.[306] Korea has rather argued that "the point of the second sentence is to consider the export transactions individually, so the authority can decide about the normal value to which each export transaction will be compared".[307] This argument would seem to refer to the phrase "individual export transactions" in the second sentence. We have already explained that this phrase relates to identifying the (pattern) transactions to be compared to the weighted average normal value, consistent with the general emphasis placed by the second sentence on pattern transactions. This phrase says nothing about the weighted average normal value to which the export prices of those transactions should be compared. While the second sentence envisages that particular regard be had to a particular

[301] Korea's second written submission, para. 198.

[302] As explained below, zeroing is still prohibited in this context, since the investigating authority must have regard to the totality of the exporter's pricing behaviour within the pattern.

[303] We are specifically addressing the mathematical equivalence that would arise when the results of applying the W-W comparison methodology to all transactions are compared to a combined application of the W-T comparison methodology to pattern transactions and the W-W comparison methodology to non-pattern transactions. There is no mathematical equivalence if the application of the W-T comparison methodology to pattern transactions is combined with the application of the T-T comparison methodology to non-pattern transactions (see Example 2 of Exhibit KOR-93, paras. 45-55; and United States' second written submission, para. 115). However, since an investigating authority has discretion to use either the W-W or T-T comparison methodology under the first sentence of Article 2.4.2, we do not consider that an authority choosing to apply a combination of methodologies should be required to apply the T-T methodology to non-pattern transactions simply in order to avoid mathematical equivalence.

[304] Korea's oral statement at the second meeting of the Panel, para. 7.

[305] Korea's second written submission, para. 53.

[306] We do not mean to suggest that only a single weighted average normal value should be applied. We acknowledge that model-specific weighted average normal values may be established, and that different weighted average normal values may be established for different periods within the period of investigation.

[307] Korea's response to Panel question No. 4.19(iv), para. 118. Korea also refers to Article 2.1 of the Anti-Dumping Agreement, whereby dumping exists if the export price is less than a "comparable" home market price (Korea's response to Panel question No. 4.10(ii), para. 40). According to Korea, the authority must therefore determine a normal value that is comparable to the specific individual export transaction at issue. We are not persuaded that a general provision regarding the definition of dumping should result in a reading of the second sentence of Article 2.4.2 that is at odds with the specific text of that provision.

sub-category of export transactions, there is nothing to suggest that the second sentence also envisages the establishment of a separate weighted average normal value with respect to some sub-category of domestic transactions. In other words, the exceptional nature of the W-T comparison methodology seems to reside in the "T", rather than the "W". If a proper application of the second sentence were to depend on it being "appropriate" to use a different weighted average normal value under the second sentence than under the first, as suggested by Korea, we would have expected this to have been reflected in the text of the second sentence.[308]

7.166. We take a similar view concerning Korea's argument that the second sentence also allows the authority to "rethink the adjustments that might be necessary to ensure price comparability".[309] Korea suggests that while an investigating authority might decide to use an overall average expense in making an adjustment under the W-W comparison methodology, it may make more sense for the authority to calculate expenses on transaction-by-transaction basis if the comparison is made using the W-T comparison methodology.[310] Korea explained during the second substantive meeting that such "granular analysis"[311] of adjustments would be undertaken pursuant to an investigating authority's residual discretion under Article 2.4 of the Anti-Dumping Agreement[312], rather than any specific authority governing the making of adjustments exclusively under the second sentence of Article 2.4.2.[313] We observe that the second sentence does not envisage that any price adjustments be made in addition to those made pursuant to an authority's general obligation to make a "fair comparison" pursuant to Article 2.4. Thus, there is nothing in the text of the second sentence to suggest that an authority could or should make the type of adjustments proposed by Korea in order to allow the authority to unmask targeted dumping. Rather, the adjustments referred to by Korea would be made pursuant to a provision that applies to all three comparison methodologies set forth in the first and second sentences of Article 2.4.2. If a proper application of the second sentence were to depend on the type of adjustments envisaged by Korea, we would have expected Article 2.4.2, and particularly the second sentence thereof, to have said something about this issue. Furthermore, price adjustments will likely be made by the investigating authority before the application of the second sentence of Article 2.4.2 is considered.[314] Moreover, adjustments are made prior to determining whether a pattern of significant price differences exists. This is reflected in the structure of Article 2.4, which addresses the need for adjustments for factors affecting price comparability in the chapeau of Article 2.4, before the discussion of comparison methodologies in Article 2.4.2. We see nothing to suggest that the authority should re-visit these adjustments in the event that the second sentence of Article 2.4.2 is ultimately applied. In other words, there is nothing to suggest that adjustments that would be appropriate in the context of the first sentence comparison methodologies would cease to be appropriate in the context of the second sentence methodology.

7.167. In light of the above considerations, we reject Korea's claim that the USDOC's use of "systemic disregarding" when combining the W-W and W-T comparison methodologies in the context of the DPM is "as such" inconsistent with the second sentence of Article 2.4.2.

7.4.2.3.2 Claims against "systemic disregarding" under Article 2.4

7.168. Korea also brings an Article 2.4 "fair comparison" claim against the use of "systemic disregarding" under the DPM "as such". Korea contends that "systemic disregarding" is not fair

[308] At para. 138 of its second written submission, the United States has explained that comparing export prices in one month to the monthly weighted-average normal value for that same month will not necessarily take into account appropriately the price differences. The United States suggests that this is because the monthly comparisons still are aggregated together to calculate the respondent's overall margin of dumping for the product as a whole, and offsets for negative intermediate comparison results allow higher-priced export sales made during distinct time periods to "mask" lower-priced export sales during other distinct time periods. We see merit in the United States' argument, and note that Korea has not disagreed with it.

[309] Korea's response to Panel question No. 4.19(iv), para. 118.

[310] Korea's response to Panel question No. 4.10(i), para. 35.

[311] Korea's response to Panel question No. 4.19(iv), paras. 119-122.

[312] Article 2.4 of the Anti-Dumping Agreement provides in relevant part that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability".

[313] See also Korea's response to Panel question No. 4.10.

[314] This was the case in the *Washers* anti-dumping investigation. Korea has not challenged this aspect of the investigation. Korea also acknowledges that investigating authorities have the discretion to proceed in this manner (see Korea's response to Panel question No. 4.19(iii), paras. 109 and 111).

because, like zeroing, it unlawfully inflates the dumping margin and makes a positive determination more likely, by ignoring the negative dumping margins.[315] The United States asks us to reject Korea's claim.[316]

7.169. As explained in detail above, we consider that Article 2.4.2 enables investigating authorities to establish the existence of a margin of dumping by focusing on pattern transactions. If such a situation arises and an authority chooses to combine the application of the W-W methodology to non-pattern transactions with the application of the W-T methodology to pattern transactions, systemic disregarding enables it to avoid concealing any dumping identified in respect of pattern transactions with the negative dumping in respect of non-pattern transactions. Accordingly, there is no basis for us to accept Korea's argument that "systemic disregarding" is unfair and contrary to Article 2.4 because it inflates the margin of dumping and ignores the negative amount of dumping in respect of non-pattern transactions.

7.4.3 Additional claims concerning the DPM

7.170. Korea also challenges the DPM as an ongoing conduct, and "as applied" in the first administrative review of the *Washers* anti-dumping order, including the preliminary determination published on 9 March 2015[317] and the final determination published on 8 September 2015.[318]

7.171. We recall our findings above that the DPM is "as such" inconsistent with the second sentence of Article 2.4.2. We also note that Korea's "as applied" claims relate to the same issues as its "as such" claim.[319] We therefore do not consider it necessary for the resolution of the present dispute to also review Korea's ongoing conduct and "as applied" claims concerning the DPM.[320]

7.5 Zeroing in the context of the W-T comparison methodology

7.5.1 Introduction

7.172. Zeroing in the context of establishing margins of dumping using the W-T comparison methodology occurs when the USDOC disregards (i.e. treats as "zero") any negative dumping when the results from multiple comparisons between the weighted average normal value and each of the individual export transactions are aggregated.

7.173. Korea challenges the unwritten measure whereby the USDOC uses zeroing whenever the W-T comparison methodology is applied. We note that the United States does not disagree that this measure exists, or that it is of general and prospective application.[321] Currently, the USDOC

[315] Korea's first written submission, para. 241.
[316] United States' second written submission, para. 199.
[317] Large Residential Washers from the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014, 80 Fed. Reg. 12,456 (March 9, 2015); Large Residential Washers from the Republic of Korea: Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014; Preliminary Results Margin Calculation for LGE, (Exhibit KOR-96).
[318] Issues and Decision Memorandum for the Final Results of the Antidumping Administrative Review of Large Residential Washers from the Republic of Korea (September 8, 2015), (Exhibit KOR-141). See also fn 306 below.
[319] Korea's "as applied" challenge of the DPM covers only 4 out of the 5 aspects of Korea's "as such" challenge because the improper scope of application issue did not arise in the first *Washers* administrative review. See Korea's second written submission, fn 88; and response to Panel question No. 4.22, paras. 163 and 164.
[320] The USDOC published the preliminary and final determinations of the first administrative review of the *Washers* anti-dumping order during the course of the present proceedings (Exhibits KOR-96 and 141). Korea refers to these determinations in support of its "ongoing conduct" and "as applied" claims concerning the DPM. Since we do not find it necessary to address these claims, it is not necessary for us to consider the procedural issue whether these determinations fall within our terms of reference.
[321] Korea has provided detailed evidence supporting its view that the USDOC's use of zeroing when applying the W-T comparison methodology is an unwritten measure that may be challenged "as such" (see Korea's response to Panel question No. 1.2). The United States has not contested the existence of this measure. In these circumstances, and bearing in mind that findings have been made in respect of the use of zeroing "as such" under the first sentence of Article 2.4.2 in numerous previous dispute settlement proceedings, we find that the unwritten measure whereby the USDOC applies zeroing when applying the W-T comparison methodology may be challenged "as such".

applies the W-T comparison methodology as part of the DPM and applies zeroing to the transactions to which it applies the W-T comparison methodology.[322] In cases where the value of pattern transactions is between 33% and 66% of the total export transactions, the W-T comparison methodology with zeroing is applied to pattern transactions. Alternatively, when pattern transactions represent more than 66% by value of total export transactions, the W-T comparison methodology with zeroing is applied to all export transactions. In the *Washers* anti-dumping investigation, the USDOC used zeroing when applying the W-T comparison methodology to all export transactions pursuant to the then applicable *Nails II* methodology.[323]

7.174. Korea claims that the measure whereby the USDOC applies zeroing in the context of the W-T comparisons in original investigations is inconsistent "as such" with the second sentence of Article 2.4.2, Articles 2.1 and 2.4 of the Anti-Dumping Agreement, and Article VI:1 of the GATT 1994. Korea also claims that the measure whereby the USDOC applies zeroing in the context of the W-T comparisons in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Additionally, Korea claims that the USDOC's application of zeroing when aggregating the results of the W-T comparisons in the *Washers* anti-dumping investigation and "subsequent connected stages", including administrative reviews, is inconsistent with the second sentence of Article 2.4.2, and with Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994.

7.175. The United States asks us to reject these claims.

7.176. We begin by addressing Korea's claims against zeroing under the second sentence of Article 2.4.2.

7.5.2 Korea's claims against zeroing under the second sentence of Article 2.4.2

7.5.2.1 Main arguments of the parties

7.177. Korea's zeroing claims[324] are based primarily on findings made by the Appellate Body concerning the use of zeroing in the context of original investigations and reviews in which the W-W or T-T comparison methodologies were applied. Korea contends that these Appellate Body findings are dispositive of the question of whether zeroing is permitted in the context of any anti-dumping proceeding, regardless of the comparison methodology used. This, according to Korea, is because the Appellate Body has conclusively interpreted the concept of "dumping", for the Anti-Dumping Agreement as a whole, as a product-wide and exporter-specific concept. Korea submits that the USDOC's use of zeroing in the W-T comparison methodology is based on a transaction-specific notion of dumping, allowing it to disregard (i.e. set at zero) non-dumped transactions when aggregating intermediate comparison results. Korea contends that the Appellate Body has on numerous occasions rejected the argument that the concepts of "dumping" and "margin of dumping" could possibly occur at the transaction-specific level. Korea submits that there is nothing in the second sentence of Article 2.4.2 to suggest that zeroing is somehow permissible in that context, while impermissible in the context of all other anti-dumping proceedings. Korea asserts that the application of zeroing in the context of the W-T comparison methodology in original investigations is indistinguishable from the application of zeroing in any other context. Korea submits that the second sentence of Article 2.4.2 merely provides a limited exception to the application of the symmetrical methodologies provided for in the first sentence. Korea submits that the second sentence does not, under any circumstance, provide an exception to the general rule that "dumping" and "margin of dumping" reflect product-wide and exporter-specific concepts throughout the Anti-Dumping Agreement.

7.178. The United States disagrees[325] with Korea's suggestion that prior Appellate Body reports are dispositive of the permissibility of zeroing in the context of the W-T comparison methodology. The United States asserts that the Appellate Body has expressly stated that it has not ruled on the question of whether or not zeroing is permissible under the W-T comparison methodology when the requirements of the second sentence of Article 2.4.2 are satisfied. The Appellate Body has merely addressed contextual arguments pertaining to that methodology when considering the

[322] Korea's first written submission, paras. 120-121.
[323] Korea's response to Panel question No. 1.2, para. 13.
[324] Korea's main arguments are set forth at paras. 54-70 of its first written submission.
[325] United States' main arguments are set forth at paras. 154-268 of its first written submission.

WTO-consistency of zeroing when applying the normal comparison methodologies provided for in the first sentence of Article 2.4.2. The United States also denies that it treats the results of transaction-specific comparisons as "margins of dumping" when the W-T comparison methodology is applied. The United States submits that it is not asking the Panel to depart from the Appellate Body's finding that such transaction-specific comparisons are merely inputs that are to be aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer. The United States argues that nothing in the text of the second sentence of Article 2.4.2 prohibits the use of zeroing and, contextually, since the second sentence is an exception to the first sentence of Article 2.4.2, the W-T comparison methodology set forth in the second sentence should not yield results that are systematically similar to the results of the comparison methodologies set forth in the first sentence (W-W and T-T). The United States submits that, if the use of zeroing is prohibited in connection with the W-T comparison methodology, then the result of applying the W-T comparison methodology would be mathematically equivalent to the result of applying the W-W comparison methodology, rendering the second sentence of Article 2.4.2 *inutile*. The United States contends that, while the Appellate Body has considered mathematical equivalence previously, nothing in prior Appellate Body findings forecloses the possibility that mathematical equivalence could support a finding that zeroing is permissible in connection with the use of the W-T comparison methodology. The United States also argues that negotiating history documents from the Uruguay Round confirm the interpretation proposed by the United States.

7.5.2.2 Main arguments of third parties[326]

7.179. Brazil notes[327] that there are considerable uncertainties as to how the W-T comparison methodology should operate in targeted dumping situations and that no decision has yet been taken on whether "zeroing" is or is not permitted in this context. Brazil argues that the Appellate Body has already held that there "is an inherent bias in a zeroing methodology"[328] and that as a "way of calculating" margins the zeroing methodology "cannot be described as impartial, even-handed, or unbiased"[329], because the comparison necessarily excludes any negative results.

7.180. Canada argues [330] that the definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement applies throughout the Agreement. In Canada's opinion, when examining the use of zeroing under the T-T comparison methodology, the Appellate Body found that the concepts of "dumping" and "margins of dumping" can only be found to exist in relation to a product. Because the individual comparisons only yield intermediate results and not margins of dumping, margins of dumping cannot be found to exist under any methodology at the transaction level.[331] Canada argues that this means that even when an investigating authority is justified in using the exceptional W-T comparison methodology, the results of the individual comparisons must be aggregated to determine the margin of dumping in accordance with Article 2.4.2.

7.181. China agrees with Korea[332] that the Appellate Body has settled that the term "dumping" used throughout the Anti-Dumping Agreement is a "product-related" concept[333], and that the existence of "dumping" and "margins of dumping" are determined in relation to all export sales by an exporter or foreign producer of the relevant product. China stresses on the importance of the rejection of a transaction-specific understanding of dumping for the resolution of the zeroing issues in this dispute. China contends that if dumping is – in contrast to the apparent United States' position – understood to exist only in the aggregate of an exporter's pricing of a product over time, and a "margin of dumping", by definition, is a margin for the product as a whole, then any calculation or aggregation of comparison results that fails to take account of all intermediate comparison results is simply not a margin of dumping consistent with the covered agreements.

[326] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[327] Brazil's third party oral statement, para. 17.
[328] Ibid., referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.
[329] Ibid., referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 142.
[330] Canada's third party submission, paras. 8 and 9.
[331] Ibid. para. 8 (citing Appellate Body Reports *US – Zeroing (Japan)*, para. 115; *US – Stainless Steel (Mexico)*, paras. 104 and 105; and *US – Continued Zeroing*, para. 308).
[332] China's third party submission, paras. 65 and 66.
[333] Ibid. para. 65 (citing Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94).

7.182. The European Union disagrees with Korea's argument[334] that a targeted dumping case has already been decided by the existing case law on zeroing. According to the European Union, panels and the Appellate Body have exercised judicial restraint in this matter, addressing specific cases with specific types of comparison methodologies. As a targeted dumping case has not been addressed before, the European Union contends that it is not prejudged.

7.183. Japan agrees with Korea's understanding[335] that the Appellate Body jurisprudence covers the W-T comparison methodology under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Japan contends that the Appellate Body has clarified that the determination of dumping is made in relation to "a product", so that the concepts of "dumping" and "margins of dumping" must be applied in a coherent and consistent manner to all provisions of the Anti-Dumping Agreement, and for all types of anti-dumping proceedings.[336]

7.184. Norway agrees[337] with Korea in that the Appellate Body has repeatedly found that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[338] Furthermore, Norway contends that the Appellate Body has underlined that the concepts of "dumping" and "margin of dumping" are exporter-specific, and it has further clarified that these two terms must have "the same meaning in all provisions of the *Agreement* and for all types off anti-dumping proceedings"[339]. Norway agrees with Korea that the cohesive interpretation of these terms by the Appellate Body precludes an interpretation of "dumping" and "margins of dumping" to the effect that these may be considered on a transaction-specific basis, including under the second sentence of Article 2.4.2.

7.185. Thailand contends[340] that although the Appellate Body has not yet considered the use of zeroing in the W-T comparison methodology in cases of "targeted dumping" under the second sentence of Article 2.4.2, the Anti-Dumping Agreement does not permit the use of zeroing in such case.

7.186. Viet Nam agrees[341] with Korea's reading of the second sentence of Article 2.4.2 as not permitting recourse to the "zeroing" methodology. Viet Nam contends that the fact that it is an exception does not speak to the issue of zeroing, as it is exceptional because it is asymmetrical-that is, what is compared on one side of the comparison (a weighted average) is different from what is on the other side of the comparison (individual transactions).

7.5.2.3 Evaluation by the Panel

7.187. We recall the emphasis placed on pattern transactions in the second sentence of Article 2.4.2.[342] As we shall explain, we consider that in light of the text of the second sentence of Article 2.4.2 and previous findings of the Appellate Body concerning zeroing when determining the margins of dumping, the second sentence of Article 2.4.2 allows an investigating authority to have particular regard to the pricing behaviour of an exporter in respect of those pattern transactions in determining the margin of dumping for that exporter. However, such possibility requires that the entirety of the pricing behaviour within that pattern must be taken into account. We see no basis for ignoring, or zeroing, individual pattern transactions that may be priced above normal value.

7.188. We refer to our analysis in paragraphs 7.158. to 7.160. above concerning the four fundamental concepts identified by the Appellate Body[343], which apply regardless of the comparison methodology used to establish margins of dumping. Our analysis therein explains our understanding of the possible tension that may be inferred from those principles and the

[334] European Union's third party submission, para. 46.
[335] Japan's third party submission, para. 10.
[336] Ibid. (citing Appellate Body Reports, *US – Softwood Lumber V*, paras. 92 and 93; *US – Zeroing (EC)*, para. 126; and *US – Stainless Steel (Mexico)*, para. 106).
[337] Norway's third party statement, para. 5.
[338] Ibid. (citing Appellate Body Reports, *US – Zeroing (EC)*, para 126; and *US – Softwood Lumber V*, paras. 92 and 93).
[339] Ibid. (citing Appellate Body Report, *US – Zeroing (Japan),* para. 109).
[340] Thailand's third party statement, para. 6.
[341] Viet Nam's third party statement, paras. 6 and 7.
[342] See para. 7.25. above.
[343] See Appellate Body Report, *US – Zeroing (Japan)*, paras. 108-114.

explanation by the Appellate Body[344], that the phrase "individual export transactions" in the second sentence of Article 2.4.2 refers to the transactions that fall within the relevant pricing pattern, a more limited universe than the export transactions covered when applying the symmetrical comparison methodologies foreseen in the first sentence of Article 2.4.2. With this analysis in mind, we refer to the claim by Korea that zeroing in the context of the W-T comparison methodology is contrary to the second sentence of Article 2.4.2.

7.189. In the context of the second sentence of Article 2.4.2, when an investigating authority determines the margin of dumping for an individual exporter or foreign producer, the investigating authority is entitled to have particular regard, and therefore limit its analysis to the pricing behaviour of the exporter or foreign producer in respect of the transactions that form "a pattern of export prices which differ significantly among different purchasers, regions or time periods". This explains the Appellate Body's reference to the "emphasis" of the second sentence of Article 2.4.2 being on pattern transactions. Consequently, and in order to fulfil the object and purpose of the second sentence of Article 2.4.2, the W-T comparison methodology allows the investigating authority to zoom in on the evidence of dumping in respect of pattern transactions, and ensure that such evidence is fully reflected in the margin of dumping, rather than being masked through the use of one of the symmetrical comparison methodologies provided for in the first sentence.[345]

7.190. Since the second sentence involves particular emphasis on the exporter's pricing behaviour in respect of pattern transactions, the *entirety* of the evidence of dumping in respect of that pattern must be taken into account. The focus of the W-T comparison methodology is on the prices of the "individual" export transactions within the pattern. The word "individual" suggests to us that each pattern transaction should be considered in its own right, and with equal weight, irrespective of whether the export price is above or below normal value. There is no basis to conclude that the export prices in certain individual transactions (e.g. those below normal value) should be accorded greater significance than the export prices in other individual export transactions (e.g. those above normal value). There is certainly nothing in the text of the second sentence to suggest that the investigating authority is entitled to disregard evidence pertaining to pattern transactions where the export price is above normal value. On the contrary, the phrase "individual export transactions" in the first part of the second sentence suggests to us that each and every pattern transaction should be fully taken into account in the assessment of the exporter's pricing behaviour in respect of that pattern.

7.191. The United States asserts that zeroing is needed to ensure that pattern transactions whose export price is above normal value do not mask the evidence of dumping in respect of pattern transactions whose export price is below normal value.[346] We see no justification for this approach. As indicated above, the object and purpose of the second sentence indicates that non-pattern transactions should not mask the evidence of dumping in respect of pattern transactions. The possibility that non-pattern transactions might mask dumping in respect of pattern transactions arises because of the significant price difference between these transactions. There is no consideration of whether transactions *within* the pattern are priced at significantly different levels relative to one another. There is therefore no basis to conclude that one (pattern) transaction priced significantly lower than non-pattern transactions might mask evidence of dumping in respect of another (pattern) transaction priced significantly lower than non-pattern transactions.

7.192. For the reasons set forth above, we find that the USDOC's use of zeroing when applying the W-T comparison methodology is "as such" inconsistent with the second sentence of Article 2.4.2. For the same reasons, we also find that the USDOC acted inconsistently with the second sentence of Article 2.4.2 by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation.

7.193. Concerning the claim by Korea of violation of Article 2.4.2 regarding the use of zeroing when applying the W-T methodology in "subsequent connected stages" of *Washers*, including any administrative reviews of the *Washers* anti-dumping order, we note that the preliminary

[344] Appellate Body Report, *US – Zeroing (Japan)*, para. 135. We observe that a similar statement was made by the Appellate Body in footnote 166 of its report on *US – Softwood Lumber V (Article 21.5)*.

[345] This is consistent with Korea's view that "[t]he specific addition of the term 'pattern' in the text of the second sentence of Article 2.4.2 indicates a focus on a subset of total export sales that constitute the 'intelligible form' that the authority seeks to discern" (see Korea's second written submission, para. 99).

[346] United States' first written submission, para. 151.

determination of the first administrative review of the *Washers* anti-dumping order was published on 9 March 2015 (Exhibit KOR-96). The final determination of that review was published on 16 September 2015 (Exhibit KOR-141). The United States asserts that these determinations fall outside our terms of reference. Korea asserts that they should be included within the Panel's terms of reference. The Panel has already found the USDOC's use of zeroing when applying the W-T comparison methodology is "as such" inconsistent with the second sentence of Article 2.4.2. In light of that finding, it is not necessary for us to address Korea's claim regarding the USDOC's use of zeroing when applying the W-T methodology in "subsequent connected stages of *Washers"*, including any administrative reviews of the *Washers* anti-dumping order. Nor, therefore, is it necessary for us to address the procedural issue of whether the preliminary and final determinations in the first administrative review of the *Washers* anti-dumping order fall within our terms of reference.

7.5.3 Korea's claims against zeroing under other provisions

7.194. Korea has also raised claims regarding the United States' use of zeroing when applying the W-T comparison methodology under other provisions of the Anti-Dumping Agreement. Korea claims that the USDOC's use of zeroing is inconsistent with the "fair comparison" requirement set forth in Article 2.4, and as a consequence also Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, both "as such" and as applied in the *Washers* anti-dumping investigation and "subsequent connected stages". In addition, Korea claims that the use of zeroing in administrative reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994, both "as such" and as applied in "subsequent connected stages".

7.195. The United States asks us to reject these claims.

7.5.3.1 Main arguments by the parties

7.196. Korea contends[347] that the use of zeroing invariably leads to the results of intermediate W-T comparisons being disregarded or artificially set to zero, thus increasing the resulting margins of dumping and making an affirmative dumping determination more likely. Korea asserts that the use of zeroing is therefore inconsistent with the "fair comparison" requirement set forth in the first sentence of Article 2.4.[348] According to Korea, the Appellate Body has found that the ordinary meaning of the term "fair" requires investigating authorities to be "impartial, even-handed, or unbiased" when comparing the export price and normal value, and this obligation applies with equal force to all three comparison methodologies provided in Article 2.4.2. Korea suggests that the Appellate Body has indicated that the use of zeroing cannot be considered impartial, even-handed or unbiased, because it distorts the prices of non-dumped export transactions, which are either not considered at their real value or artificially reduced.[349]

7.197. Korea also claims that, as a result of zeroing in original investigations being inconsistent with the second sentence of Article 2.4.2 and the Article 2.4 fair comparison requirement, it is also inconsistent with the definition of "dumping" set forth in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, and with the general principle set forth in Article 1 of the Anti-Dumping Agreement.[350]

7.198. Furthermore, Korea contends that the USDOC also systematically applies the zeroing methodology when calculating margins of dumping for the product and exporter in the context of administrative reviews, where those administrative reviews entail the use of the W-T comparison methodology. Korea asserts that the USDOC therefore levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement. Korea submits that the use of zeroing when applying the W-T comparison methodology in administrative

[347] The main arguments of Korea are set forth at paras. 71-76 of its first written submission.

[348] The first sentence of Article 2.4 of the Anti-Dumping Agreement provides "[a] fair comparison shall be made between the export price and the normal value".

[349] Korea's first written submission, para. 75.

[350] Ibid. para. 352. By the terms of Korea's Request for Establishment of a Panel, Korea's Article 1 claim is limited to the USDOC's use of zeroing in the *Washers* anti-dumping investigation (Document WT/DS464/4, Section I.5, p. 3).

reviews is therefore "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.[351]

7.199. The United States asserts that Korea overstates the Appellate Body's findings in previous disputes related to zeroing and Article 2.4 of the Anti-Dumping Agreement. The United States suggests that the Appellate Body's findings that zeroing is inconsistent with Article 2.4 are closely related to, and perhaps even dependent on, earlier findings that zeroing is inconsistent with the first sentence of Article 2.4.2. According to the United States, the second sentence of Article 2.4.2 of the Anti-Dumping Agreement provides Members a means to "unmask targeted dumping"[352] in "exceptional"[353] situations. The United States contends that it is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. The United States asserts that because zeroing is not inconsistent with Articles 2.4 or 2.4.2 (second sentence), there is no basis to uphold Korea's dependent claims under Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

7.200. Regarding Korea's claim that the use of zeroing in administrative reviews is "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994, the United States notes[354] that this claim is premised on Korea's argument that the USDOC "systematically levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement."[355] The United States recalls its earlier arguments that the USDOC's use of zeroing, or its approach to determining dumping under the average-to-transaction comparison methodology, is not inconsistent with Article 2 of the Anti-Dumping Agreement. The United States submits that there is therefore no basis for Korea's claims of inconsistency with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.5.3.2 Main arguments of third parties[356]

7.201. Canada asserts[357] that the practice of zeroing is inconsistent with the obligation to make a "fair comparison" contained in Article 2.4. The chapeau of Article 2.4 requires that "[a] fair comparison shall be made between the export price and the normal value". The introductory clause to Article 2.4.2 indicates that the dumping calculation methodologies set out therein are subject to the fair comparison obligation in Article 2.4.[358] Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4. In this case, the USDOC practice of zeroing while employing the average-to-transaction methodology distorts certain facts related to an investigation and contains an inherent bias. It therefore cannot be described as "fair" in accordance with Article 2.4 of the Anti-Dumping Agreement.

7.202. China considers[359] that zeroing involves disregarding the prices at which above-normal value export transactions occur, thereby *preventing* these relatively high prices from offsetting the relatively low prices of other individual export transactions, and therefore failing to generate a margin for the product as a whole. Instead, such a practice "artificially inflates" the level at which dumping is alleged to occur[360], by basing the determination solely on a subset of the universe of export transactions – specifically, low-priced transactions that generate positive intermediate

[351] Article 9.3 of the Anti-Dumping Agreement provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1".

[352] Appellate Body Reports, *US – Zeroing (Japan)*, para. 135; and *EC – Bed Linen*, para. 62.

[353] See Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97; and *US – Zeroing (Japan)*, para. 131.

[354] United States' first written submission, para. 267.

[355] Korea's first written submission, para. 98.

[356] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.

[357] Canada's third party submission, para. 10.

[358] Ibid. (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 136).

[359] China's third party submission, paras. 95 and 96.

[360] Ibid. para. 95 (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142, referring to the use of zeroing in the context of the T-T comparison methodology).

comparison results. Because a margin determined through a methodology that involves zeroing of some intermediate comparison results is not a "margin of dumping" in the sense of the Anti-Dumping Agreement, an approach to the imposition of anti-dumping duties that employs zeroing is inconsistent with Article 9.3, something confirmed by the Appellate Body.[361]

7.203. Japan contends[362] that zeroing under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement violates the fair comparison obligation imposed on Members' authorities by Article 2.4. The Appellate Body found that zeroing in W-T comparisons in the context of periodic reviews and new shipper reviews is, as such, inconsistent with Article 2.4[363], clarifying that disregarding certain comparisons or transactions is unfair because it artificially increases the resulting margins of dumping and making an affirmative dumping determination more likely. Japan concludes that nothing in the Anti-Dumping Agreement suggests that this well-established general proposition under Article 2.4 would not apply to the second sentence of Article 2.4.2.

7.204. Norway considers[364] that as with the other two comparison methodologies, the use of zeroing while applying the W-T comparison methodology distorts certain facts related to the investigation and contains an inherent bias, making a positive determination of dumping more likely. According to Norway this is clearly in violation of the "fair comparison" obligation of Article 2.4 of the Anti-Dumping Agreement.

7.205. Thailand submits[365] that the Anti-Dumping Agreement does not permit the use of zeroing in the W-T comparison methodology. The first sentence of Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal price", which, in Thailand's view, must apply to Article 2.4 as a whole, including both the first and second sentences of Article 2.4.2. According to Thailand, allowing the use of zeroing in the W-T comparison methodology under targeted dumping while prohibiting it in all other instances would render the previous interpretations of "fair comparison" with regard to zeroing meaningless.

7.5.3.3 Evaluation by the Panel

7.206. Turning to Korea's Article 2.4 claim, we observe that the Appellate Body has in a number of cases upheld Article 2.4 claims against the use of zeroing after finding that zeroing is inconsistent with the first sentence of Article 2.4.2.[366] We note in particular the Appellate Body's finding in *US – Zeroing (Japan)* that "[i]f anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a 'fair comparison' within the meaning of the first sentence of Article 2.4."[367] We consider that the use of zeroing in the context of the W-T comparison methodology would not lead to a fair comparison, since individual pattern transactions priced above normal value would not be properly taken into account when an investigating authority has particular regard to the exporter's pricing behaviour within that pattern. We therefore find that the use of zeroing in the context of the W-T comparison methodology is "as such" inconsistent with Article 2.4. For the same reasons, we find that the USDOC acted inconsistently with Article 2.4 by using zeroing in the *Washers* anti-dumping investigation.

7.207. Having found that the use of zeroing is inconsistent with both Article 2.4 and the second sentence of Article 2.4.2, we do not consider it necessary for the resolution of the present dispute to also review Korea's dependent claims under Articles 1 and 2.1 of the Anti-Dumping Agreement, and Article VI:1 of the GATT 1994.

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[361] China's third party submission, para 96 (citing in relation to zeroing in reviews "as such", the Appellate Body Reports, *US – Zeroing (Japan)*, para. 166; *US – Stainless Steel (Mexico)*, para. 133; and *US – Continued Zeroing*, para. 199).

[362] Japan's third party submission, para. 17.

[363] Ibid. (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 169).

[364] Norway's third party statement, para. 10.

[365] Thailand's third party statement, para. 4.

[366] See, for example, Appellate Body Reports, *US – Zeroing (Japan)*, paras. 123-125; *EC – Bed Linen*, para. 55; and *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 138-143.

[367] Appellate Body Report, *US – Zeroing (Japan)*, para. 168.

7.208. In respect of Korea's "as such" claim under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the United States' defence is based exclusively on its argument that zeroing is not inconsistent with Article 2 of the Anti-Dumping Agreement. We have already rejected this argument in the context of our findings that the use of zeroing is inconsistent with Articles 2.4 and 2.4.2 (second sentence). Article 9.3 stipulates that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Similarly, Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Since the use of zeroing in the context of the W-T comparison methodology would artificially inflate the margin of dumping, any duties collected would necessarily be excessive. Thus, bearing in mind our findings under Articles 2.4 and 2.4.2 (second sentence), taking account of the findings of the Appellate Body against the use of zeroing in administrative reviews[368], and in the absence of any additional argumentation by the United States, we find that the use of zeroing by the USDOC when applying the W-T comparison methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.209. In light of this finding against the use of zeroing by the USDOC when applying the W-T comparison methodology in administrative reviews "as such", we do not consider it necessary to also address whether the use of zeroing by USDOC when applying the W-T comparison methodology in "subsequent connected stages" of the *Washers* anti-dumping order, including administrative reviews, is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Accordingly, it is not necessary for us to address the procedural issue of whether the preliminary and final determinations of the first administrative review of the *Washers* anti-dumping order are within our terms of reference.

7.6 Claims under the SCM Agreement

7.6.1 Introduction

7.210. Korea pursues a number of claims concerning the USDOC's determination that two tax credit subsidy programmes benefiting Samsung are specific. Korea also challenges the manner in which the USDOC calculated the amount of subsidy conferred on Samsung under those programmes.

7.211. The first programme, Article 10(1)(3) of the Restriction of Special Taxation Act (RSTA), provides tax credits pursuant to certain Research and Development (R&D) expenditures. The USDOC found *de facto* specificity under Article 2.1(c) of the SCM Agreement, on the basis of its finding that Samsung received a disproportionately large amount of the total benefit under that programme. Korea challenges the USDOC's finding of *de facto* specificity.

7.212. The second programme, Article 26 of the RSTA, provides tax credits pursuant to investment in certain business assets. The USDOC found specificity under Article 2.2 of the SCM Agreement, on the basis of its finding that the programme was limited to certain enterprises located within a designated geographical region. Korea challenges this determination of regional specificity.

7.213. The USDOC calculated Samsung's margin of subsidization for the relevant tax credits using an allocation method based on the sales value of all products produced by Samsung in Korea. Korea challenges the USDOC's decision not to calculate an amount of subsidy conferred on Samsung in respect of only the Digital Appliances business unit. Korea also challenges the USDOC's calculation of the amount of subsidization for RSTA Article 10(1)(3) tax credits without including the sales value of LRWs produced by Samsung outside of Korea.

7.214. The United States asks the Panel to reject Korea's claims.

[368] Appellate Body Reports, *US – Continued Zeroing*, paras. 314-316; *US – Stainless Steel (Mexico)*, paras. 133 and 134; *US – Zeroing (Japan)*, para. 166; and *US – Zeroing (EC)*, paras. 134 and 135.

7.6.2 Whether the USDOC properly found that RSTA Article 10(1)(3) tax credit subsidies are *de facto* specific: disproportionately large amounts

7.6.2.1 Introduction

7.215. The USDOC found that the RSTA Article 10(1)(3) tax credit scheme was not *de jure* specific pursuant to Article 2.1(a) of the SCM Agreement, but that it was *de facto* specific pursuant to Article 2.1(c). In particular, the USDOC determined that subsidies had been provided to Samsung under that scheme in "disproportionately large amounts". The USDOC's determination was based on the facts that: (i) Samsung received a "very large" percentage of total subsidies disbursed under that scheme, and (ii) Samsung received many times more than the average recipient.[369] Following domestic judicial proceedings, this issue was subsequently remanded to the USDOC for review. In its remand determination, the USDOC supplemented and reaffirmed its original finding of *de facto* specificity. The USDOC found *inter alia* that Samsung claimed more tax credits and saved more tax under the RSTA Article 10(1)(3) scheme than 99 other companies in a similar "economic position", as measured by taxable income.[370]

7.216. Korea claims that both the USDOC's original determination and its remand determination are inconsistent with Article 2.1(c) of the SCM Agreement. The United States asks us to reject Korea's claims.

7.6.2.2 Main arguments of the parties

7.217. Korea denies[371] that Samsung received subsidies in disproportionately large amounts under RSTA Article 10(1)(3). Korea contends that the USDOC's determination of *de facto* specificity is based solely on the fact that the tax credit claimed by Samsung on its 2011 tax return constituted a larger percentage of the total than the average tax credit claimed by each other Korean company. Korea asserts that the amount of subsidy received by Samsung was not disproportionately large because it was determined using one of the two formulas provided for in the programme, and therefore calculated according to the conditions for eligibility for that subsidy. Korea further asserts that the USDOC was unable or unwilling to state what would have constituted a "proportionately" large amount of the Article 10(1)(3) tax credit that Samsung could have received without being subject to a finding of specificity.

7.218. Korea notes that the Appellate Body found in *US – Large Civil Aircraft (2nd complaint)* that a finding of *de facto* specificity under Article 2.1(c) requires the investigating authority to establish that "a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure".[372] Korea refers in particular to the Appellate Body's finding that an assessment must be made as to whether "the actual allocation of the 'amounts of subsidy' to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b)".[373] Korea submits that the USDOC had no evidence of any difference between the tax year 2010 credit amount that Samsung calculated and the amount that "would be [calculated] if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b)." Korea submits that the USDOC therefore had no basis to conclude that Samsung's RSTA Article 10(1)(3) tax credits were "disproportionate".

7.219. Korea notes that the USDOC confirmed its finding of disproportionality in a remand determination. Korea asserts that the USDOC again failed to examine whether the amounts of tax credits differed from the allocation that would be expected under the conditions for eligibility for that programme. Korea asserts that the USDOC's focus in the remand determination on the 99 largest Korean companies, measured by taxable income, is no different in principle from its original focus. Korea further asserts, *inter alia*, that the USDOC's reliance upon taxable income to assess the issue of disproportionality is inappropriate because taxable income has no relationship

[369] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), pp. 35-36.
[370] *Washers* CVD Redetermination, (Exhibit KOR-44) (BCI), pp. 10-11.
[371] Korea's main arguments are set forth at paras. 265-276 of its first written submission.
[372] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 877.
[373] Ibid. para. 879.

to a company's size and because taxable income reflects innumerable business decisions on both the sales and expense sides. As such calculating tax savings as a percentage of the amount of the tax owed is irrelevant.[374]

7.220. Korea also claims that the USDOC's original and remand determinations on disproportionality are further inconsistent with Article 2.1(c) because they fail to address two mandatory factors set forth in that provision, namely the extent of economic diversification and the length of time during which the programme has been in operation.[375] Korea observes that there is no explicit reference to these factors in the USDOC's determination, and contends that there is no authority in the SCM Agreement for these factors to be taken into account implicitly.[376]

7.221. The United States submits[377] that the USDOC's determination of *de facto* specificity is consistent with Article 2.1(c) of the SCM Agreement. The United States asserts that the USDOC's determination is amply supported by the facts. According to the United States, despite the broad *de jure* availability of the programme, a single company, Samsung, received a very large proportion of all subsidies disbursed under the programme, which had nearly 12,000 participants.[378] The United States notes that Samsung received many times more subsidy than the average recipient.[379] The United States also notes that the USDOC's remand determination showed that Samsung received a large proportion of all credits claimed by the 100 largest companies participating in the programme, and the bulk of the combined credits claimed by the other 99 largest recipients.[380] The United States also asserts that the USDOC's redetermination showed that Samsung received a greater reduction in its tax liability to Korea than the average tax reduction received by the other 99 largest companies.[381] According to the United States, it is remarkable that Korea would criticize the USDOC for relying on taxable income as an indicator of company size, given that the GOK refused to provide data on company revenue or assets. The USDOC explained that its "initial attempt" to address the size argument "based upon the size of assets and amount of revenue was not possible," but that "[t]axable income is a suitable alternative" in part because the "benefit" of a tax credit can be framed as a function of the amount by which taxes are reduced – i.e. the tax savings – and thus premised on taxable income.[382] In the view of the United States, the fact that a company's taxable income and tax savings may reflect tax planning strategies does not render this data irrelevant, particularly at the level of an aggregate comparison between Samsung and the other 99 companies. The United States argues that the USDOC used the best data available, which accounts for company size.[383]

7.222. The United States further submits that, in accordance with the findings of the Appellate Body in *US – Large Civil Aircraft (2nd complaint)*, the USDOC determined that there was a significant disparity between the expected distribution of these subsidies based on the programme's eligibility criteria – which are open to any company investing in research or human resources development – and their actual distribution. The United States refers in this regard to the USDOC's determination that:

> It is a significant indicator of disproportionate use that Samsung and LG together accounted for a very large percentage of all tax credits provided under this program, when this program had more than 11,000 beneficiaries. Even though we would not expect each beneficiary to receive an equal percentage of the total benefits, in the case of Samsung and LG, the percentage of total benefits received is significant.[384]

7.223. The United States contends that this statement should be read in context with the USDOC's finding that RSTA Article 10(1)(3) is not *de jure* specific. The United States asserts that

[374] Korea's second written submission, paras. 273-275.
[375] Korea's first written submission, paras. 272-274.
[376] Korea's second written submission, para. 270.
[377] The main arguments of the United States are set forth at paras. 339-382 of its first written submission.
[378] Final Samsung CVD Calculation Memo, Attachment 7, (Exhibit USA-26) (BCI).
[379] Ibid.
[380] *Washers* CVD Redetermination, (Exhibit KOR-44) (BCI), pp. 10-11.
[381] Ibid. pp. 11-12 and 14.
[382] Ibid. p. 28.
[383] United States' second written submission, paras. 259-260.
[384] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), pp. 35-36.

the USDOC found that the implementing statute for RSTA Article 10(1)(3) "do[es] not limit eligibility to a specific enterprise or industry or group thereof"[385], and that the absence of any restrictions on eligibility means that benefits would have been expected to be distributed more evenly across the programme's 11,764 recipients. The United States submits that there was therefore a significant disparity between the expected distribution of subsidy based on those conditions of eligibility and the actual distribution in which two recipients received such a large percentage of credits and so much more than the average recipient. The United States adds that the text of Article 2.1(c) did not require the USDOC to frame its expectations in precise, quantitative terms. The United States also notes that the Appellate Body did not express in quantitative terms the allocation of benefits it would have expected given the eligibility criteria in *US – Large Civil Aircraft (2nd complaint)*. The United States suggests that this is consistent with the panel's observation in *US – Upland Cotton* that "specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition".[386]

7.224. In the view of the United States, the USDOC also considered at length the explanations provided by the parties for the distribution of RSTA Article 10(1)(3) subsidies – including the "common formula" argument and "size defense" asserted by Samsung, and supported by Korea in this dispute. Regarding Korea's argument that Samsung's tax credits were proportionate because they were calculated using one of the formulas provided for in the programme, the United States contends that the fact that common formulas are used to calculate subsidy amounts has no bearing on the disproportionality inquiry. The United States suggests that these formulas relate to different aspects of a specificity analysis under Article 2.1, namely consideration of potential non-specificity on the basis of the existence of "objective criteria or conditions", pursuant to Article 2.1(b). The United States notes in this regard that the Article 2.1(c) *de facto* specificity analysis is made "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)".

7.225. The United States also disputes Korea's argument that the distribution of benefits reflects the fact that Samsung is a large company, and that any tax credit reflects a large company's research and human resources development activities.[387] The United States observes that Samsung made this argument before the USDOC, but failed to offer any supporting evidence, either quantitative or qualitative.[388] According to the United States, this "size defense" was fundamentally at odds with the purpose of the disproportionality inquiry. Given the level of generality at which it was framed, this theory would render subsidies "proportionate" any time a "large" company received larger amounts of subsidy under a program. Regardless of the metric used as the basis for calculating subsidies (investments, revenue, employment, etc.), large companies will often qualify for and receive more. But, in the view of the United States, this fact is not sufficient to characterize *any* distribution that emerges as "proportionate."[389]

7.226. The United States submits that Korea has failed to make a *prima facie* case of inconsistency regarding the USDOC's alleged failure to address two of the mandatory factors set forth in the third sentence of Article 2.1(c).[390] The United States contends that an authority need only take account of these factors to the extent that they inform an authority's task of "determin[ing] whether a subsidy … is specific."[391] The United States asserts that where these factors are plainly irrelevant to that determination, an authority satisfies its obligation by determining that they are, in fact, irrelevant. The United States asserts that an authority need not conduct an empty analysis, merely to demonstrate compliance with a formalistic checklist.

7.227. The United States asserts that the USDOC properly found that neither of the two factors identified by Korea has any bearing on the USDOC's specificity inquiry. The United States argues that the USDOC expressly found, in respect to the "length of time during which the subsidy

[385] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12.
[386] Panel Report, *US – Upland Cotton*, para. 7.1142; see also ibid. ("At some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy …").
[387] United States' first written submission, paras. 380-382.
[388] United States' second written submission, paras. 235-237.
[389] Ibid. para. 239.
[390] United States' first written submission, paras. 383-394.
[391] SCM Agreement, Article 2.1 (*chapeau*).

programme has been in operation", that the RSTA Article 10(1)(3) programme began in 1982.[392] The United States contends that the thirty-year duration of this subsidy programme was repeatedly noted in the record.[393]

7.228. The United States also suggests that the USDOC took Korea's economic diversification into account implicitly. The United States refers in this regard to the fact that, because Korea was unable to provide data setting out the distribution of RSTA Article 10(1)(3) subsidies by industry and sector[394], the USDOC found that "the information on the record is not sufficient to evaluate predominance or disproportionality on an industry basis".[395] The United States also asserts that the USDOC was in any event aware of the publicly known fact that Korea is one of the wealthiest and most diversified economies in the world – a fact that Korea neither raised nor contested.[396] The United States observes in this regard that the record indicates that Korea is a member of both the Organization for Economic Cooperation and Development (OECD) and G20, and chaired a recent G20 summit[397], and that the RSTA Article 10(1)(3) R&D tax credit programme had nearly 12,000 participants[398], reflecting Korea's status as an advanced, diversified economy.

7.6.2.3 Main arguments of third parties[399]

7.229. China asserts[400] that the Appellate Body has confirmed that the term "disproportionately large" is a relative term.[401] According to China, its plain meaning denotes a *comparative* exercise to determine whether the "amounts" of subsidy received are *greater* than the amount that would have been received *in proportion* to something else. China contends that, because the text of Article 2.1(c) is silent on the benchmark (i.e. the "something else") from which to measure whether the amounts received are "disproportionately large" or not, the issue on which the parties disagree is the following: Must the amounts received be disproportionate, solely in absolute terms, when compared both to the total amount available under the subsidy programme and to the amounts received by other recipients (which is the United States' position), or must the amounts received be disproportionate, in "relational" terms[402], to the amount that the recipient at issue could be expected to receive, given the precise terms of the eligibility criteria, the amount of benefitting activity, and other relevant factors (which is Korea's position)? In China's view, the question whether "disproportionately large amounts" of subsidy are received by a particular recipient cannot be based on a simple assessment of whether that recipient receives a major portion of the total amount available under the subsidy programme and a greater amount, in absolute terms, than other recipients. China contends that the implication of such an approach would be that only subsidies received in equal amounts by all producers could be considered non-specific. China asserts that such an approach would turn the concept of "disproportion" on its head: if small producers with little R&D expenditure each received the same amounts of R&D subsidy as a large producer with a massive R&D spend, the small producers are likely receiving a disproportionately large amount. Referring to the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)*, China contends that the question is whether USDOC's determination of "disproportionate amount" rested on something more than a simple finding that Samsung received a major portion of the total amount available under the subsidy programme and a larger share, in absolute terms, of the subsidy than other recipients. That alone would not be sufficient, as

[392] *Washers* CVD Preliminary Determination, 77 Fed. Reg. at 33187, (Exhibit KOR-85).
[393] See, e.g. GOK April 9, 2012 Questionnaire Response (QR) at App. Vol. at II-75, 108 (Exhibit KOR-75) (BCI).
[394] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12. Korea was unable to provide this information, on the grounds that it did not compile data for RSTA Article 10(1)(3) along industry and sector lines (Ibid.).
[395] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12.
[396] The United States refers, for example, to Panel Report, *US – Softwood Lumber IV,* para. 7.124 (finding that the USDOC took into account the "publicly known fact" that Canada is a highly diversified economy when the USDOC noted that the vast majority of companies and industries in Canada do not receive benefits under the programmes in question).
[397] GOK April 9, 2012 QR at Ex. Gen02 (PR-56) at "Minister's Forward" (Exhibit USA-27).
[398] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12; Final Samsung CVD Calculation Memo, Attachment 7, (Exhibit USA-26) (BCI).
[399] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[400] China's third party submission, paras. 102-106.
[401] China refers in this regard to Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.
[402] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.

explained by the Appellate Body, to reach a finding that a recipient received disproportionately large amounts of subsidies in the sense of Article 2.1(c) of the SCM Agreement. China contends that, consistent with the guidance provided by the Appellate Body, an authority must carefully examine two factors: first, whether "the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution"; and, second, "the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy, in relational terms, to certain enterprises".

7.230. Referring to the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)*, the European Union[403] considers that the Panel should identify the amounts of subsidy granted to Samsung pursuant to that provision since its entry into force. Then, the Panel should determine whether those amounts are "disproportionately large" relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b). If there is a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, the Panel should also examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to Samsung. If, ultimately, the reasons for Samsung obtaining more tax credits than other eligible Korean companies is determined by the conditions for eligibility (i.e. qualifying investments in R&D activities), this may indicate that Samsung did not receive disproportionally large amounts for the entire period. Since the amount of subsidisation was established by reference to a particular year (i.e. 2011), the Panel may also look into whether Samsung received disproportionally large amounts of tax credits in that year as compared to other eligible Korean companies in the same period.

7.6.2.4 Evaluation by the Panel

7.6.2.4.1 The USDOC's original determination

7.231. We begin by addressing Korea's claim concerning the finding of disproportionality in the USDOC's original determination. We then address the USDOC's redetermination of this issue. Thereafter, we address Korea's claim concerning the USDOC's alleged failure to address the two factors set forth in the final sentence of Article 2.1(c) of the SCM Agreement.

7.232. Article 2.1(c) of the SCM Agreement provides in relevant part:

> If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[404] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

7.233. Article 2.1(c) of the SCM Agreement therefore allows investigating authorities to find that subsidies are *de facto* specific when they result in the "granting of disproportionately large amounts of subsidy to certain enterprises". There is no guidance in Article 2.1(c) as to how one might establish that the amount of subsidy provided is actually "disproportionately large". However, this issue was addressed by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* in the following manner:

> The language of Article 2.1(c) indicates that the first task is to identify the "amounts of subsidy" granted. Second, an assessment must be made as to whether the amounts of subsidy are "disproportionately large". This term suggests that

[403] European Union's third party submission, paras. 101-103.

[404] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

> disproportionality is a relational concept that requires an assessment as to whether the amounts of subsidy are out of proportion, or relatively too large. When viewed against the analytical framework set out above regarding Article 2.1(c), this factor requires a panel to determine whether the actual allocation of the "amounts of subsidy" to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b). In our view, where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, a panel will be required to examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to certain enterprises.[405]

7.234. Referring to these findings, the Appellate Body further explained in *US – Carbon Steel (India)* that it:

> [D]o[es] not see that an investigating authority or a panel could assess whether "amounts of subsidy" that were granted were "disproportionately large" without having some benchmark, perhaps informed by who was expected to receive that subsidy, against which to compare those granted amounts.[406]

7.235. A similar approach had been adopted by the panel in *EC and certain member States – Large Civil Aircraft*:

> [A] subsidy granted to certain enterprises in an amount that represents 50% of the total amount of subsidies granted under a relevant subsidy programme says little, if anything, about whether that amount is "disproportionately large". As we have previously explained, assessing whether the amount of a subsidy is "disproportionately large" involves determining whether the relationship between the amount of the subsidy at issue and a relevant "baseline" demonstrates that the amount of subsidy is greater than the amount that it would need to be in order to be proportionate. Thus, determining whether a 50% share of the total amount of subsidies granted under a particular subsidy programme to certain enterprises is "disproportionately large" involves considering whether the 50% share is greater than what it would need to be in order to say that the certain enterprises received a proportionate amount of all subsidies granted under that same programme.[407] (footnote omitted)

7.236. We agree with these findings, and attach particular importance to the fact that disproportionality is a "relational concept". We understand the relational nature of the analysis to mean that a finding of disproportionality must be based on an assessment of how the amount of subsidy actually received relates to an objective benchmark indicative of the amount of subsidy that the recipient would have been expected to receive if the subsidy were distributed proportionately, in accordance with the conditions for eligibility.[408]

7.237. The United States agrees that disproportionality is a relational concept, but does not consider that the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* mean that the USDOC was required to undertake the type of relational analysis described above. The United States disagrees that the USDOC was required to compare the amount of subsidy received by Samsung with the amount of subsidy that Samsung should have received. The United States

[405] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.
[406] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.389.
[407] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.972. This finding was not reviewed by the Appellate Body.
[408] Korea suggests that the amount of subsidy received by Samsung should have been compared by the USDOC to a "second ratio" representing the amount of subsidy that Samsung should have received. Korea suggests that the Appellate Body upheld the need for such a "second ratio" in *US – Large Civil Aircraft (2nd Complaint)*. The United States denies that the Appellate Body stated that any such "second ratio" was required. We shall refrain from using the term "second ratio", since the precise meaning of that term is unclear. It is neither a treaty term, not a term defined by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)*. We shall therefore complete our evaluation of Korea's claim without finding whether or not the USDOC was required to have considered any such "second ratio" in its relational analysis.

contends that precise quantification of the amount that Samsung should have received was not required by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint).* The United States asserts that the USDOC properly found that Samsung received more than expected, relative to the amounts received by other recipients and bearing in mind the absence of any *de jure* restrictions on eligibility. The United States asserts that the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint*) support the determination made by the USDOC, because the Appellate Body found that it would have expected "a wider distribution of [subsidy] benefits", and this "provides a reason to believe that the IRB subsidies were granted in disproportionately large amounts to certain enterprises".[409]

7.238. We are not persuaded by the United States' argument. As indicated above, the standard set forth by the Appellate Body clearly calls for a relational analysis. While the Appellate Body accepted that the fact that recipients received 69% of total subsidies "provide[d] a reason to believe"[410] that the relevant subsidies were granted in disproportionately large amounts, because normally a wider distribution would have been expected, the Appellate Body nevertheless explained that it was necessary to examine possible reasons that explain the disparity between actual and expected distribution of a subsidy.[411] The Appellate Body accepted the United States' argument that it would have made sense to examine, in this latter context, whether the disparity could be explained by certain undefined "qualifying investments".[412] Bearing in mind the Appellate Body's earlier reference to disproportionality being a relational concept, this reference to "qualifying investments" is, in our view, clearly intended to establish how the amount received relates to some objective benchmark, i.e. the amount of "qualifying investments" in that case.

7.239. The Appellate Body found that the United States had not placed any evidence on the panel record concerning the level of "qualifying investments". In the absence of "sufficient reasons supported by evidence to undermine the assessment"[413] that the granting of 69% of total subsidies represents an allocation at variance from the allocation that would have been expected, the Appellate Body upheld the panel's finding. This follows from the fact that the task of the Appellate Body in reviewing the findings of a panel is not to conduct its own examination of the facts *de novo*, but rather examine whether the findings of the panel are erroneous as a matter of law. In contrast, in a countervailing duty investigation, an investigating authority has the burden of investigating, and evaluating facts in light of the proper legal framework. The investigating authority is entitled to reach a preliminary determination of disproportionality based on an alleged disparity between the actual and expected distribution of a subsidy. However, that authority is then required to investigate the reasons for that disparity, by undertaking the requisite relational analysis using a relevant benchmark, before finding disproportionality on the basis of that disparity. The authority is not entitled to place the burden on the respondents to rebut that determination with evidence supporting a relational analysis that explains the disparity. The onus is on the investigating authority to investigate the facts concerning the issue of potential disproportionality for itself, and make a determination on the basis of the relational analysis set forth above.[414]

7.240. We note the United States' assertion that the USDOC was not required to express the expected distribution under RSTA Article 10(1)(3) in precise, quantitative terms.[415] We do not disagree. Nor does Korea claim that this is what the USDOC should have done.[416] However, a finding of disproportionality must be based on some form of relational analysis examining how the amount received relates to a benchmark – whether described in quantitative or qualitative terms –

[409] United States' first written submission, para. 370 (citing Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint*), para. 884).

[410] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 884.

[411] Ibid. para. 886.

[412] Ibid. para. 887.

[413] Ibid. para. 888.

[414] We therefore reject the United States' argument that Korea and Samsung were in the same position before the USDOC in the *Washers* countervailing investigation that the United States was in before the panel and Appellate Body in *US – Large Civil Aircraft (2nd Complaint)*, in the sense that they were required to show why the large amount of subsidy received by Samsung did not indicate that the subsidies were granted in disproportionately large amounts (United States' oral statement at the second meeting of the Panel, para. 52). The onus was rather on the USDOC to undertake the relational analysis necessary for a proper determination of disproportionality.

[415] United States' second written submission, para. 214.

[416] Korea's second written submission, para. 258.

that is indicative of the amount that the recipient would have been expected to receive were the distribution proportionate.

7.241. The United States also objects to Korea's argument that the amounts received by Samsung were necessarily proportionate because they were consistent with the amounts that Samsung should have received, bearing in mind the application of the applicable formula to the amount of qualifying investments. The United States considers that the formula and conditions for eligibility of the RSTA Article 10(1)(3) scheme pertain exclusively to the issue of non-specificity under Article 2.1(b). The United States notes in this regard that Article 2.1(c) begins with the phrase "[n]otwithstanding any appearance of non-specificity resulting from the principles laid down in" *inter alia* Article 2.1(b). Second, the United States asserts that while an entitlement to a tax credit under the RSTA Article 10(1)(3) tax credit scheme arises as a result of qualifying investments, those qualifying investments do not determine the amount of tax credit actually claimed.[417] The United States asserts that benefits under RSTA Article 10(1)(3) are calculated according to formulas that vary depending on company size, and recipients may elect not to take tax credits or defer them given Korea's Minimum Tax requirements. The United States submits that benefits do not simply reflect amounts invested, or any formula set forth in RSTA Article 10(1)(3).[418]

7.242. We do not agree that the conditions for eligibility and other provisions governing the amount of subsidy to be provided are only relevant to the issue of non-specificity pursuant to Article 2.1(b) of the SCM Agreement. As explained above, the Appellate Body has stated clearly that the conditions for eligibility may play an important role in the relational analysis required for determining whether or not subsidy amounts are disproportionate in the sense of Article 2.1(c). We agree, since these conditions are generally relevant when identifying a benchmark that is indicative of what the expected amount of subsidy would have been. In these circumstances, reference is not made to conditions for eligibility in order to establish non-specificity under Article 2.1(b). A determination of non-specificity under Article 2.1(b) would not somehow trump a determination of *de facto* specificity under Article 2.1(c). However, the fact that the conditions for eligibility are not relied on to establish non-specificity under Article 2.1(b) does not mean that those same conditions should not – to the extent relevant – inform the relational analysis required to demonstrate *de facto* specificity on the basis of disproportionality.

7.243. Concerning the relevance of qualifying investments to determining the amount of subsidy, we do not disagree with the United States' assertion that "[t]he amount of tax credits received may reflect a range of factors – such as the size of the company (SME vs. non-SME), the extent to which expenses in the tax year compare to the annual average over preceding years, a company's tax loss, compliance with Minimum Tax requirements, and other tax planning considerations".[419] There is no dispute between the parties regarding this matter. However, the fact that the amounts claimed do not relate directly to the amounts of qualifying investments does not mean that the USDOC was not required to undertake the relational analysis explained above. It rather means that, in conducting such relational analysis, the USDOC was required to take account of the broad range of factors having a bearing on the amount that Samsung would have been expected to receive. Since Article 2.1(c) concerns a determination of *de facto* specificity, a determination under that provision must take proper account of all relevant *facts*. We recognize the complexity of the relational analysis required of the USDOC, given the number of different factors having a bearing on the amount of subsidy that Samsung might be expected to claim and receive in a given year. However, the complexity of the task does not absolve the USDOC from its obligations under Article 2.1(c) of the SCM Agreement.[420]

7.244. The USDOC's determination of disproportionality did not include the required relational analysis of the amount of subsidy received by Samsung. The USDOC's determination was based on

[417] See United States' response to Panel question No. 5.3, paras. 8-13.

[418] United States' first written submission, para. 379; and response to Panel question No. 5.3, paras. 8-13.

[419] United States response to Panel question No. 3.1, para. 130.

[420] We disagree with Korea's argument that the USDOC should have assessed disproportionality on the basis of the tax credit *earned*, as opposed to the amount *claimed* (Korea's response to Panel question No. 5.3, para. 8). A tax credit constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement because it results in "government [tax] revenue that is otherwise due [being] foregone or not collected". The amount of benefit is the amount of tax revenue foregone or not collected, and therefore relates to the amount of tax credit actually claimed by the taxpayer. If no tax credits are claimed for a given period, no revenue is foregone or not collected – even if tax credits are actually *earned* in that period.

the facts that (i) Samsung received a certain percentage of all subsidies disbursed under that scheme, and (ii) Samsung received many times more than the average recipient. While the USDOC considered how the amount received by Samsung related to the amounts received by other recipients, the USDOC failed to consider how the amount of subsidy received by Samsung related to a benchmark that was indicative of the amount that Samsung would have been expected to receive, taking account of all factors having a bearing on that amount were the subsidy distributed proportionately. We therefore find that the USDOC's determination of disproportionality is inconsistent with Article 2.1(c) of the SCM Agreement.

7.6.2.4.2 The USDOC's remand determination

7.245. In its remand determination, the USDOC affirmed its original finding of disproportionality. The USDOC did so *inter alia* by comparing the amounts received by Samsung with the amounts received by the other 99 largest recipients. The USDOC also compared the amount of tax saved by Samsung with the amount of tax saved by 99 other companies in a similar "economic position", as measured by taxable income.[421]

7.246. Before addressing the parties' substantive arguments regarding the USDOC's remand determination, we note the United States' argument that the USDOC's remand determination falls outside the Panel's terms of reference, and therefore cannot be found to be WTO-inconsistent. The United States asserts in this regard that the parties did not consult on the remand determination, and that the remand determination did not exist at the time that the Panel was established.[422] However, the United States accepts that the remand determination "is a relevant fact that the Panel may take into account".[423]

7.247. We consider that the United States' argument that the parties did not consult on the remand determination is linked to its argument that the remand determination was not in existence at the time that the Panel was established. We note that, as such, the remand determination is not expressly covered by the text of Korea's Request for Consultations.[424] In this latter regard, we note that Korea's Request for Consultations, dated 3 September 2013, requested consultations on the following:

> Any determination in the proceeding entitled Large Residential Washers from Korea, including the investigation and all administrative reviews, new shipper reviews, changed circumstances reviews, sunset reviews and other segments of that proceeding.[425]

Korea also requested consultations on "any closely connected, subsequent measures that apply a measure or measures described in this request for consultations".[426] In our view, this language is sufficiently broad to cover the remand determination.

7.248. The Appellate Body addressed the question of whether a measure not in existence at the time of establishment of a panel could be covered by a panel's terms of reference in *US – Zeroing (Japan) (Article 21.5)*. The Appellate Body stated:

> We recall that Article 6.2 of the DSU provides that the request for the establishment of a panel "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Apart from the reference in the present tense to the fact that the complainant must identify the measures "at issue", Article 6.2 does not set

[421] Exhibit KOR-44 (BCI), p. 28. The United States asserts that the USDOC used taxable income to identify comparable companies because the Government of Korea had failed to provide data on company revenue or assets (United States' second written submission, para. 259). We note that there was no finding by the USDOC that the Government of Korea had failed to cooperate with its investigation. Nor did the USDOC apply facts available in this context.

[422] United States' comments on Korea's response to Panel question No. 5.7, para. 28; and second written submission, fn 348.

[423] United States' comments on Korea's response to Panel question No. 5.7, para. 29.

[424] The United States does not contend that the remand determination is not covered by Korea's Request for Establishment of a Panel.

[425] Document WT/DS464/1, Section V.4.

[426] Ibid. Section V.

> out an express temporal condition or limitation on the measures that can be identified in a panel request. Indeed, in *US – Upland Cotton*, where the issue was raised in the context of measures that had expired prior to the panel proceedings, the Appellate Body explained that "nothing inherent in the term 'at issue' sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired". In *EC – Chicken Cuts*, the Appellate Body stated that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel." Nevertheless, the Appellate Body also stated in that case that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".[427] (footnotes omitted)
>
> As a further argument to support its view that Review 9 could not fall within the Panel's terms of reference, the United States relies on the Appellate Body's statement in *EC – Chicken Cuts* that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel", and that only in "certain limited circumstances" will measures enacted subsequent to a panel's establishment fall within the Panel's terms of reference. According to the United States, the circumstances of this case, including the fact that it is a compliance proceeding, do not justify the inclusion of Review 9 in the Panel's terms of reference. As the United States itself recognizes, however, in *EC – Chicken Cuts*, the Appellate Body did not rule that Article 6.2 categorically prohibits the inclusion, within a panel's terms of reference, of measures that come into existence or are completed after the panel is requested. Rather, the Appellate Body noted explicitly that, in certain circumstances, such measures could be included in a panel's terms of reference. Moreover, whereas the statement in *EC – Chicken Cuts* to which the United States refers was made in the context of original WTO proceedings, we are dealing here with Article 21.5 proceedings. As we explained earlier, the requirements of Article 6.2 must be adapted to a panel request under Article 21.5, and the scope and function of Article 21.5 proceedings necessarily inform the interpretation of the Article 6.2 requirements in such proceedings. The proceedings before us present circumstances in which the inclusion of Review 9 was necessary for the Panel to assess whether compliance had been achieved, and thereby resolve the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings".[428] (footnotes omitted)

7.249. We are guided by these findings, and agree that Article 6.2 of the DSU does not impose any express temporal condition or limitation on the measures that can be identified in a panel request. We also agree that measures enacted subsequent to the establishment of the panel may, in certain circumstances, fall within a panel's terms of reference.[429] Whereas the Appellate Body in *US – Zeroing (Japan) (Article 21.5 – Japan)* attached importance to the fact that the proceedings in that case were brought under Article 21.5 of the DSU, nothing in the Appellate Body's Report suggests that a similar approach may not be adopted in other specific circumstances. Considering the circumstances of the present case, we observe that there is a very close nexus between the remand determination and the measures expressly cited in the request for the establishment of the Panel. In particular, the remand determination supplements and reaffirms the USDOC's original determination of disproportionality, and is restricted to that issue. In these particular circumstances, we consider that the remand determination is covered by our terms of reference, despite the fact that it was not in existence at the time that this Panel was established.

7.250. Having found that the USDOC's remand determination is properly before us, we now examine Korea's claim that the redetermination suffers from the same analytical flaw as the

[427] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 121.
[428] Ibid. para. 125.
[429] Furthermore, it is not necessary to explicitly identify every challenged measure in the panel request, provided that a measure not explicitly mentioned has "a clear relationship to a measure that is specifically described [in the request], so that it can be said to be 'included' in the specified measure". Such a condition may be satisfied where, for example, the measure not explicitly referred to in the request amends a measure that is explicitly identified, without changing the essence of that original measure (Appellate Body Reports, *Chile – Price Band System*, paras. 126-144; *EC – Chicken Cuts*, paras. 156-159).

original determination. We have already explained that, in order to properly find that Samsung was granted tax credits in disproportionately large amounts, the USDOC should have shown that Samsung received more tax credits than it would have been expected to receive, taking account of all factors having a bearing on the amount of tax credit that Samsung was entitled to claim. Just as in the original determination, the USDOC failed to undertake this type of relational analysis in its remand determination.[430] The USDOC compared Samsung's situation to that of other companies, but failed to compare the amounts received by Samsung with any benchmark indicative of what Samsung would have been expected to receive, taking account of all factors having a bearing on that benchmark, were the subsidy distributed proportionately. For this reason, we find that the remand determination is inconsistent with Article 2.1(c) of the SCM Agreement.

7.6.2.4.3 Whether the USDOC took account of the two factors set forth in the final sentence of Article 2.1(c)

7.251. We begin our analysis of Korea's claim by reviewing the following findings of the panel in *US – Countervailing Measures (China)*:

> A fourth aspect of China's claim under Article 2 of the SCM Agreement concerns the final sentence of Article 2.1(c). The question before the Panel is whether the factors in the final sentence of Article 2.1(c), namely "the extent of diversification of economic activities within the jurisdiction of the granting authority" and "the length of time during which the subsidy programme has been in operation", must be taken into account by an investigating authority in every Article 2.1(c) analysis.
>
> With regard to the ordinary meaning of the final sentence of Article 2.1(c), we are of the view that the use of the term "shall" clearly connotes an obligation. Indeed, the term is defined as "has a duty to; more broadly, is required to". The decision by the drafters of the SCM Agreement to use the term "shall" instead of terms such as "should" or "may" is significant.
>
> With regard to the context of Article 2.1(c) more broadly, as we have seen above, subparagraph (c) concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise. In this context, we consider the last sentence of Article 2.1(c) to function as a safeguard that keeps in check this flexibility. Indeed, where economic activities within the jurisdiction of the granting authority are less diversified, the use of a subsidy programme by a limited number of certain enterprises may nonetheless lead to a finding of non-specificity. Use by a limited number of certain enterprises may similarly lead to a finding of non-specificity where the subsidy programme has been in operation for a limited period of time only.
>
> In light of the above, the Panel agrees with the finding of the panel in *US – Softwood Lumber IV* that taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly. Similarly, the panel in *EC – Countervailing Measures on DRAM Chips* did not find it unreasonable for an investigating authority to not include an *explicit* statement that these factors had been taken into account. In *US – Softwood Lumber IV*, however, the panel found that a certain statement of the investigating authority indicated that these factors had been taken into account implicitly.[431]

7.252. We agree with these findings. There is no doubt that the duration and economic diversification factors set forth in Article 2.1(c) of the SCM Agreement are mandatory, in the sense that an investigatory authority must ("shall") take account of them whenever a finding of *de facto*

[430] The United States suggests that the USDOC's analysis was limited by Korea's failure to provide certain requested information (United States' first written submission, paras. 393 and 399). Korea asserts that Korea supplied all information that the Department requested that was reasonably available to it. (Korea's second written submission, para. 278).We note that there was no finding by the USDOC that Korea failed to provide necessary information, in the sense of Article 12.7 of the SCM Agreement, nor any application of facts available under that provision. Accordingly, we do not consider that Korea's alleged failure to provide certain requested information is relevant to our evaluation of Korea's claim.

[431] Panel Report, *US – Countervailing Measures (China)*, paras. 7.250-7.256. (footnotes omitted)

specificity is made. Although it may be reasonable for an investigating authority to not include an *explicit* statement that these factors had been taken into account in its determination, there must in any event be some means of determining from the determination that the authority did take them into account. The phrase "taking account of" was addressed by the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*. The Appellate Body found that this phrase calls for "active and meaningful consideration".[432] Although this finding was made in the context of Article 2.2 of the Agreement on Technical Barriers to Trade, we see no reason why this finding should not guide our interpretation of the (similar) phrase "account shall be taken" in the context of Article 2.1(c) of the SCM Agreement. We shall therefore consider whether the USDOC's determination indicates that the USDOC gave active and meaningful consideration to the two factors at issue.

7.253. Regarding the length of time during which the subsidy programme has been in operation, the United States asserts that the USDOC's record contains references to the fact that the RSTA Article 10(1)(3) program began in 1982. One such reference identified by the United States relates to the USDOC noting, in a brief description of the RSTA Article 10(1)(3) programme, that the Government of Korea had "reported" that the programme was first introduced in that year.[433] The other reference concerns the description of the programme provided by the Government of Korea in its Questionnaire Response.[434] These references therefore pertain to statements made by the Government of Korea, and do not indicate that the USDOC undertook any active and meaningful consideration of the duration of the programme in the context of its determination of *de facto* specificity.

7.254. Regarding the extent of economic diversification, the United States refers to the fact that, because Korea was unable to provide data setting out the distribution of RSTA Article 10(1)(3) subsidies by industry and sector[435], the USDOC found that "the information on the record is not sufficient to evaluate predominance or disproportionality on an industry basis".[436] The United States also asserts that the USDOC was in any event aware of the publicly known fact that Korea is one of the wealthiest and most diversified economies in the world – a fact that Korea neither raised nor contested.[437] The United States observes in this regard that the record indicates that Korea is a member of both the Organization for Economic Cooperation and Development (OECD) and G20, and chaired a recent G20 summit[438], and that the RSTA Article 10(1)(3) R&D tax credit programme had nearly 12,000 participants.[439] We do not doubt that such evidence may be of potential relevance to the extent of economic diversification within Korea. However, a series of isolated references to potentially relevant evidence again placed on the record by the Government of Korea does not indicate that the USDOC undertook active and meaningful consideration of this factor in the context of its determination of *de facto* specificity.

7.255. For the above reasons, we find that the USDOC's determination of *de facto* specificity failed to take account of the two mandatory factors referred to in the final sentence of Article 2.1(c) of the SCM Agreement.

7.6.3 Whether the USDOC properly determined regional specificity in respect of RSTA Article 26

7.256. This claim concerns Article 26 of the RSTA, which is entitled Tax Deduction for Facilities Investment. RSTA Article 26 provides tax credits for investments in a variety of business assets outside of the Seoul "overcrowding control region". Korea challenges the USDOC's determination

[432] Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.
[433] *Washers* CVD Preliminary Determination, 77 Fed. Reg. at 33187, (Exhibit KOR-85).
[434] See, e.g. GOK April 9, 2012 QR at App. Vol. at II-75, 108, (Exhibit KOR-75) (BCI).
[435] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12. Korea was unable to provide this information, on the grounds that it did not compile data for RSTA Article 10(1)(3) along industry and sector lines (Ibid.).
[436] Ibid.
[437] The United States refers, for example, to Panel Report, *US – Softwood Lumber IV,* para. 7.124 (finding that the USDOC took into account the "publicly known fact" that Canada is a highly diversified economy when the USDOC noted that the vast majority of companies and industries in Canada do not receive benefits under the programmes in question).
[438] GOK April 9, 2012 QR at Ex. Gen02 (PR-56) at "Minister's Forward", (Exhibit USA-27).
[439] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12; Final Samsung CVD Calculation Memo, Attachment 7, (Exhibit USA-26) (BCI).

that the RSTA Article 26 tax credit scheme is regionally specific pursuant to Article 2.2 of the SCM Agreement. Article 2.2 provides:

> A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

7.257. Korea challenges various aspects of the USDOC's determination. First, Korea suggests that the RSTA Article 26 scheme is non-specific according to Article 2.1(b), and therefore cannot be found to be specific under Article 2.2. Second, Korea contends that the subsidy recipients under the Article 26 scheme are not "enterprises" located within a designated geographical region. Third, Korea asserts that there is no "designated geographical region" for subsidization under the Article 26 scheme. Fourth, Korea submits that the USDOC in any event failed to establish that the tax credits were only available to "certain enterprises" within the alleged "designated geographical region". We address each of these claims below.

7.6.3.1 Relationship between Article 2.1(b) and Article 2.2

7.6.3.1.1 Main arguments of the parties

7.258. Korea suggests that the eligibility requirements for RSTA Article 26 are "objective criteria and conditions" within the meaning of Article 2.1(b), and thus non-specific by virtue of that provision.[440] We understand Korea to argue that a subsidy programme deemed non-specific under Article 2.1(b) cannot be deemed specific under Article 2.2.

7.259. The United States asserts that Korea's interpretation has no grounding in the text of Article 2, since Article 2.2 provides that subsidies limited to designated regions "shall be specific". The United States observes that the panel in *EC and certain member States – Large Civil Aircraft* stated:

> There is no indication in the text of the SCM Agreement that a finding of specificity under Article 2.2 is somehow subject to further examination under Article 2.1(b). There is thus no basis for the inference of a hierarchy … and a reading of the provisions of Article 2 as potentially conflicting in this manner is to be avoided.[441]

7.260. The United States also contends that Korea's interpretation would make Article 8.2(b) redundant. The United States observes that Article 8.2(b)(ii) provided that assistance to a disadvantaged region would be non-actionable if, among other things, the region is "considered as disadvantaged on the basis of *neutral and objective criteria*" (emphasis added). The United States recalls that the panel in *EC and certain member States – Large Civil Aircraft*, when dealing with a similar argument, observed that such position "effectively would re-introduce the expired provisions of Article 8.2(b), making regional assistance subsidies non-actionable on the basis of being non-specific under Article 2.1(b), which is not a justifiable outcome".[442]

7.6.3.1.2 Evaluation by the Panel

7.261. Korea makes a simple assertion that because the eligibility requirements for RSTA Article 26 are "objective criteria and conditions" within the meaning of Article 2.1(b), and because RSTA Article 26 "fully meets the requirements of Article 2.1(b)", "the tax credits are not specific". Korea does not discuss the relationship between Articles 2.1(b) and 2.2, nor support its assertion with any analysis of the text of these provisions. We see no basis to conclude that a finding of non-specificity under Article 2.1(b) should trump, or exclude, a finding of regional specificity under Article 2.2. The text of these provisions does not suggest that there is any hierarchy between them. In addition, we note that the panel in *EC and certain member States – Large Civil Aircraft* found that "[t]here is no indication in the text of the SCM Agreement that a finding of specificity

[440] Korea's first written submission, paras. 322-327.
[441] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1233.
[442] Ibid. para. 7.1234.

under Article 2.2 is somehow subject to further examination under Article 2.1(b)".[443] We agree with this finding, and similarly consider that Article 2.2 operates independently of Article 2.1(b). In these circumstances, we decline to find that the RSTA Article 26 subsidies are necessarily non-specific because of the operation of Article 2.1(b) of the SCM Agreement, irrespective of the application of Article 2.2.

7.6.3.2 Whether RSTA Article 26 imposes any limitation on the geographical location of enterprises

7.6.3.2.1 Main arguments of the parties

7.262. Korea denies that RTSA Article 26 imposes any limitation on the geographical location of certain "enterprises". Korea asserts that the only geographical limitation in RSTA Article 26 is the limitation on the investments that give rise to the tax credits. Korea asserts that an "enterprise" located anywhere in the territory of Korea is eligible to receive the Article 26 tax credits to the extent that it makes qualifying investments outside of the designated "overcrowding control region".

7.263. Korea asserts that although the Appellate Body has not provided a detailed interpretation of this provision, it has confirmed that Article 2.2 is focused on limitations as to the location of the *enterprises* benefiting from the subsidy. Korea refers in this regard to statements by the Appellate Body in *US – Carbon Steel (India)*.[444] Korea notes that the ordinary meaning of the term "enterprise" is "[a] business firm, a company", as has been confirmed by the Appellate Body.[445] Korea asserts that, based on its ordinary meaning, the term "enterprise" refers to the overall business organization having legal personality and not to particular operations, facilities or investments of such enterprise.[446] Korea notes the United States' reliance on the compound term "certain enterprises" and the definition of this term in the chapeau of Article 2.1 as extending to an industry or group of enterprises.[447] Korea contends that the fact that the term may encompass more than one business firm or company does not mean that the term is also intended to cover just parts of those companies or firms, such as their facilities or investments. On the contrary, the fact that the drafters expressly referred to aggregate forms of enterprises in the definition of "certain enterprises" but did not refer to sub-divisions of such enterprises, strongly suggests that they did not intend the term to be expansive in both directions.[448]

7.264. The United States refutes Korea's suggestion that the Article 26 programme addresses the "use" of a subsidy. The United States contends that Article 26 instead ties eligibility to the geographic location of the underlying facilities. The United States argues that the fact that the geographical restriction in RSTA Article 26 is addressed to the location of the facilities, as opposed to the head office of the subsidy recipient, is of no moment, since Article 2.2 does not impose a "head office" test when establishing the location of the recipient enterprises. The United States contends that an enterprise or industry can be "located" in a variety of places – including where its investments and facilities are located. The United States notes that, in *EC and certain member States – Large Civil Aircraft*, Airbus received numerous subsidies in Spain that were found to be regionally specific, based on the location of Airbus-owned facilities in various designated regions – and not the location of its headquarters.[449] The United States suggests that if a "head office test" were accepted, Members could readily circumvent the SCM Agreement by imposing geographic restrictions at the level of assets and investments, as opposed to the head office of recipients.[450]

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[443] Panel Report, EC and certain member States – Large Civil Aircraft, para. 7.1233.

[444] Appellate Body Report, *US – Carbon Steel (India)*, footnote 1011 to para. 4.375. Korea also referred the Panel to Appellate Body Report, *U.S. – Anti-Dumping and Countervailing Duties (China)*, para. 413.

[445] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373 (referring to Shorter Oxford English Dictionary, 6th ed., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 841).

[446] Korea's second written submission, paras. 354-355.

[447] U.S. response to Panel question 3.2, paras. 142-143.

[448] Korea's second written submission, para. 350.

[449] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1207-7.1210, 7.1235-7.1236, and 7.1243-7.1244; see also ibid., paras. 7.1206, 1235, 1243 (finding that subsidies are regionally specific based on location of Airbus facility in Nordenham).

[450] See Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, para. 9.143 (finding that if the narrow reading of "designated geographical region" were correct, "it would become a simple matter to circumvent the SCM Agreement by providing subsidies through industrial parks or similar geographical areas, without targeting particular enterprises within those areas").

7.265. The United States also submits that the term "enterprise" is broad enough to include a firm's facilities or investments. The United States observes that the term "enterprise" is part of the compound term "certain enterprises", which is defined in the chapeau of Article 2.1 as "an enterprise or industry or group of enterprises or industries". The United States asserts that this term therefore encompasses a wide variety of economic structures and activities. The United States suggests that a firm, industry or group thereof may be "located" in a variety of places, including the site of head office, branch, manufacturing facility, or other asset or investment. According to the United States, the fact that the term "certain enterprises" encompasses the term "industries" renders it particularly inappropriate to draw formalistic distinctions about location.

7.6.3.2.2 Evaluation by the Panel

7.266. Korea notes that the text of Article 2.2 focuses on limitations concerning the geographical location of certain "enterprises". Korea interprets "enterprises" as companies or businesses having legal personality.[451] Korea contends that there are no limitations on such enterprises under RSTA Article 26. Korea asserts that the RSTA Article 26 tax credits are available to any enterprise that meets the qualifications of that scheme, without regard to where the enterprise is located. Korea contends that an Article 26 recipient enterprise can be located anywhere within Korea, even within the Seoul "overcrowding control region". Korea asserts that Article 26 merely imposes a geographical limitation on the use of the subsidized activity, which is restricted to investments in facilities outside of the Seoul overcrowding region. In other words, Korea claims that the geographical restriction pertains to the location of the *facilities* acquired in the context of the RSTA Article 26 scheme, rather than the *enterprises* acquiring those facilities.[452]

7.267. We are not persuaded that the application of Article 2.2 should hinge on the distinction drawn by Korea between an "enterprise" (as defined by Korea) and the "facilities" of such an enterprise. Read in isolation, the term "enterprise" means "a business or company".[453] The term "business" includes the notion of "commercial activity".[454] An enterprise's "commercial activities" may be broad in scope, ranging from research and design through to production, sales and servicing. There is no reason why the facilities in which an enterprise performs these "commercial activities" should not be treated as part of that enterprise's "business". Nor is there anything in the meaning of these terms to suggest that the relevant "commercial activities" should each have separate legal personalities.

7.268. Furthermore, even if the meaning of the term "enterprise" were limited to a business or company with legal personality, as suggested by Korea, Article 2.2 applies in respect of subsidies that are limited to "certain enterprises" within a designated geographical region. The chapeau of Article 2.1 provides that the phrase "certain enterprises" includes "an enterprise or industry or group of enterprises or industries". Viewed in this context, the term "enterprise" must be interpreted more broadly than suggested by Korea. This is because an "industry or group of enterprises or industries" would never meet the definition of "enterprise" proposed by Korea, because such entities are not companies or businesses with legal personality. The fact that these entities are nevertheless explicitly deemed to constitute "certain enterprises" by Article 2.1 of the SCM Agreement must mean that Korea's interpretation of the term "enterprise" is overly restrictive.

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[451] Korea's second written submission, para. 356.

[452] Korea asserts that the United States has consistently defined, in its free trade agreements, the term "enterprises" as an "entity constituted or organized under applicable law …, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization" (Korea's response to Panel question No. 5.10, para. 34). Korea observes that there is no reference in this definition to an entity's facilities. As explained above in section 7.4.3, we are bound to evaluate Korea's claim on the basis of the ordinary meaning of the text of Article 2.2, read in light of its context and object and purpose. We will therefore not evaluate Korea's claim on the basis of language that may be included by the United States in its free trade agreements.

[453] Oxford Dictionaries, last accessed on 02/10/2015 <http://www.oxforddictionaries.com/definition/english/enterprise>. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373 (referring to *Shorter Oxford English Dictionary*, 6th ed., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 841).

[454] Oxford Dictionaries, last accessed on 02/10/2015 <http://www.oxforddictionaries.com/definition/english/business>.

7.269. An industry is not a business or company with legal personality, and yet it can be a "certain enterprise" within the meaning of Article 2.2. In respect of an industry, therefore, the application of Article 2.2 cannot depend on the location of the business or company having legal personality. The fact that Article 2.2 does not exclude that an industry (i.e. "certain enterprise" in the same area of manufacturing) may be "located within a designated geographical region" suggests that it is rather the location of the constituent parts of the industry that trigger the application of Article 2.2. The industry is therefore located within a designated region if a constituent part of that industry, including for example a manufacturing facility belonging to that industry, is located in that region. In the context of an industry, therefore, a "facility" would constitute the "certain enterprise" within the meaning of Article 2.2. There is nothing in Article 2.2 to suggest that a narrower approach should be adopted when the recipient is an individual enterprise.[455]

7.270. Furthermore, even if Korea were correct in arguing that the term "enterprise" should be interpreted narrowly to mean a business or company with legal personality, we consider that a business or company may be "located" in a variety of places, including the site of its head office, branches, manufacturing facilities, or other assets or investments.[456] The verb "locate" includes "tak[ing] up business in a place", "establish[ing] oneself … in a place", and "be[ing] situated".[457] A company headquartered in London but with a manufacturing facility in Liverpool effectively has two locations: one in London, and one in Liverpool. It is established, or situated, in both cities. In our view, a subsidy programme that imposes limits in respect of the geographic location of any one of these would fall within the scope of Article 2.2.

7.271. We find support for rejecting Korea's narrower approach to the scope of Article 2.2 in the findings of the panel in *EC and certain member States – Large Civil Aircraft*. That panel found that certain Spanish subsidies for Airbus "facilit[ies]"[458] in designated parts of Spain were specific by virtue of Article 2.2. The panel found that these subsidies were specific under Article 2.2 because they were "provided to enterprises in designated geographical regions".[459] We acknowledge that the panel in that case was not required to address the precise legal issue currently before us.[460] Nevertheless, we consider it relevant that the panel appears to have found specificity under Article 2.2 of the SCM Agreement on the basis of the recipients' physical presence in the designated regions. In doing so, the panel either considered that the facilities, etc. in the designated regions of Spain could be treated as an "enterprise" within the meaning of Article 2.2, or the panel considered that the Airbus enterprise was located in those regions by virtue of that

[455] Korea suggests that the reference to "facilities" in (the now expired) Article 8.2(c) of the SCM Agreement means that the drafters intended to distinguish "facilities" from "enterprise". We are not persuaded by this argument, since the very same provision also contains the term "firms". The logic of Korea's argument would suggest that a "firm" should also not be treated as an "enterprise", and yet Korea accepts that a "firm" falls within the definition of "enterprise". See Korea's second written submission, para. 350.

[456] We note that the term "located" is expressed in the past tense, possibly suggesting that the enterprise must already be located in the designated geographical region at the time that the subsidy is provided in order for Article 2.2 to apply. Korea did not pursue this temporal issue when we raised it in Panel question No. 5.10. The United States asserted in its response to that question that the timing of when the enterprise received the subsidy has no bearing on whether the subsidy is regionally specific. The United States notes that the goal of the subsidy programme may be to stimulate companies to "locate" for the first time in that region. The United States also asserts that the timing question is in any event not presented in the facts of this case, since the qualifying investments had already been made by the time that the tax credits were claimed, i.e. by the time that the tax credit subsidies were granted. We consider that there is merit in these arguments by the United States. Although in its comments on the U.S. arguments Korea contested the United States' assertion that the location of an enterprise can include a site that is undetermined at the time the subsidy is granted and where facilities may be constructed in the future, Korea did not specifically address these arguments. Nor did Korea specifically address the temporal issue raised in the Panel's question. Korea's comments were primarily concerned with the issue of whether or not "facilities" were equivalent to "enterprises".

[457] The verb "locate" is defined in relevant part as "[e]stablish oneself or itself in a place; take up residence or business in a place . . . [f]ix or establish in a place . . . be situated." 1 *New Shorter Oxford English Dictionary* 1614 (1993) (Exhibit USA-48).

[458] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1207-7.1211.

[459] Ibid. para. 7.1235.

[460] This point is made by Korea at para. 38 of its comments on the United States' response to Panel question No. 5.11. Korea also suggests at para. 39 of those comments that the facts are different in the present case, because the RSTA Article 26 subsidies are broadly available across 98% of the territory of Korea. We disagree that any difference in coverage should mean that the essence of the legal approach to Article 2.2 adopted by the panel in *EC and certain member States – Large Civil Aircraft* is not relevant in the present case.

enterprise establishing itself in those regions through its facilities. Most importantly, the panel did not reject the application of Article 2.2 on the basis that the regional facilities were not businesses or companies having legal personality, as Korea's approach suggests it should have done.

7.272. Korea suggests that Article 2.2 was actually applied by the panel on the basis of the location of the recipient *company*, Airbus Spain, in a territory (Spain) within the jurisdiction of the granting authority (European Regional Development Fund (ERDF)).[461] Korea refers in this regard to the panel's statement that the relevant subsidies were co-financed by the ERDF, an institution with Europe-wide jurisdiction. Korea suggests that the ERDF's Europe-wide jurisdiction meant that the relevant geographically designated region was the whole of Europe, including Spain. Korea's position is not persuasive, though, because the subsidies were co-financed by the ERDF and the Spanish authorities. Given the co-financing, the panel addressed Article 2.2 regional specificity at two levels.[462] The panel only turned to regional specificity in respect of the ERDF's involvement after noting that the European Union did not challenge the application of Article 2.2 in respect of the Spanish authorities' involvement in the subsidies. The panel specifically concluded that the subsidies *provided by the Spanish authorities* were "provided to enterprises in designated geographical regions within the territory of the respective granting authorities".[463] This finding, therefore, applies only to the involvement of the *Spanish* authorities in the subsidization of the *Spanish* facilities. It has nothing to do with the location of the Airbus enterprise within the territory of the ERDF. In respect of ERDF's involvement, the panel appears[464] to have accepted the United States' argument that subsidies under the ERDF, which is a *regional* development fund, are necessarily limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority".

7.273. Furthermore, we note that the broader purpose of the specificity provisions suggests that Article 2.2 should be interpreted to apply to any subsidy that is contingent on considerations regarding geographical location. Specificity is concerned with the potential for governments to distort trade through interference in the allocation of resources.[465] Subsidies that are generally available are not specific because, being available to all operators, they do not distort the allocation of resources among those operators. The purpose of Article 2.2 is to cover subsidy programmes whereby governments and public bodies encourage particular enterprises to direct their resources to certain geographic regions, thereby interfering with the market's allocation of resources within the territory of the Member. The fact that Korea refers to RSTA Article 26 as alleviating "serious geographical imbalances"[466] and addressing "developmental concerns"[467] confirms that the underlying rationale of the scheme is to direct resources towards the development of particular geographical regions other than the Seoul overcrowding region. Accordingly, the fact that the Article 26 subsidy is contingent on an enterprise becoming "located within" a designated geographical region provides sufficient geographic contingency to render that subsidy specific under Article 2.2 of the SCM Agreement.

7.274. Finally, we note Korea's argument that RSTA Article 26 "is essentially a zoning regulation, and any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy".[468] This argument is not persuasive. First, Article 2.2 is concerned with the specificity, rather than the legality of subsidies. Thus, the fact that a subsidy is specific by virtue of Article 2.2 of the SCM Agreement does not mean that the subsidy is somehow "illegal", as suggested by Korea. Second, the WTO Agreement does not infringe on a Member's right to pursue any particular zoning policy. (Indeed, Korea might have chosen to address the abovementioned "serious geographical imbalances" by prohibiting new

[461] Korea's second written submission, para. 357.
[462] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1235-7.1236.
[463] Ibid. para. 7.1235.
[464] Ibid. para. 7.1236.
[465] According to p. 198 of the WTO 1996 World Trade Report, "[t]he SCM text is predicated on the potential of specific subsidies to be trade distorting. Indeed, the more closely targeted a subsidy in terms of intended beneficiaries, the more concentrated will be its relative price effect. In many circumstances, this could be taken to imply a higher probability that the subsidy is distorting and less justifiable economically. A subsidy to a single industry, for example, rather than to many industries could impart a narrow advantage that does not reflect action in the face of a well defined market failure. The more broadly based subsidy recipients are defined, then, the more "spread out" and shallower will be the likely subsidy impact."
[466] Korea's first written submission, para. 318.
[467] Ibid. para. 319.
[468] Korea's oral statement at the first meeting of the Panel, para. 90.

facility investments in the Seoul overcrowding area.) However, when a Member chooses to pursue that policy through the bestowal of subsidies, the disciplines of the SCM Agreement will apply if those subsidies are specific pursuant to Article 2 of the SCM Agreement.

7.6.3.3 Designated geographical region

7.6.3.3.1 Main arguments of the parties

7.275. Korea submits that the exclusion of a small area from the otherwise generally available tax credits provided under RSTA Article 26 does not establish regional specificity under Article 2.2 of the SCM Agreement. Korea contends that a subsidy that is available for 98% of the land mass of Korea is functionally equivalent to a subsidy that is available for 100% of the land mass. It subsequently explained that the point that Korea makes is that where, as in this case, there is no identifiable demarcation between the area in which a subsidy may be used and the broader jurisdiction of the granting authority, and the degree of overlap between the two is almost total, there is no "designation" of a geographical region and there is effectively no limitation as to the geographical location of the enterprises.[469]

7.276. Korea further contends that, under Article 2.1 of the SCM Agreement, the designation of a class of subsidy recipients must be "explicit". Korea notes that the Appellate Body has interpreted this to mean that the designation must be "express, unambiguous, or clear from the context of the relevant instrument, and not merely 'implied' or 'suggested'".[470] Korea asserts that the only geographical area explicitly designated in RSTA Article 26, i.e. the Seoul "Overcrowding Control Region", is an area designated as an *exception* to the general availability of the tax credit, rather than as an area designated for receipt of a subsidy. Korea contends that nowhere in RSTA Article 26 or in Article 23(1) of the Enforcement Decree of the RSTA is there any express, unambiguous, or clear designation of a geographical region that is eligible for these tax credits. At most, some remainder – the rest of the country except for the overcrowding control region of the Seoul Metropolitan Area – might be said to be "implied" or "suggested" as a "region" eligible for subsidies. Korea also contends that the term "designate" means that the designation must be made affirmatively, rather than by implication or exception.

7.277. The United States disagrees with Korea's argument that because the RSTA Enforcement Decree speaks only of the region that is excluded (i.e. the Seoul overcrowding area), there is no explicit designation of a geographical region. The United States asserts that Article 2.2 does not require that any geographic region be designated "explicitly", as Korea suggests. The United States notes that Korea draws this alleged requirement from the text of Article 2.1(a), rather than Article 2.2. The United States observes that Article 2.2 does not contain the word "explicit". The United States asserts that if the drafters of Article 2.2 had intended to impose such a requirement, they could have easily done so. The United States also suggests that Korea's argument would effectively limit Article 2.2 to situations of *de jure* specificity. The United States asserts that the panel in *US – Anti-dumping and Countervailing Duties (China)* rejected a similar argument – i.e. that Article 2.2 is limited to situations of *de facto* specificity.[471] The United States notes that the panel observed that regional specificity is addressed in its own Article (Article 2.2), separate from the general provisions containing the definitions of *de facto* and *de jure* specificity.[472]

7.278. Furthermore, regarding the fact that the Article 26 programme covers 98% of the territory of Korea, the United States asserts that there is no basis for Korea's assertion that larger regions (which are subject to "exclusions" such as the Seoul overcrowding area) should be exempted from the disciplines of Article 2.2. The United States observes that the panel in *US – Anti-dumping and Countervailing Duties (China)* found that the term "designated geographical region" can encompass "*any* identified tract of land within the jurisdiction of a granting authority", and need not have a formal administrative or economic identity.[473] According to the United States, it would be particularly inappropriate to overlook the geographic limitation imposed here. The excluded

[469] Korea's second written submission, para. 365.
[470] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 372.
[471] Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, para. 9.134.
[472] Ibid. para. 9.134.
[473] Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, paras. 9.140-9.144. (emphasis added)

area is the most densely populated area of Korea, and accounts for a substantial portion of Korea's economy.[474]

7.6.3.3.2 Evaluation by the Panel

7.279. We begin by addressing Korea's "exception" argument, which is based on Korea's assertion that the only area explicitly designated through affirmative identification in RSTA Article 26 is the area excluded from the subsidy scheme. We observe that there is no requirement in Article 2.2 that the designation of the relevant geographical area for subsidization should be "explicit". This requirement is only found in Article 2.1(a). As noted above, a previous panel has found that Article 2.2 operates independently of Article 2.1. The inclusion of the word "explicitly" in the text of Article 2.1(a) therefore has no bearing on the interpretation of Article 2.2.

7.280. Korea asserts that the meaning of the term "designate" (in Article 2.2) requires an affirmative identification of the relevant geographical region, rather than identification through implication or suggestion. Korea refers in this regard to the definition of that term advanced by the United States[475], whereby "designate" means "[p]oint out, indicate, specify…[c]all by name or distinctive term; name, identify, describe, characterize". While certain aspects of the definition – "point out" and "specify" – perhaps suggest that the designation of the region must be affirmative, the reference to "indicate" suggests that designation might also be accomplished through less direct means that nevertheless make the region known.[476] Article 23 of the RSTA Enforcement Decree provides that the RSTA Article 26 scheme applies in respect of investments in "business assets out of overcrowding control region of the Seoul Metropolitan Area".[477] Article 23 of the RSTA Enforcement Decree therefore makes it known that RSTA Article 26 tax credit subsidies are only available for investments outside of the Seoul Metropolitan Area. In making this known, Article 23 of the RSTA Enforcement Decree effectively designates the geographical region in which the relevant investments will be eligible for subsidization.

7.281. In addition, we recall[478] that the purpose of Article 2.2 is to cover subsidy programmes whereby governments and public bodies encourage particular enterprises to direct their resources to certain geographic regions, thereby interfering with the market's allocation of resources within the territory of the Member. Article 23 of the RSTA Enforcement Decree makes it clear where enterprises should direct their resources in order to benefit from RSTA Article 26 tax credits.

7.282. Korea also argues that the excluded Seoul Metropolitan Area accounts for only 2% of Korea's land-mass, and that a subsidy available for 98% of the territory is "functionally equivalent" to a subsidy that is available for 100% of the territory. We note that Article 2.2 refers simply to a "geographical region" that has been designated. The phrase "geographical region" is not qualified in any way. This suggests that the designation of *any* geographical region – no matter how small or how large – would suffice to trigger the application of Article 2.2.[479] We find support for our approach in the findings of the panel in *US – Anti-Dumping and Countervailing Duties (China)*. That panel found that:

> [T]he text [of Article 2.2] on its own would appear to allow any identified tract of land within the jurisdiction of a granting authority to be a "designated geographical region" in the sense of Article 2.2 of the SCM Agreement.

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[474] United States' first written submission, para. 430; United States' second written submission, para. 297.

[475] United States' first written submission, fn 502 (referring to *The New Shorter Oxford English Dictionary*, (Exhibit USA-31), p. 645).

[476] The online Oxford dictionary defines "indicate" as "point out, show" (Oxforddictionaries.com, Oxford University Press, accessed 24 September 2015 <http://www.oxforddictionaries.com/definition/english/indicate>).

[477] GOK questionnaire response, (Exhibit KOR-75), p. 142.

[478] See para. 7.273. above.

[479] Korea asserts that such an approach would be "too extreme", and would mean that Article 2.2 covers subsidies provided to enterprises making investments anywhere in the United States, except within one of its national parks (Korea's second written submission, paras. 367 and 368). We shall focus on evaluating Korea's claim, in light of the applicable facts, rather than dwell on policy considerations that may or may not arise in future cases. We also recall that Members enjoy broad policy space under the WTO Agreement, and need not necessarily pursue policy objectives through subsidization.

7.283. Korea observes that the facts before the *US – Anti-Dumping and Countervailing Duties (China)* panel differed from those in the present case. Korea also observes that the issue in the present case was "substantially different" from the issue raised in these proceedings.[480] We do not disagree. However, the panel provided a legal interpretation of the phrase "designated geographical region" that is not dependent on the facts of that case, or on the precise issue at hand. Since the panel's legal interpretation is based on a specific part of the text of Article 2.2, there is no reason why that interpretation should not afford guidance whenever that text is considered in subsequent WTO dispute settlement proceedings.

7.6.3.4 Certain enterprises

7.6.3.4.1 Main arguments of the parties

7.284. Korea submits in the alternative that, even if the Article 26 programme did impose limitations on eligibility based on the enterprise's location in a designated geographical region, the USDOC failed to show that eligibility was limited to "certain enterprises" in that designated region. Korea notes that the chapeau of Article 2.1 defines the term "certain enterprises" as "an enterprise or industry or group of enterprises or industries."[481] As defined in Article 2.1, the term "certain enterprises" necessarily refers to a subset of enterprises. Therefore, according to Korea, a determination under Article 2.2 requires not only a finding that the subsidy is limited to a designated geographical region, but also that the subsidy is limited to "certain enterprises" within that geographical region. Korea contends that the Article 26 scheme is actually available to *all* enterprises within the relevant region, and therefore not limited to *certain* enterprises only. Korea further notes that the United States' position is internally inconsistent. Korea explains that if the United States relies on the definition of "certain enterprises" in Article 2.1 to interpret Article 2.2, as it does in response to the Panel's questions, it must accept the full implications that flow from the application of that definition.[482] In particular, the United States must accept that transposing the definition of "certain enterprises" from Article 2.1 to Article 2.2 necessarily means that only subsidies that are limited to a subset of enterprises located within a designated geographical region are specific for purposes of Article 2.2.

7.285. The United States asserts that a similar argument was rejected by the panel in *EC and certain member States – Large Civil Aircraft*, on the basis that it would require specificity "on a double basis" within Article 2.2.[483] The United States notes that the panel suggested that the approach proposed by Korea would render Article 2.2 redundant: "[i]f a national authority grants a subsidy to a subset of enterprises within its territory, whether that subset of enterprises is located in a designated region or not, such a subsidy would, by definition, already be specific under Article 2.1."[484] The United States also notes that the *EC and certain member States – Large Civil Aircraft* panel found that Korea's interpretation would make Article 8.2(b) redundant.[485] The United States further observes that the panel in *US – Anti-dumping and Countervailing Duties (China)* rejected the "double basis" interpretation of Article 2.2, for essentially the same reasons as the panel in *EC and certain member States – Large Civil Aircraft*.[486]

7.6.3.4.2 Evaluation by the Panel

7.286. We do not accept Korea's argument that specificity must be established on a double basis, i.e. that the subsidy must be both (i) limited to a designated geographical region and (ii) limited to only a subset of enterprises within that region. Korea's double specificity argument would create redundancy with both Articles 2.1(a) and 8.2(b) of the SCM Agreement. We are guided in this regard by the findings of the panel in *EC and certain member States – Large Civil Aircraft*, which addressed the issue thoroughly in the following terms:

> Article 2.2 is not particularly clearly drafted. It could be understood, based on the text alone, as establishing specificity on the basis of a geographical limitation on the

[480] Korea's second written submission, para. 365.
[481] Ibid. para. 372.
[482] Ibid. para. 373 (referring to U.S. response to Panel question 3.2, paras. 142-143).
[483] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1223.
[484] Ibid. paras. 7.1224-7.1225.
[485] Ibid. para. 7.1226.
[486] Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, paras. 9.127-9.139.

recipients ("within a designated region"), which is the United States' position. It could also be understood to establish specificity on the double basis posited by the European Communities – "certain", i.e. not all, enterprises, "within a designated region". While the text, standing alone, is not unambiguous in this respect, when the text is considered in its context and in light of its object and purpose, it is clear to us that Article 2.2 is properly understood to provide that a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region.

We recall that the European Communities argues that under Article 2.2 of the SCM Agreement, only a subsidy that is limited to *certain* enterprises within a designated geographical region within the jurisdiction of the granting authority shall be specific. The European Communities' proposed interpretation would entail that, in order to be specific, a subsidy granted by a regional authority must not only be limited to a designated region within the territory of the granting authority, but must in addition be limited to only a subset of enterprises within that region. However, if a national authority grants a subsidy to a subset of enterprises within its territory, whether that subset of enterprises is located in a designated region or not, such a subsidy would, by definition, already be specific under Article 2.1.

...

Thus, the European Communities' proposed reading of Article 2.2 merely replicates the standard set out in Article 2.1(a), and thereby makes Article 2.2 redundant.

...

The European Communities appears to recognize that its reading of Article 2.2 has the effect of making it redundant of Article 2.1(a), but dismisses this as a "structural overlap", which it describes as "not uncommon" in treaty-making. However, in our view, there is a perfectly reasonable reading of Article 2.2 which avoids this problem, and we consider it appropriate to eschew a reading of that provision which raises it. On this basis alone, we consider the European Communities' proposed interpretation of Article 2.2 to be unsatisfactory, as it fails to give full effect to the text of Article 2 as a whole.

In addition, as the United States points out, the European Communities' reading of Article 2.2 also creates a redundancy with Article 8.2(b). Although Article 8.2(b) has expired (pursuant to the provisions of Article 31 of the SCM Agreement), it did form part of the original "traffic light" architecture of the SCM Agreement, and thus provides us with important context for understanding the intended scope of other provisions. Article 8.2(b) specifically rendered assistance to disadvantaged regions within the territory of a Member non-actionable, as long as that assistance met certain criteria. One of those criteria was that the assistance be "non-specific (within the meaning of Article 2) within eligible regions." Under the European Communities' reading of Article 2.2, a regional subsidy that is not "limited to certain enterprises" within the region is not specific. Thus, the European Communities' reading of Article 2.2 would have rendered Article 8.2(b) redundant and unnecessary from the outset. Moreover, Article 8.1(b) provided that subsidies which were specific within the meaning of Article 2, but which met all the conditions of Article 8.2, would be non-actionable. Thus, Article 8.2(b) carved out as non-actionable regional development subsidies which, presumably, would otherwise have been actionable, in part because they were specific. Given that the establishment of particular types of subsidies as non-actionable under Article 8, including assistance to disadvantaged regions, was a significant achievement of the Uruguay Round negotiations, an interpretation of Article 2.2 which would have rendered one of the key provisions of Article 8 in this regard redundant and useless from the outset makes no sense to us, and we reject such an interpretation.[487] (footnotes omitted)

[487] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1223-7.1226.

7.287. The potential redundancy of Article 8.2(b) of the SCM Agreement was also explained by the panel in *US – Anti-Dumping and Countervailing Duties (China)* in the similar terms.[488]

7.288. We agree with the findings of the *EC and certain member States – Large Civil Aircraft* and *US – Anti-Dumping and Countervailing Duties (China)* panels. The reference to "certain" enterprises, read in isolation, is not unambiguous. However, consideration of the text in its context and in light of its object and purpose, makes it clear that Article 2.2 provides that a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region.

7.6.3.5 Conclusion

7.289. For the above reasons, we reject Korea's claim that the USDOC's determination that the RSTA Article 26 tax credit scheme is regionally specific is inconsistent with Article 2.2 of the SCM Agreement.

7.6.4 Whether the USDOC should have determined that RSTA Article 10(1)(3) and Article 26 tax credit subsidies were tied to Samsung's production of digital appliances

7.6.4.1 Main arguments of the parties

7.6.4.1.1 Korea

7.290. Korea submits[489] that the USDOC's calculation of Samsung's subsidy margins for RSTA Article 10(1)(3) and Article 26 tax credits, on the basis of the total tax credits received for expenditures on all products divided by the total value of Samsung's sales of all products, was inconsistent with the United States' obligation under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement not to impose a countervailing duty in excess of the estimated subsidy determined to have been granted on the manufacture, production or export of the investigated product. Korea submits that the USDOC improperly took account of tax credits that Samsung received on products outside of the Digital Appliances business unit (which was responsible *inter alia* for the production of LRWs). Korea asserts that, because certain tax credits were tied to digital appliances[490], the proper calculation of Samsung's subsidy margins for both the Article 10(1)(3) and Article 26 programmes should have used those tax credits (i.e. those received on digital appliances) for the numerator, and Samsung's sales of digital appliances, including LRW, as the denominator.

7.291. Korea submits that both Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 draw a direct link between the subsidy that may be countervailed and the subsidization received by the exported product. According to Korea, therefore, countervailing action cannot be taken against a subsidy or bounty that has been conferred on some other product that is not subject to the investigation. Korea contends that the investigating authority's obligation to determine – based on an objective analysis and positive evidence – the amount of a countervailable subsidy that is attributable to the merchandise being investigated, and not to any "non-subject" merchandise, has been repeatedly affirmed by WTO panels and the Appellate Body. Korea refers in this regard to the findings of the panel in *US – Lead and Bismuth II*, and of the Appellate Body in *US – Countervailing Measures on Certain EC Products*. Korea also observes that the panel in *China – Broiler Products* emphasized the proactive role that the investigating authority must take in "ascertain[ing] the precise amount of subsidy attributed to the imported products under investigation".

7.292. Korea submits that the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement by determining that the subsidy amount would only be limited to tax credits for digital appliances if the relevant tax credits were "tied" to production and sales of those products through the granting authority's prior knowledge of "the intended use" of the tax

[488] Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, paras. 9.130-9.133.
[489] Korea's main arguments are set forth at paras. 277-303 of its first written submission.
[490] See, for example, para. 281 of Korea's second written submission ("Since the DOC was able to tie the R&D expenses of the Digital Appliance Division to washers, then it necessarily (and logically) follows that the Article 10(1)(3) (and Article 26) tax credits generated by those very same R&D expenses can also be tied to the Digital Appliance Division").

credits. Korea submits that the USDOC's application of its "tying" requirement was impermissible because Samsung submitted data and documentation to demonstrate that the subsidy in fact benefited the production or sale of a particular product or category of products. Korea contends that the USDOC verified that R&D expenses incurred in the Digital Appliances business unit benefited all of the products within that division, including LRWs. Korea asserts that the USDOC's refusal to consider that information, and to use it to calculate the proper numerator and denominator in determining Samsung's subsidy margin, is inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

7.6.4.1.2 United States

7.293. The United States[491] submits that the USDOC appropriately found that these subsidies were bestowed on Samsung on an "untied" basis, and divided the total amount of benefit over the adjusted total sales of all products manufactured in Korea. The United States contends that RSTA Article 10(1)(3) is not an "R&D subsidy" to the extent that it does not require that the tax savings that a company receives be used for a particular activity, much less R&D activity.[492]

7.294. The United States notes that neither Article VI:3 of the GATT 1994 nor Article 19.4 of the SCM Agreement dictate precisely how the rate of subsidization is to be calculated. The United States asserts that because the GATT 1994 and the SCM Agreement do not give significant guidance on what methodologies should be employed for calculating subsidy rates, this is an issue that an administering authority will therefore need to examine and determine. The United States suggests that, in determining an appropriate approach, an investigating authority may nonetheless derive some guidance from certain provisions, such as Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement, which suggest that the facts relating to the granting authority's bestowal of the subsidy are a key consideration in determining the existence and amount of subsidization.[493] According to the United States, the reference in Article VI:3 of the GATT 1994 to a subsidy bestowed "indirectly" on the manufacture, production, or export of a product suggests that there are some subsidies that will potentially benefit more than one product or activity of a recipient. Thus, an investigating authority may find that subsidies are essentially "untied" when calculating the rate of subsidization, and divide the benefit conferred by the subsidy by the company's combined sales of all products.[494] The United States contends that, in other cases, an investigating authority may determine that it is appropriate to attribute a subsidy to a particular product. An authority may examine a subsidy and determine that there is a product-specific "tie," for example, where its nature and structure reveal bestowal upon a particular product. Based on such a determination, the authority may allocate the subsidy entirely to that product and, in calculating the rate of subsidization, divide the benefit by only the sales of the product that it views as "tied" to that subsidy.[495] The United States notes that the use of both approaches is reflected in Annex IV of the SCM Agreement, which informs a serious prejudice analysis under Article 6.1. Regarding the treatment of subsidies as "tied", the United States notes that the Informal Group of Experts (IGE) established by the SCM Committee on Subsidies and Countervailing Measures[496] developed recommendations to address when a subsidy is "tied" for purposes of Annex IV:3. The United States observes that the IGE recommended the following test:

> To determine whether a subsidy is "tied" to a particular product in the sense of paragraph 3 of Annex IV, and hence whether the sales denominator should be the recipient's sales of that product alone, instead of its total sales, it is recommended that a subsidy be deemed to be tied to a product if its intended use is known to the

[491] The main arguments of the United States are set forth at paras. 433-484 of its first written submission.

[492] United States' response to Panel question No. 5.2, para. 6.

[493] United States' first written submission, paras. 445-446; United States' second written submission, paras. 301-302.

[494] United States' first written submission, para. 447.

[495] Ibid. para. 448.

[496] The Committee on Subsidies and Countervailing Measures established the Informal Group of Experts with the following terms of reference: "To examine matters which are not specific in Annex IV to the [SCM] Agreement or which need further clarification for the purposes of paragraph 1(a) of Article 6, and to report to the Committee such recommendations as the Group considers could assist the Committee in the development of an understanding among Members, as necessary, regarding such matters." (Decision of the WTO Committee on Subsidies and Countervailing Measures regarding Informal Group of Experts, G/SCM/5, June 22, 1995 (Exhibit USA-30)).

> giver, and so acknowledged, prior to or concurrent with the subsidy's bestowal.[497] (emphasis added)

7.295. The United States further observes that, with respect to research and development subsidies, the IGE recommended that such subsidies should be presumptively treated as "untied". The IGE explained that, "in view of the future orientation of research and development activities", it is recommend that "subsidies for these activities be presumptively allocated across the recipient firm's total sales, unless it is demonstrated that treating them as 'tied' to the product in question is appropriate".[498]

7.296. The United States also observes that, in respect of Article 3.1(a) prohibited export subsidies, footnote 4 of the SCM Agreement refers to a subsidy being "in fact tied to" actual or anticipated export performance. The United States asserts that the Appellate Body has confirmed that the existence of a "tie" to anticipated exportation is not based on the actual effects of that subsidy:

> In setting out this test, we do *not* suggest that the issue as to whether the granting of a subsidy is in fact tied to anticipated exportation could be based on an assessment of the *actual effects* of that subsidy. Rather, we emphasize that it must be assessed on the basis of *information available to the granting authority at the time the subsidy is granted*.[499] (emphasis added)

7.297. The United States contends that the USDOC's approach is consistent with this contextual guidance afforded by the IGC and the Appellate Body. In particular, the USDOC found that "the GOK had no way to know the intended use at the time the company was authorized to claim the tax credits, nor can the recipient company acknowledge receipt of the subsidy prior to or concurrent with its bestowal".[500] The United States observes that the RSTA legislation did not specify any product-specific tie, and eligibility criteria were not limited by product type. Moreover, the structure, architecture, and design of the RSTA subsidy programs did not reflect a product-specific tie. Under the RSTA, Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on formulas that related to *aggregate* and *average* expenses for the company's entire domestic operations – and not to particular products.[501] Samsung's tax return did not indicate that any tax credits were tied to any particular merchandise or facilities.[502] Samsung admitted this in its questionnaire responses, stating that "*the tax return did not specify the merchandise for which this reduction was to be provided*".[503] The United States submits that the fact that Samsung purported to have certain underlying documentation showing expenditures in connection with particular products is of no moment, as "these documents do not form the basis for bestowal and are not included in the annual tax returns that the company files with the Korean tax authorities".[504]

7.298. The United States asserts that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require investigating authorities to treat subsidies as "tied" based on their alleged use and effects. The United States contends that Korea's position would convert the inquiry into the amount of the subsidy benefitting the subsidized product into a speculative inquiry into "uses" and effects of a subsidy, rather than the means by and terms on which the Member bestows the subsidy.

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[497] IGE Report, Recommendation 6, (Exhibit USA-29), para. 10

[498] IGE Report, Recommendation 20, (Exhibit USA-29), para. 2.

[499] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1049.

[500] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), pp. 41-42.

[501] United States' second written submission, paras. 303, 314-318; United States' first written submission, paras. 479-482.

[502] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 42.

[503] Samsung April 9, 2012 Questionnaire Reponse (QR) at Ex. 24, (Exhibit KOR-72), p. 2; see also ibid. at Ex. 22, p. 1.

[504] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 42.

7.6.4.2 Main arguments of third parties[505]

7.299. China asserts that the relevant jurisprudence leaves no doubt as to the obligations imposed on an investigating authority under WTO law when it comes to determining, based on an objective analysis and positive evidence, the amount of a countervailable subsidy that is attributable to the merchandise being investigated. China is of the view that investigating authorities are indeed obliged, under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, to receive and carefully examine data and documentation submitted by interested parties in order to determine the precise amount of a given countervailable subsidy that is actually attributable to the merchandise being investigated. China contends that a careful examination of all relevant factors, including the data and documentation submitted by interested parties, is needed for an investigating authority to be able to determine the precise degree to which a given subsidy is a "genuine and substantial cause" of a particular market effect observed for the merchandise being investigated.[506]

7.300. The European Union considers that Articles VI:3 of the GATT 1994 and 19.4 of the SCM Agreement require Members to accurately determine the per unit subsidy amount found to exist with respect to the product under investigation and not impose countervailing duties exceeding that amount. That being said, the European Union further notes that, in practice, it may be very difficult to identify precisely the amounts that a company has received for the particular production or sale of the product concerned, especially when the company in question manufactures and sells a variety of products not covered by the investigation and which are made in the same production line. Likewise, when the subsidy found to exist is not granted on a product basis, but rather on a company basis, it may also be difficult to identify what portions were used by the company for manufacturing the product concerned as opposed to other products. In this respect, if the subsidy is clearly tied in law or in fact to the production or sale of a particular product, this may allow the investigating authority to allocate the amounts received by the company to those specific products and, thus, calculate the specific subsidisation for the product concerned. However, if the subsidy is not tied to any particular product (such as e.g. a tax reduction in the income tax of a company in a given year), it may be presumed that the company allocated this benefit across its entire production. The European Union does not take a position on whether the Article 10(1)(3) and Article 26 tax credits were only received by Samsung with respect to its digital appliances (and thus including LRW) or whether they were granted with the express purpose to benefit only domestic production and sales. A relevant question for the Panel to examine, however, appears to be whether RSTA Articles 10(1)(3) and 26 confer a subsidy with respect to a single or a variety of different products or whether they are granted on a company basis, provided that certain activities (such as investments on R&D or business assets) are conducted.[507]

7.6.4.3 Evaluation by the Panel

7.301. Korea's claim is based on Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, which provide that the amount of countervailing duty should not exceed the amount of per unit subsidization. In the *Washers* countervailing investigation, the USDOC found that tax credit subsidies bestowed pursuant to RSTA Articles 10(1)(3) and 26 are not tied to any particular product. The USDOC therefore allocated these subsidies across all products, by dividing the total amount of Samsung's tax credits by the value of sales by Samsung for all products.

7.302. Korea contends that the subsidies are R&D subsidies[508], and that the tax credits generated pursuant to R&D expenditures in the Digital Appliances business unit are tied to the production of Digital Appliances products, including LRWs. Korea contends that because the tax credits are provided as a result of R&D activities undertaken by Samsung, and because the tax credits would have the effect of retroactively reducing the cost of those R&D activities[509], Samsung could tie the tax credits to the underlying R&D activities, and the products in respect of which they were

[505] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[506] China's third party submission, paras. 108-109.
[507] European Union's third party submission, paras. 84-86.
[508] Korea's response to Panel question No. 5.2, para. 2.
[509] Korea's response to Panel question No. 5.16, para. 37.

undertaken.[510] Korea submits that the USDOC should therefore have calculated the amount of R&D undertaken by Samsung's Digital Appliances division, and allocated only the tax credits claimed in respect of that R&D to Digital Appliances (including LRWs).

7.303. Korea's claim is based on an erroneous characterisation of the nature of the subsidy at issue. Korea contends that RSTA Article 10(1)(3) provides for R&D subsidies, because the resultant tax credits retroactively reduce the cost of the R&D activities that gave rise to those tax credits.[511] We disagree with Korea's characterisation. The relevant subsidies in the present case are the tax credits. These tax credit subsidies are not R&D subsidies. The fact that these tax credit subsidies were provided as a result of eligible R&D activity does not mean that those subsidies are tied to that R&D activity, or the products in respect of which that R&D activity was undertaken. The tax credit subsidies are provided after the underlying R&D activities have been undertaken, in an amount determined by reference to total R&D activities. Tax credits constitute subsidies because government revenue is foregone or not collected. The benefit is the amount of revenue that is foregone or not collected. That revenue foregone or not collected is equivalent to cash that Samsung can keep in its account, rather than spending on its tax bill.[512] Korea's argument that the relevant tax credit subsidies are tied to Digital Appliance products (and therefore LRWs) overlooks the fact that the cash acquired by Samsung as a result of the tax credit subsidy may be spent by Samsung on any product. Samsung acknowledged this in its questionnaire responses, stating that "the tax return did not specify the merchandise for which this reduction was to be provided".[513] This is further confirmed by Korea's statement that "[t]he cash that is saved by paying less in taxes than otherwise would be the case *can then be spent on any activities that the taxpaying company elects*".[514] Thus, Samsung was not required to spend the proportion of benefit generated by Digital Appliance R&D expenditures on the future production of Digital Appliance products. It could have spent none of it on those products. Or it could have spent all of it on those products. It is Samsung's discretion regarding the use of the cash resulting from the tax credit subsidy that justifies the USDOC's treatment of that subsidy as untied, and therefore the allocation of that subsidy across the sales value of all products.

7.304. Korea argues that the "effect" of the tax credit is to spur the particular investment that results in the earning of the credit.[515] Korea also contends that the "effect" of the availability of the tax credit should be distinguished from a company's use of the "proceeds of the tax credit".[516] We are not persuaded by Korea's arguments, since they continue to reflect an erroneous characterisation of the subsidy at issue. It is the "proceeds of the tax credit" – rather than the underlying R&D activity – that constitute the subsidy. That subsidy is only provided at the time that the tax credit is provided, i.e. at the time that revenue is foregone or not collected. Since the benefit of that subsidy may be used in any way that the recipient company sees fit, the USDOC was not required to find that the subsidy was tied to the products in respect of which the underlying R&D activities were undertaken. The fact that Samsung may be able to identify the R&D activities undertaken in respect of Digital Appliance products is irrelevant, since there is no necessary correlation between those R&D expenditures and the amount of tax credit cash (if any) used by Samsung for the production of Digital Appliance products.[517]

7.305. Korea's failure to properly characterize the subsidy at issue, and the benefit conferred thereby, also undermines its reliance on the fact that the USDOC verified R&D costs specific to Samsung's Digital Appliance business unit in the parallel anti-dumping investigation. In an anti-dumping investigation, an authority may need to construct a normal value on the basis of

[510] Korea's second written submission, paras. 288-297.
[511] Korea's response to Panel question No. 5.2, paras. 3 and 4.
[512] Korea asserts at para. 3 of its response to Panel question No. 5.2 that the tax credit "is effectively the same as giving cash to a company equal in amount to the tax credit amount".
[513] Samsung April 9, 2012 QR at Ex. 24, (Exhibit KOR-72), p. 2; see also ibid. at Ex. 22, p. 1.
[514] Korea's response to Panel question No. 5.2, para. 6. (emphasis added).
[515] Ibid.
[516] Ibid.
[517] Korea accuses the USDOC of applying an "irrebuttable presumption" (Korea's second written submission, para. 286). Korea asserts that Samsung should not be penalized "because the government of Korea chose not to require taxpayers to *identify in their tax returns the amount of any particular expenditure that pertained to any particular product*". This argument misses the point, since even if expenditures had been assigned to particular products in the tax returns, this still leaves open the question of whether the Government of Korea would have required recipients to use the tax credits for the production of particular products.

certain cost inputs. Certain costs that are incurred generally will need to be allocated to the product under investigation on a pro rata basis. Other costs, which are incurred specifically in respect of the product under investigation, are allocated directly to that product. However, this costing exercise has nothing to do with the amount – and destination – of benefit conferred by tax credit subsidies conferred after those costs have been incurred. Even if the R&D costs incurred in the production of LRWs may be determined precisely for the purpose of constructing a normal value, this says nothing about the amount (if any) of the benefit conferred by the tax credit subsidies that is ultimately directed towards the future production of LRWs. We recall that Samsung was free to spend its tax credit cash as it saw fit, irrespective of the particular products for which the eligible R&D expenditures giving rise to those tax credits were undertaken.[518]

7.306. The above analysis applies *mutatis mutandis* to Korea's claim regarding the USDOC's allocation of the RSTA Article 26 tax credit subsidies. Those subsidies were conferred at the time that the tax credits were claimed and granted, and Samsung was free to spend that tax credit cash as it saw fit.

7.307. For the above reasons, we reject Korea's claim that the USDOC's failure to tie the RSTA Article 10(1)(3) and 26 tax credit subsidies to Digital Appliance products is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

7.6.5 Whether the Article 10(1)(3) subsidy amount should have been determined by reference to Samsung's worldwide sales

7.6.5.1 Main arguments of the parties

7.6.5.1.1 Korea

7.308. Korea claims[519] that in order to calculate the *ad valorem* rate of subsidization for Samsung's receipt of tax credits under Article 10(1)(3), the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement by utilizing a denominator that was inconsistent with the numerator. Korea complains that the USDOC limited the denominator to the sales value of products produced in Korea, whereas the numerator included all tax credits. Korea submits that because the R&D activities giving rise to the tax credits would have benefited Samsung's global production activities, the denominator should have included the sales value of all products that benefited from the tax credits. Korea contends that the USDOC's use of a denominator that did not include the value of all sales that benefited from the underlying R&D activities was to artificially inflate the *ad valorem* rate of subsidization, contrary to the requirement of Article VI:3 of the GATT 1994, carried over into Article 19.4 of the SCM Agreement, that "[n]o countervailing duty shall be levied [...] in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation." Korea submits that the Appellate Body stated in *US – Softwood Lumber IV* that "the correct calculation of the countervailing duty rate would depend on matching the elements taken into account in the numerator with the elements taken into account in the denominator".[520]

7.309. Korea asserts that, in its final determination in the *Washers* countervailing investigation, the USDOC applied "a presumption that government subsidies benefit domestic production".[521] The USDOC also found that Samsung had not rebutted that presumption, since it had not "demonstrated that the express purpose of these tax credits is to benefit not only domestic production, but also production that occurs outside of Korea".[522] Korea submits that the USDOC's reliance on a presumption that the subsidies benefitted only Samsung's domestic production

[518] In its second written submission, Korea refers to the USDOC verifying that R&D expenses incurred in the Digital Appliances division "benefited" all of the products within that division, including LRWs (Korea's second written submission, paras. 291 and 296). Korea subsequently clarified, in its response to Panel question No. 5.15, para. 36, that this reference to "benefit" was not intended to mean "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. This clarification is consistent with our own view that the allocation of R&D costs for the purpose of constructing normal value is not determinative of the treatment of the "benefit" (in the sense of Article 1.1(b) of the SCM Agreement) conferred by tax credit subsidies.

[519] Korea's main arguments are set forth at paras. 304-315 of its first written submission.

[520] Appellate Body Report, *US – Softwood Lumber IV*, para. 164, fn 196.

[521] Korea refers to *Washers* CVD I&D Memorandum, p. 52 (KOR-77). (footnotes omitted)

[522] Ibid.

violated its obligations under the SCM Agreement. Korea contends that there is no basis for any such presumption in the SCM Agreement. Korea submits that the question of which sales and production benefit from a particular subsidy is a question of fact, and the investigating authority is obliged to make its determination on the basis of an "in-depth examination" of "positive evidence".[523] Korea asserts that the USDOC failed to do this. Korea also contends that the presumption applied by the USDOC was fully rebutted by Samsung, both by showing that the results of its R&D (which gave rise to the tax credit) in fact benefited its worldwide sales and production, and by showing that the USDOC had previously analysed this identical issue on two separate occasions and had determined on each occasion that the Article 10(1)(3) tax credits benefited Samsung's global production.

7.6.5.1.2 United States

7.310. The United States submits[524] that there is no basis for Korea's assertion that the USDOC was required to include in the denominator the sales value of products manufactured outside Korea. The United States asserts that Korea's argument that the underlying R&D activities affected manufacturing facilities operated by Samsung affiliates in other parts of the world is not grounded in the SCM Agreement or the GATT 1994. The United States asserts that the USDOC was not required to trace the possible indirect effects of subsidies overseas.

7.311. The United States submits that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require Members to take into account the sales value of products manufactured outside the territory of the subsidizing Member when calculating subsidy rates. According to the United States, the language of these provisions suggests a focus on production activity occurring within the territory of the granting Member. The United States asserts that these provisions do not address possible overseas knock-on effects from these subsidies.

7.312. The United States also contends that Members generally grant subsidies to generate economic benefits within their borders. The United States suggests that for a subsidy provided by a Member to a recipient within its territory to be deemed to be attributable to production occurring elsewhere would require specific facts supporting such a unique conclusion. The United States asserts that, on the facts of this case, the USDOC explained that it was not appropriate to attribute subsidies to overseas production, since eligibility is restricted to Korean companies and nothing in the legislation or enforcement decree suggests an intent to subsidize production outside Korea. As the USDOC stated, "there is no indication in the statutory provisions that a company could claim a tax credit on, for example, R&D conducted outside of Korea or a facility located outside of Korea".[525] The United States observes that Korea concedes that Samsung only claimed tax credits for R&D work conducted in Korea.[526] The United States also points to statements made by the Government of Korea that RSTA Article 10(1)(3) "aims to facilitate Korean corporations' investment in their respective research and development activities, and thus to *boost the general national economic* activities in all sectors".[527] According to the United States, there was no evidence that the granting Member intended to subsidize overseas production, and no connection between the structure and operation of the subsidy programme and overseas production.

7.313. The United States asserts that Korea's argument that the USDOC failed to "match" the elements in the numerator and denominator rests on a flawed premise – namely, that the inquiry hinges on the possible indirect effects of subsidies overseas, rather than the structure and design of the subsidy programme itself. The United States contends that Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement do not require an effects-based tracing analysis. The United States asserts that the USDOC was not required to chase down the supposed overseas effects of R&D activities conducted in Korea, and in any event Korea has made no showing that these effects existed. According to the United States, Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that the purpose of countervailing duties is to offset the bestowal of subsidies. Subsidies can only be bestowed to the extent that they exist. Yet, in the

[523] Korea refers to Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[524] The main arguments of the United States are set forth at paras. 485-501 of its first written submission.
[525] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 52.
[526] Korea's first written submission, para. 313.
[527] GOK April 9, 2012 QR at App. Vol. 108 (emphasis supplied) (Exhibit KOR-75); Washers Final CVD I&D Memo at 52 (Exhibit KOR-77); United States' first written submission, para. 490; United States' second written submission, para. 349.

view of the United States, Korea would premise the calculation of a subsidy rate on R&D activities that occur distinct from and prior to the existence or bestowal of a subsidy.[528] Moreover, the United States contends that Korea fails to address the troubling implications of its effects-based approach. Investigating authorities would be required to conduct a jurisdiction-by-jurisdiction inquiry into how R&D activities affect production across the globe. The United States argues that tracing these effects is particularly challenging, given the differing legal, tax, and other regulations applicable to overseas operations; complexities in how companies structure their overseas and domestic operations; and the time lag between R&D activities and their effects.[529]

7.314. The United States also submits that Korea wrongly criticizes the USDOC for its alleged use of a presumption in favour of attributing subsidies to domestic production only. The United States asserts, as a threshold matter, that an investigating authority is not barred from employing methodologies that are not expressly addressed in the text of the WTO Agreement. The United States further observes that WTO panels and the Appellate Body have repeatedly endorsed the use of presumptions where they are reasonable and rebuttable.[530] The United States contends that, in any event, this presumption had no bearing on the outcome, as the facts amply confirmed that the subsidy was not bestowed on overseas production.[531]

7.6.5.2 Main arguments of third parties[532]

7.315. China recalls that the Appellate Body expressly recognized in *US – Softwood Lumber IV* that the elements taken into account in the numerator of a subsidy calculation must match those taken into account in the denominator. China is concerned that USDOC appears to have established a *presumption* that government subsidies benefit only domestic production, which applies in the absence of positive evidence to the contrary. China considers it important not to discount the possibility that subsidies paid by a government may, under specific factual circumstances, benefit certain segments of a recipient's worldwide production of a product and may not extend to other segments. However, where a subsidy benefits a product manufactured by a recipient, an investigating authority may not simply presume that the subsidy benefits only a specific segment of that production. Rather, the investigating authority may only determine that the benefits are limited in this manner if, and to the extent, there is positive evidence to support a finding that the benefit is, *in fact*, limited to a subset of the recipient's global production of the product. According to China, therefore, absent findings based on positive evidence, the total amount of the subsidy should be spread over the total volume of sales.[533]

7.316. The European Union suggests that the Panel may find it relevant to examine whether the Article 10(1)(3) tax credits were in law or in fact limited to benefit production or sales carried out in Korea. Whilst it appears that the subsidy was granted with respect to R&D activities conducted in Korea, this does not necessarily mean that the subsidy benefitted only Samsung's domestic production, as the results of those activities could materialise in Samsung's total production (thus including exports).[534]

7.6.5.3 Evaluation by the Panel

7.317. Korea challenges the USDOC's decision to limit the denominator to the sales value of products produced by Samsung in Korea. Korea's claim is based on its assertion that, as a matter of fact, the R&D activities giving rise to the tax credits benefited Samsung's global production

[528] United States' second written submission, para. 348.
[529] Ibid. para. 354.
[530] The United States refers in this regard to Appellate Body Report, *US – Lead and Bismuth II*, para. 62, and Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.75. The United States observes that, on appeal, the Appellate Body noted that both parties concurred in the panel's finding with respect to the use of this presumption, and observed that in *US – Lead and Bismuth II* "we found this practice permissible under the SCM Agreement, so long as the presumption was not irrebuttable". (Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 84).
[531] United States' opening statement at the first substantive meeting, para. 66.
[532] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[533] China's third party submission, paras. 112-114.
[534] European Union's third party submission, para. 86.

activities.[535] Korea contends[536] that if certain revenue attributable to Samsung's R&D activities is to be excluded from the denominator because it pertains to products produced by Samsung's subsidiaries outside of Korea, then the subsidy benefit attributable to those R&D activities should also be excluded from the amount of subsidy in the numerator.[537] Korea contends that the United States' arguments "fail[] to address the real issue, which is whether the R&D activities that Samsung conducted in Korea benefited the production of washers that Samsung produced in its overseas subsidiaries".[538]

7.318. We disagree that the "real issue" concerning the USDOC's allocation of the benefit conferred by RSTA Article 10(1)(3) tax credit subsidies hinges on the effects of the R&D activities that gave rise to those subsidies. As explained above, the subsidies at issue are the tax credits provided to Samsung in Korea.[539] The benefit of that subsidy is the tax credit cash that Samsung (including its affiliate companies) does not have to spend on taxes. That benefit is 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. The benefit conferred by the tax credit subsidies does not, therefore, have to be allocated across revenue from Samsung's overseas production operations simply because such operations – to use Korea's terminology – "benefited" from the underlying R&D activities. The positive effect of the underlying R&D alluded to by Korea does not constitute "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.

7.319. Korea also argues, in respect of the tax credit subsidies, that the USDOC was not entitled to rely on any presumption that those subsidies only benefit Samsung's domestic production operations. The United States contends that it is logical to presume (rebuttably) that a Member grants a subsidy to benefit domestic production.[540] WTO panels and the Appellate Body have already endorsed the use of presumptions where they are reasonable and rebuttable. In *US – Lead and Bismuth II*, for example, the Appellate Body accepted that investigating authorities are entitled to rebuttably presume, in administrative reviews, that a benefit continues to flow from an untied, non-recurring financial contribution.[541] In *US – Countervailing Measures on Certain EC Products*, the panel found that "it is a normal and accepted practice … for the importing Member to presume that a non-recurring subsidy will provide a benefit over a period of time, which is normally presumed to be the average useful life of assets in the relevant industry".[542] In the *Washers* countervailing investigation, the recipients of the tax credit subsidies (i.e. Samsung and its Korean affiliates) only produced in the territory of the subsidizing Member.[543] The USDOC was therefore entitled to presume that the tax credit subsidies only benefited Samsung's domestic production operations. Furthermore, the presumption applied by the USDOC was rebuttable. The

[535] See, for example, Korea's first written submission, where Korea asserts that "the R&D performed by the Digital Appliance business unit – for which Samsung received the RSTA 10(1)(3) tax credits on which the numerator was calculated – benefited Samsung's global production of digital appliances" (Korea's first written submission, para. 308).

[536] Korea's first written submission, paras. 304-309 (referring in turn to Samsung's arguments before the USDOC set forth in Exhibits KOR-77 and United States Department of Commerce, Case brief of Samsung Electronics, Co. Ltd., investigation No. C-580-869 (2 November 2012), (Exhibit KOR-90)).

[537] Korea asserts that the USDOC included Samsung's revenue from sales of products produced outside of Korea in the denominator in an earlier proceeding (see, for example, Korea's second written submission, paras. 319-322). The United States contends that the USDOC had simply made a mistake based on erroneous reporting of data by Samsung (see, for example, United States' oral statement at the second meeting of the Panel, para. 71). Since this case is concerned with the USDOC's actions in the *Washers* countervailing investigation, we shall confine our analysis to that case.

[538] Korea's comments on the United States' response to Panel question No. 5.1, para. 3.

[539] See the United States' response to Panel question No. 5.1, and Korea's comments thereon, which make it clear that the tax credit subsidies were received by Samsung (including its Korean affiliates), which produces LRWs in Korea. There is no suggestion by Korea that the recipients of the tax credit subsidies produced LRWs outside of Korea. In response to Panel question No. 5.1, which asked whether the entity that received subsidies "engages in production and/or sales outside of Korea", Korea only references overseas production carried out by Samsung's overseas affiliates. In addition, Samsung reported in its questionnaire responses that it "performed all LRW production operations at its Gwangju, Korea facility" (Samsung April 9, 2012 QR, at 3, Ex. 1, (Exhibit USA-100)).

[540] United States' first written submission, para. 498.

[541] Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

[542] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.75. On appeal, the Appellate Body noted that both parties concurred in the panel's finding with respect to the use of this presumption, and observed that in *US – Lead and Bismuth II* "we found this practice permissible under the SCM Agreement, so long as the presumption was not irrebuttable" (Appellate Body Report, *US – Countervailing Measures on Certain EC Products,* para. 84).

[543] See fn 505 above.

USDOC's regulations provide in this regard: "If it is demonstrated that the subsidy was tied to more than domestic production, the [USDOC] will attribute the subsidy to multinational production".[544] In these circumstances, we consider that the rebuttable presumption applied by the USDOC is not inconsistent with Article 19.4 of the SCM Agreement or Article VI:3 of the GATT 1993.[545] We also consider that the USDOC was entitled to conclude that neither Samsung nor Korea had rebutted that presumption. As discussed above, the fact that the underlying R&D activities may have been beneficial to the production operations of Samsung's overseas subsidiaries does not mean that the benefit conferred by the tax credit subsidies also passed through to those overseas operations.

7.320. For the above reasons, we reject Korea's claim that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by limiting the denominator to the sales value of products produced by Samsung in Korea when allocating the benefit conferred by RSTA Article 10(1)(3) tax credit subsidies.

8 CONCLUSIONS AND RECOMMENDATION(S)

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to the anti-dumping measures,

i. the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, by applying the W-T comparison methodology to transactions other than those constituting the patterns of transactions that the USDOC had determined to exist in the *Washers* anti-dumping investigation;

ii. Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation by determining the existence of a "pattern of export prices which differ significantly" among purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences;

iii. the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation, by merely focusing on the difference between the margin of dumping calculated using the W-W comparison methodology and the margin calculated using the W-T comparison methodology and failing to consider whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping;

iv. Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation by failing to explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology;

v. Korea failed to establish that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 by determining the existence of "a pattern of export prices which differ significantly" among purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences;

vi. the DPM is inconsistent "as such" with Article 2.4.2 of the Anti-Dumping Agreement, because it applies the W-T comparison methodology to non-pattern transactions when the aggregated value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66% or more of the value of total sales;

[544] 19 CFR § 351.525(b)(7), (Exhibit USA-24).

[545] Korea also alleges that the USDOC's approach in the *Washers* countervailing investigation is inconsistent with its decision in the earlier *Refrigerators* case to include the sales revenue from Samsung's global production operations in the denominator. The present claim concerns the USDOC's conduct in *Washers*. We therefore confine ourselves to what the USDOC did in the *Washers* countervailing investigation.

vii. the DPM is inconsistent "as such" with the second sentence of Article 2.4.2, because in applying the "meaningful difference" test, the DPM focuses on the difference between the margin of dumping calculated with the W-W comparison methodology and the margin calculated using the W-T comparison methodology or the mixed comparison methodology. The DPM fails to provide for any consideration of whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping;

viii. Korea failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 when, having concluded that the W-W comparison methodology cannot appropriately take into account the observed pattern of significantly different prices, it does not also consider whether the relevant price differences could be taken into account appropriately by the T-T comparison methodology;

ix. the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish "a pattern of export prices which differ significantly among different purchasers, regions or time periods";

x. Korea failed to establish that the United States' use of "systemic disregarding" under the DPM is "as such" inconsistent with the second sentence of Article 2.4.2;

xi. Korea failed to establish that the United States' use of "systemic disregarding" under the DPM is "as such" inconsistent with Article 2.4;

xii. the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with Article 2.4.2 of the Anti-Dumping Agreement;

xiii. the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with Article 2.4 of the Anti-Dumping Agreement;

xiv. the USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation;

xv. the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation;

xvi. the United States' use of zeroing when applying the W-T comparison methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994;

b. With respect to the countervailing measures,

i. the USDOC's original and remand determinations of disproportionality are inconsistent with Article 2.1(c) of the SCM Agreement;

ii. the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take account of the two mandatory factors referred to in the final sentence of that provision in its determination of *de facto* specificity;

iii. Korea failed to establish that the USDOC's determination of regional specificity in respect of the RSTA Article 26 tax credit scheme is inconsistent with Article 2.2 of the SCM Agreement;

iv. Korea failed to establish that the USDOC's failure to tie the RSTA Article 10(1)(3) and 26 tax credit subsidies to Digital Appliance products is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994;

v. Korea failed to establish that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by limiting the denominator to the sales value of products produced by Samsung in Korea when allocating the benefit conferred by RSTA Article 10(1)(3) tax credit subsidies.

8.2. For the reasons also set forth in this Report, the Panel declines to make any findings regarding the allegations of WTO-inconsistency set forth in paragraphs 102, 103 and 111-117 of Korea's second written submission, concerning the USDOC's use of average export prices rather than actual export prices in calculating standard deviation and the USDOC's alleged "sufficiency test", respectively.

8.3. We do not consider it necessary to address Korea's claims against zeroing under Articles 1 and 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in the *Washers* anti-dumping investigation, in "subsequent connected stages" and "as such". Nor is it necessary to address Korea's claims against zeroing in "subsequent connected stages" of *Washers* under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. It is also not necessary for us to address Korea's "as applied" and "ongoing conduct" claims concerning the DPM.

8.4. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994, they have nullified or impaired benefits accruing to Korea under those agreements.

8.5. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under those Agreements.

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WORLD TRADE ORGANIZATION

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UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS464/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA
(DS464)

WORKING PROCEDURES OF THE PANEL (AS AMENDED)

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the date of a request from a Member, or the date the written submission in question is submitted to the Panel, whichever is later, unless a different deadline is established by the panel upon written request of a party showing good cause.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members who have notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all the members of its own delegation and shall ensure that each member of its own delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event, no later than in its first written submission to the Panel. If Korea requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Korea shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal and

answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comments, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of it into a WTO working language. The Panel may grant reasonable extensions of time for the translation of such exhibit upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Korea could be numbered KOR-1, KOR-2, etc. If the last exhibit in connection with the first submission was numbered KOR-5, the first exhibit of the next submission thus would be numbered KOR-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including in writing prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Korea to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Korea presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Korea. If the United States chooses not to avail itself of that right, the Panel shall invite Korea to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement, and should make available the final version of its closing statement if that statement was prepared in writing prior to being presented at the meeting, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than in responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each executive summary submitted by each party of opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages each. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft

Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA (DS464)

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously treated by the U.S. Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute, entitled Large Residential Washers from the Republic of Korea (A-580-868 and C-580-869). However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in one or both of the investigations at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Korea and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. 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.

4. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorization letter referred to in paragraph 2. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in paragraph 2 to grant such authorization. If an entity refuses to grant the authorization referred to in paragraph 2, a party may bring the situation to the attention of the Panel.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used 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.

6. The party submitting BCI 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 follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement

will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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ANNEX B

ARGUMENTS OF KOREA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. This dispute concerns the protectionist and unlawful conduct of the USDOC in its final anti-dumping and countervailing duty determinations in the proceedings entitled *Large Residential Washers from Korea* (*Washers*) and in other measures of general and prospective application by which the USDOC applies anti-dumping duties to imported products. The *Washers* anti-dumping measure at issue in this dispute is one of many so-called "targeted dumping" determinations that the USDOC has issued in recent years. The sudden and dramatic increase in the USDOC's resort to the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is designed to circumvent the recommendations and rulings of the DSB prohibiting the use of "zeroing" in the calculation of dumping margins. The USDOC also misinterpreted and misapplied the relevant provisions of the SCM Agreement in its simultaneous countervailing duty investigation.

II. STANDARD OF REVIEW

2. This Panel is required to apply the standard of review set forth in Article 11 of the DSU. In conducting its assessment, the Panel must interpret the relevant provisions of the GATT 1994, the Anti-Dumping Agreement, and the SCM Agreement in accordance with the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and determine whether the USDOC's actions are consistent with the relevant provisions of the covered agreements. The Panel is also required to review the factual components of the USDOC's determination. In doing so, the Panel must conduct a "critical and searching" analysis and an "in depth" examination of the USDOC's determination.

III. THE EVOLUTION OF THE USDOC'S INTERPRETATION AND APPLICATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

3. The most significant aspect of the evolution of the USDOC's approach to the interpretation and application of the second sentence is the inextricable linkage between the USDOC's approach to "targeted dumping" and the history of "zeroing" in WTO dispute settlement. When the United States first implemented Article 2.4.2 in U.S. law following the completion of the Uruguay Round Agreements, it adopted an approach to "targeted dumping" and the interpretation of Article 2.4.2 that in important respects was faithful to that provision. However, after the Appellate Body's successive rulings that the USDOC's use of zeroing was WTO inconsistent, the United States radically changed its approach to "targeted dumping". This change was an effort to avoid the effect of the Appellate Body's zeroing jurisprudence.

IV. THE UNITED STATES ACTED INCONSISTENTLY WITH ARTICLES 2.4 AND 2.4.2 OF THE ANTI-DUMPING AGREEMENT BOTH "AS SUCH" AND "AS APPLIED" IN THE *WASHERS* INVESTIGATION BY APPLYING "ZEROING" IN W-T COMPARISONS

A. Introduction

4. By disregarding the results of intermediate W-T price comparisons when calculating the aggregated margin of dumping for the product as a whole and for the exporter, the USDOC runs afoul of the basic principles of the Anti-Dumping Agreement and of the GATT 1994, such as the definitions of "dumping", "margin of dumping", "product", and "injury", as interpreted in numerous panel and Appellate Body reports. These decisions dispositively hold that zeroing is not permitted in the context of any anti-dumping proceeding, regardless of the particular price comparison methodology that is applied to calculate the margin of dumping for the product as a whole and for each exporter. This is because the Appellate Body has conclusively interpreted the concept of "dumping", which by virtue of Article 2.1 applies with the same meaning to the entire Anti-Dumping Agreement, as a product-wide and exporter-specific concept. The Appellate Body has found ample contextual support for this interpretation in Articles 2.4, 2.4.2, 3.1, 5.8, 6.10, 9.3

and 9.5 of the Anti-Dumping Agreement, and has categorically rejected the contrary interpretation that dumping could ever occur at the transaction-specific level.

B. The Concepts of "Dumping" and "Margins of Dumping" Are Product-Wide and Exporter-Specific, and Apply Consistently throughout the Entire Anti-Dumping Agreement

5. The USDOC considers that recourse to the W-T comparison methodology provided for under the second sentence of Article 2.4.2 somehow permits the inference that dumping may occur at the transaction-specific level. This untenable position allows the USDOC to disregard non-dumped transactions when aggregating intermediate comparison results for the purposes of calculating the weighted average margin of dumping for each product and exporter. The transaction-specific construct applied by the United States when margins of dumping are calculated with recourse to the W-T comparison methodology finds no basis in the Anti-Dumping Agreement, as interpreted in previous panel and Appellate Body reports. The Appellate Body has specifically addressed – and categorically rejected on numerous occasions – the argument that the concepts of "dumping" and "margin of dumping" could possibly occur at the transaction-specific level. The Appellate Body has conclusively ruled that the terms "dumping" and "margins of dumping" are exporter-specific and product-wide concepts, and they must be interpreted in a consistent and coherent fashion throughout the entire Anti-Dumping Agreement.

C. Articles 2.4.2 and 2.4 Require Aggregation of All Results of Intermediate Comparisons when Calculating the Margin of Dumping

6. While it is permissible to undertake multiple comparisons between normal value and export price at an intermediate stage, the Appellate Body has found that Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement require that investigating authorities aggregate the results of all such intermediate comparisons when calculating the product-wide and exporter-specific margins of dumping, regardless of the comparison methodology that is being applied. Thus, the use of zeroing in W-T comparisons under the second sentence of Article 2.4.2 is inconsistent with the requirement that the results of all intermediate comparisons be aggregated when the investigating authority establishes the margin of dumping for the product as a whole and for each exporter. It is also inconsistent with the "fair comparison" requirement of Article 2.4, because it artificially inflates the margins of dumping.

D. The Appellate Body Has Rejected the USDOC's Contention that Zeroing is Permissible under the W-T Comparison Methodology

7. The Appellate Body has consistently rejected the USDOC's position that dumping may somehow occur at the transaction-specific level whenever the comparison methodology at issue calls for a comparison between normal value and the prices of individual export transactions in *US – Softwood Lumber V (Art. 21.5 – Canada)*, *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)* and *US – Continued Zeroing*. The Appellate Body conclusively found that the application of zeroing under the W-T comparison methodology in administrative reviews was inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because it led to the assessment of duties in excess of the amount of the anti-dumping margin for the product as a whole.

E. Nothing in the Text of the Second Sentence of Article 2.4.2 Suggests that Dumping Is a Transaction-Specific Concept

8. The second sentence of Article 2.4.2 allows investigating authorities to compare "a normal value established on a weighted-average basis" to "prices of individual export transactions" when three cumulative conditions are met. First, the investigating authority must identify "a pattern of export prices". Second, the investigating authority must identify a pattern of export prices that "differs significantly among purchasers, regions or time periods". Third, the investigating authority must provide an "explanation … as to why differences in export prices cannot be taken into account appropriately" by the two symmetrical comparison methodologies that an investigating authority must "normally" apply under the first sentence of Article 2.4.2 (the W-W and T-T comparison methodologies). These textual elements suggest that, just like elsewhere in the Anti-Dumping Agreement, a margin of dumping cannot be established at the transaction-specific

level, and the results of intermediate comparisons may not be disregarded when establishing the margin of dumping.

F. The Use of Zeroing in W-T Comparisons Is "As Such" Inconsistent with Articles 2.4 and 2.4.2, Second Sentence, of the Anti-Dumping Agreement

1. The Use of Zeroing in W-T Comparisons under the Second Sentence of Article 2.4.2 Is a Measure Challengeable "As Such"

9. The USDOC's use of zeroing in the W-T comparison methodology under the second sentence of Article 2.4.2 is attributable to the United States; it has the precise content as evidenced in numerous original investigations and administrative reviews by the USDOC; and finally, the USDOC has consistently and systematically applied zeroing whenever calculating margins of dumping with recourse to the methodology provided for under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

2. The Use of Zeroing in W-T Comparisons Is "As Such" Inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement

10. The use of zeroing invariably results in the USDOC disregarding or artificially reducing to zero the results of W-T comparisons when aggregating those results for the purposes of calculating the margin of dumping for the product as a whole and for each individual exporter or foreign producer. For this reason, it is "as such" inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, and as a consequence is also "as such" inconsistent with Articles 2.1 of the Anti-Dumping Agreement, and Article VI:1 of the GATT 1994.

11. Moreover, Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to be "impartial, unbiased, and even-handed" when comparing normal value and export price. The use of the zeroing methodology invariably leads to the results of intermediate W-T comparisons being disregarded or artificially reduced to zero, thus increasing the resulting margins of dumping and making an affirmative dumping determination more likely. For this reason, just like in the context of any other anti-dumping proceeding, the use of zeroing is "as such" inconsistent with Article 2.4 of the Anti-Dumping Agreement.

12. The USDOC also systematically applies the zeroing methodology when calculating margins of dumping for the product and exporter in the context of administrative reviews, where those administrative reviews entail the use of the W-T comparison methodology under the second sentence of Article 2.4.2. To that extent, the USDOC systematically levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement. For this reason, the use of zeroing in administrative reviews is "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

G. The Application of the Zeroing Methodology in the Original *Washers* Determination and in Subsequent Connected Stages of *Washers* Is Inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement

13. The USDOC's use of zeroing in its final anti-dumping duty determination in the *Washers* investigation resulted in the USDOC disregarding or artificially reducing to zero the results of W-T comparisons undertaken at the intermediate stage when establishing the margin of dumping applicable for the product under consideration for each investigated exporter. The USDOC's final anti-dumping duty determination in Washers is inconsistent "as applied" with Articles 2.4 and 2.4.2, second sentence, of the Anti-Dumping Agreement. As a consequence, the application of the zeroing methodology in *Washers* is also inconsistent "as applied" with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

14. Korea also challenges the USDOC's use of zeroing in subsequent connected stages of the Washers proceedings, as ongoing conduct. Any such use of zeroing by the USDOC will be inconsistent with Article 2.4, Article 2.4.2, Article 2.1, and Article 9.3 of the Anti-Dumping Agreement, as well as Articles VI:1 and VI:2 of the GATT 1994.

V. THE USDOC'S METHODOLOGIES FOR INVOKING THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT ARE INCONSISTENT WITH THE OBLIGATIONS SET FORTH IN THAT PROVISION, BOTH "AS APPLIED" IN THE *WASHERS* INVESTIGATION AND AS "ONGOING CONDUCT" OR "AS SUCH" IN RESPECT OF THE CURRENT "DIFFERENTIAL PRICING" METHODOLOGY

A. Overview of the Obligations for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement

15. A normal value calculated on a weighted average basis may be compared to prices of individual export transactions if the investigating authority find that there are "export prices which differ significantly", and that those differing export prices constitute "a pattern", and explain why applying either one of the comparison methodologies set forth in the general rule would not permit such differences to be "taken into account appropriately". The text and context of Article 2.4.2 make clear that if all three of these conditions are satisfied in a given case, the exception is to be applied only to those transactions that have met the criteria for application of the W-T comparison methodology.

B. The USDOC's Methodology for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement in the *Washers* Investigation Failed to Comply with the Requirements of that Provision

1. The USDOC Acted Inconsistently With the Second Sentence of Article 2.4.2 in the *Washers* Investigation by Relying Solely on Quantitative Criteria to Invoke the Exception to Article 2.4.2

16. As the term, "a pattern", is used in the second sentence of Article 2.4.2, the significantly differing prices found to exist in sales to a purchaser, or in a given region or time period must not be the result of some random or exogenous cause, but rather in fact must reflect what reasonably can be inferred to be targeting conduct. This conclusion is reinforced by the requirement in Article 2.4.2 that the prices differ not only by customer, region or time period, but also that they differ "significantly". Outside the context of Article 2.4, it can be seen that when the Anti-Dumping Agreement uses the word "significant" or "significantly", it does so with the intent of conveying a meaning that is qualitative as well as, or instead of, quantitative.

17. Contrary to the ordinary meaning of the terms "pattern" and "significantly", and contrary to its own analysis in its initial implementation of the second sentence of Article 2.4.2, in the "targeted dumping" analysis applied in *Washers*, the USDOC applied its so-called "pattern test" and "gap test" as purely quantitative tests. The USDOC applied these tests mechanically, and then it analysed only the quantitative differences among those average prices; the USDOC never examined the reasons for the alleged "pattern" of "significant" price differences that it found to exist.

2. The USDOC Acted Inconsistently With the Second Sentence of Article 2.4.2 in the *Washers* Investigation by Failing to Provide an Adequate Explanation

18. It is important to note the high standard for justifying the use of a W-T comparison methodology: the second sentence requires a determination that the W-W and T-T comparison methodologies *cannot* take into account appropriately the relevant pattern of significantly different prices. In other words, the W-T comparison methodology is not permitted if there is any way in which the W-W or T-T comparison methodology can produce a dumping margin calculation in which the pattern of significantly differing prices to the purchaser (or region, or time period) in question can be taken into account appropriately.

19. In *Washers*, the USDOC made no pretence of meeting this explicit requirement of the second sentence of Article 2.4.2. After finding the existence of "targeting" through a mechanical application of its "pattern test" and "gap test", the USDOC compared the respondents' dumping margins using the W-W comparison methodology (without any zeroing) and the W-T comparison methodology (with zeroing). Because this comparison yielded what the USDOC considered to be a "material difference" or a "meaningful difference", it concluded that it must apply the

W-T comparison methodology to all sales for both respondents. These "explanations" are facially inadequate to meet the high standard that the second sentence of Article 2.4.2 imposes. Indeed, the USDOC's statements are wholly conclusory and provide no explanation at all.

3. The USDOC Acted Inconsistently with Article 2.4.2 in the *Washers* Investigation by Applying the W-T Comparison Methodology to All of the Respondents' Sales

20. The structure and language of Article 2.4.2 confirm that the limited exception set forth in the second sentence only authorizes the application of the W-T comparison methodology to those transactions determined to have met the criteria for invocation of the exception, and not to all export transactions.

21. By using the mandatory term "shall", the general rule articulated in the first sentence of Article 2.4.2 reflects a clear and strong preference for the use of either the W-W or T-T comparison methodologies in every anti-dumping investigation. In contrast, by using the term "may", the exception set forth in the second sentence of Article 2.4.2 is never mandatory. Rather, it merely provides investigating authorities with the discretion to apply the W-T comparison methodology, assuming all three conditions for invoking it have been established.

22. It naturally follows from this structure that the exception in Article 2.4.2 should be limited in application to those transactions that have justified its use, while the remainder of the export transactions at issue, which have not met those conditions, should be subject to one of the two symmetrical methodologies that otherwise would apply to all export transactions under the general rule established by the first sentence of Article 2.4.2. Indeed, a contrary interpretation would be tantamount to granting investigating authorities unbridled discretion that could lead to the exception swallowing the rule.

C. The Repetition of These Same Three Errors in Subsequent Connected Stages of the *Washers* Investigation Is Ongoing Conduct that Is Inconsistent with Article 2.4.2 of the Anti-Dumping Agreement

23. The USDOC continues to commit the same three errors identified above in the application of its so-called "differential pricing" methodology. The Appellate Body has established that Members may challenge, as ongoing conduct, the repetition of the same WTO-inconsistent behaviour in successive determinations by which duties are calculated and maintained over time. Although the original anti-dumping determination in the Washers investigation was based on the USDOC's application of its *Nails II* test, the USDOC's application of its differential pricing methodology in subsequent connected stages of the Washers proceedings will result in a repetition of the same three errors. Accordingly, Korea challenges as ongoing conduct the repetition of the same three errors described above in subsequent connected stages of the *Washers* proceedings. Any such repetition of these errors by the USDOC will be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement for the same reasons as set forth above.

D. The Differential Pricing Methodology Is Inconsistent, As Such, with the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement

1. The Differential Pricing Methodology Is a Rule or Norm of General and Prospective Application

24. The differential pricing methodology is not only a measure challengeable in WTO dispute settlement "as applied" or as "ongoing conduct", but also a measure that can be challenged "as such", because the differential pricing methodology is a rule or norm of general and prospective application. The differential pricing methodology is expressed in several determinations in written form. Furthermore, the USDOC made public the SAS Code for the differential pricing methodology and even requested public comments on it. These developments in written form clearly show that the differential pricing methodology is a rule or norm of general and prospective application. Even if these developments are considered not to be expressed in the form of a written document, the differential pricing methodology is a rule or norm of general and prospective application that can be challenged "as such".

2. The Differential Pricing Methodology Enshrines the Same Unlawful Interpretations of Article 2.4.2 as the USDOC Applied in the *Washers* Investigation

25. The differential pricing methodology relies solely on quantitative criteria to determine whether there exists a pattern of export prices which differ significantly by purchaser, region or time period. By refusing even to consider respondents' proffered reasons for the observed price differences, and by relying exclusively on a mathematical analysis, the USDOC policy of invoking the second sentence of Article 2.4.2 under the differential pricing methodology without properly determining whether the mathematical differences in prices constitute a "pattern" of prices that differ "significantly" is inconsistent "as such" with Article 2.4.2 of the Anti-Dumping Agreement.

26. The USDOC employs the differential pricing methodology without providing an adequate explanation. As was true in *Washers*, the "explanation" that the USDOC provides under the differential pricing methodology as to why the pattern of significant price differences "cannot be taken into account appropriately" by the use of either the W-W or T-T comparison methodologies is facially inadequate. Under the differential pricing methodology, if a sufficient number of sales pass the numerical thresholds including the "Cohen's *d* test" and "ratio test", the USDOC concludes without any further analysis or explanation that the W-W comparison methodology cannot take into account the observed pattern of significantly different prices whenever the respondent's dumping margin using the W-W comparison methodology (without zeroing) and the W-T comparison methodology (with zeroing) yields what the USDOC considers to be a "meaningful difference".

27. The differential pricing methodology, like the methodology applied in *Washers*, also leads the USDOC to apply the exceptional W-T comparison methodology to sales that do not meet the criteria for invoking the exception. Unlike the *Nails II* test applied in *Washers*, however, which had no threshold, the USDOC now applies the exception to all U.S. sales in any instance where more than 66 percent of the U.S. sales have been found to constitute a pattern of prices that differ significantly by purchaser, region or time period under the Cohen's *d* test.

3. The Differential Pricing Methodology Does Not Identify "a Pattern of Export Prices Which Differ Significantly Among Different Purchasers, Regions or Time Periods"

28. The differential pricing methodology does nothing more than measure the amount of price variation that can be found within an exporter's sales. An amount of price variation, however measured, does not serve to reveal "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The differential pricing methodology does not identify patterns of significant price differences that might exist among different purchasers, regions or time periods. In fact, notwithstanding its name, the differential pricing methodology bears essentially no relationship to any concept of "patterns" of export prices which "differ" among "different" purchasers, regions, or time periods. Instead, it aggregates random, unrelated price differences of every possible type and combination, and simply asserts that the accumulated price variation constitutes a "pattern".

29. For example, the ordinary meaning of the second sentence indicates that a "pattern of prices which differ significantly" may arise among different purchasers, among different regions, or among different time periods. It may not arise among *combinations* of purchasers, regions or time periods. Such "cross-category" combinations bear no relationship whatsoever to the requirement of a "pattern" of export prices which "differ significantly" among "different" purchasers, regions or time periods.

4. The "Systemic Disregarding" in the Differential Pricing Methodology Is Inconsistent with the Anti-Dumping Agreement

30. The use of "systemic disregarding" in the result of the W-W comparison, where the USDOC "set total dumping margin to zero" in the W-W comparison subset if the absolute value of the sum of the negative dumping margin is larger than the sum of the positive dumping margin, is also inconsistent with the Anti-Dumping Agreement and the GATT 1994. As opposed to the "fair comparison" obligation under Article 2.4 of Anti-Dumping Agreement, this "systemic disregarding",

similar to the original zeroing, unlawfully inflates the dumping margin and makes a positive determination more likely, by ignoring the negative dumping margins. This "systemic disregarding" method also contravenes the "product as a whole" concept of dumping margins. Furthermore, this unreasonable inflation through the "systemic disregarding" runs afoul of the object and purpose of the second sentence of Article 2.4.2.

VI. THE USDOC'S FINAL SUBSIDY DETERMINATION FOR SAMSUNG IS INCONSISTENT WITH THE SCM AGREEMENT AND WITH ARTICLE VI:3 OF THE GATT 1994

31. As with its erroneous determination in the parallel anti-dumping investigation of *Washers,* the USDOC also misinterpreted and misapplied the relevant provisions of the SCM Agreement. The USDOC not only misunderstood the Korean Government's legitimate policy tools, but also misconstrued the relevant provisions of SCM Agreement. Overall, the USDOC disregarded relevant factors that are essential to determine the existence of a countervailable subsidy, as well as the proper calculation of countervailing duty margins.

A. The USDOC's Finding that Samsung Received a "Disproportionately Large Amount" of the Total Benefit that the Government of Korea Provided under RSTA Article 10(1)(3) Is Inconsistent with Articles 1.2 and 2.1(c) of the SCM Agreement

32. RSTA Article 10(1)(3) provides that a Korean company can earn – and Samsung received – a tax credit equal to 40 percent of the amount by which its R&D expenditures during the tax year exceeded the average of its R&D expenditures in the four previous years. While Samsung claimed on its 2011 tax return a larger amount of the tax credit than the average amount claimed by other Korean companies, the amount of the credit that Samsung earned for that year was automatically determined by using one of the two statutory formulas available to all Korean companies to determine their Article 10(1)(3) tax credits.

33. Nonetheless, the USDOC found that the tax credit that Samsung claimed on its 2011 tax return under RSTA Article 10(1)(3) was specific to Samsung. In this process, the USDOC relied exclusively on the third of four factors that Article 2.1(c) enumerates as possible bases for a finding of *de facto* specificity – namely, "the granting of disproportionately large amounts of subsidy to certain enterprises." This determination was based solely on the fact that the tax credit claimed by Samsung on its 2011 tax return constituted a larger percentage of the total RSTA Article 10(1)(3) credit than the average credit claimed by each other Korean company.

34. As was made clear by the Appellate Body in previous disputes, Article 2.1(c) requires an inquiry as to "whether a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure." Here, the USDOC made no such inquiry into whether the amount of tax credits received by Samsung differed from the allocation "that would be expected to result if the subsidy were administered in accordance with the conditions for eligibility for that subsidy."

35. Indeed, there was never any issue as to whether "the conditions for eligibility" under RSTA Article 10(1)(3) were properly applied to Samsung. To the contrary, the record shows – and the USDOC has never contested – that Samsung calculated the amount of its tax credit for tax year 2010 in the manner required by the methodology and criteria of RSTA Article 10(1)(3).

36. The USDOC had no evidence of a difference between the tax year 2010 credit amount that Samsung calculated and the amount that "would be [calculated] if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b)." This constitutes a clear violation of the United States' obligations under the SCM Agreement.

37. The evidence on the record shows that Samsung received a "proportionate" amount of the tax credit because it determined the amount of the credit that it earned using the same calculation formula available to all other Korean companies. The fact that its credit, in an absolute sense, was larger in amount than the average credit amount received by all other Korean companies did not

render it disproportionate in light of the much larger investments that it made that generated its credit.

38. The USDOC's determination is further invalidated by the USDOC's failure to address the two mandatory factors in the third sentence of Article 2.1(c).

B. The USDOC's Finding that Samsung Failed To "Tie" the Tax Credits that It Received under RSTA Articles 10(1)(3) and 26 to Subject and Non-Subject Merchandise Is Inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement

39. Despite the requirement of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement that countervailing duties be limited to the amount of subsidies provided on the production and sale of LRW, the USDOC improperly attributed a significant portion of the tax credits that Samsung received on products other than LRW to LRW. The proper calculation of Samsung's subsidy margins for both the Article 10(1)(3) and Article 26 tax credits should have used Samsung's tax credit received on digital appliances, including LRW, for the numerator and Samsung's sales of digital appliances, including LRW, as the denominator, in order to calculate the margin for the product under investigation.

40. The USDOC, however, calculated Samsung's subsidy margin based on the company's sales of all products and on tax credits bestowed on all of Samsung's products. The USDOC's margin calculation, therefore, relied overwhelmingly on credits earned by Samsung for eligible expenditures that benefitted the production and sale of products other than digital appliances, including LRW. The result was a dramatic inflation of the subsidy margins.

41. The USDOC's stated reason for refusing to receive, let alone examine or verify, Samsung's data and documentation showing that only a tiny portion of its total Article 10(1)(3) and Article 26 tax credits were earned and claimed on the production of digital appliances, including LRW, was its rule that it would allocate a subsidy to one or more specific products only upon a showing that the subsidy was "tied" to the production or sale of such products. The USDOC's use of a "tying" requirement is simply impermissible where, as here, data and documentation are submitted to demonstrate that the subsidy in fact benefited the production or sale of a particular product or category of products.

42. The evidence on the record shows that the USDOC had at its disposal information that would have enabled it to determine the amount of tax credit that benefited the production and sale of the merchandise subject to the investigation. Its refusal to consider that information, and to use it to calculate the proper numerator and denominator in determining Samsung's subsidy margin, constitutes a clear violation of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

C. The USDOC's Finding that the Tax Credits that Samsung Received Under RSTA Article 10(1)(3) Benefited Only the Products that It Produced and Sold in Korea Is Inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement

43. In its final determination in the *Washers* investigation, the USDOC, reversed its previous rulings and determined for the first time that the alleged subsidy benefitted only Samsung's domestic production. This reasoning of the USDOC, however, simply misconstrues the nature of the Article 10(1)(3) tax credits.

44. The core issue is whether the benefit of in-Korea R&D activity accrues to the company's worldwide production and sales. In the case of R&D activity, the resulting benefit is not limited to the location where the R&D is conducted. Rather, the results of R&D will normally benefit all operations of the company, wherever located, as Samsung demonstrated to the USDOC. The USDOC's reference to an absence of any "application and/or approval documents" does not fit the facts of the Article 10(1)(3) process.

45. The USDOC's limitation of the denominator to Korean sales was impermissible because: (a) it was based on a presumption not authorized by the SCM Agreement; (b) the USDOC failed to

make an objective assessment of this issue based on positive evidence; (c) the reasons given by the USDOC are demonstrably inaccurate and thus fail the requirement of an adequate explanation of its determination; and (d) to the extent that the USDOC relied on its presumption, that presumption was fully rebutted by Samsung, both by showing that the results of its R&D (which gave rise to the tax credit) in fact benefited its worldwide sales and production and by showing that the USDOC had previously analysed this identical issue on two separate occasions and had determined on each occasion that the Article 10(1)(3) tax credits benefitted Samsung's worldwide sales and production.

46. The determination of the USDOC on this issue, therefore, constitutes a clear violation of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

D. The Tax Credits that Samsung Received Under RSTA Article 26 Do Not Constitute Specific Subsidies within the Meaning of Article 2 of the SCM Agreement

47. The USDOC's determination that the tax credits were specific to a geographical region is erroneous and inconsistent with the United States' obligations under Article 2 of the SCM Agreement. In all respects, RSTA Article 26 is a legitimate policy tool pursued by the Korean government, as essentially a zoning measure, to address the particular social problems associated with the overconcentration of growth in the Seoul metropolitan area. RSTA Article 26 does not in any way attempt to distort trade.

48. The RSTA Article 26 eligibility criteria are fully consistent with the principles of non-specificity in Article 2.1(b) of the SCM Agreement. The eligibility criteria are neutral, and do not favour some enterprises over others. The criteria are clearly spelled out and are objective. The amount of the subsidy is also objectively calculated. Eligibility is automatic, and there is strict adherence to the eligibility criteria. As the operation of RSTA Article 26 fully meets the requirements of Article 2.1(b) of the SCM Agreement, the tax credits are not specific.

49. Furthermore, the tax credits provided in Article 26 are not "limited to certain enterprises located within a designated geographical region", either by the terms of Article 26, or in its application. Rather, the credits are generally available to any enterprise that meets the qualifications of that Article, without regard to where the enterprise is located. An enterprise located anywhere in Korea, including within the "overcrowding control region" of the Seoul Metropolitan Area, is entitled to the tax credit for any qualifying investment made by that enterprise anywhere else in Korea.

50. Even if the USDOC had determined that RSTA Article 26 imposes limitations on eligibility based on the enterprise's location in a designated geographical region, the determination of regional specificity in this case fails under Article 2.2.The RSTA Article 26 tax credits are generally available to all enterprises in that geographical region and, therefore, are not limited to "certain enterprises". It is particularly inappropriate to define a "designated geographical region" that constitutes 98% of a Member's total territory. This constitutes no identifiable demarcation between the "designated geographical region" and the broader jurisdiction of the granting authority.

51. Therefore, the tax credits provided under Article 26 are not specific under the principles of Articles 2.1(a) and 2.1(b) of the SCM Agreement and do not constitute subsidies limited to certain enterprises located within a designated geographical region within the meaning of Article 2.2 of the SCM Agreement. The USDOC determination to the contrary constitutes violation of these provisions of the SCM Agreement.

E. The Imposition and Maintenance of Countervailing Duties on Imports of Washers Produced by Samsung Are Inconsistent With Articles 10 and 32.1 of the SCM Agreement

52. The USDOC's imposition of countervailing duties on Samsung is also inconsistent with Article 10 of the SCM Agreement. Moreover, the imposition of countervailing duties on Samsung also violates Article 32.1 of the SCM Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF KOREA

I. USDOC'S WTO INCONSISTENT "ZEROING" METHODOLOGY

A. Past Appellate Body Reports Apply Equally In This Case

1. Korea submits that the nine prior AB reports addressing the USDOC's zeroing methodology, properly understood, are largely dispositive of the question of whether zeroing is permitted in any context of any anti-dumping proceeding, regardless of the particular price comparison methodology. Although the Appellate Body may not have ruled on the specific scenario of the application of the second sentence yet, the logic of the prior AB rulings – that "dumping" margins must reflect the product as a whole, and must reflect all of the exporter's prices whether or not they are below normal value – applies with equal force under the second sentence. Indeed, the Appellate Body has also explicitly rejected the contention that zeroing is permissible under the W-T comparison methodology.

2. The USDOC's zeroing methodology has nothing to do with choosing a comparison methodology; rather, the USDOC's zeroing methodology is employed as the very last step of calculating the overall dumping margin. The second sentence says nothing about calculating the ultimate dumping margin, and therefore cannot justify the zeroing methodology.

3. Although the United States argues that the second sentence is an exception, this provision's character as an exception does not justify the use of zeroing. There is simply no authority in the Anti-Dumping Agreement or the AB rulings to support the U.S. argument that an "exception" allows the use of zeroing. The second sentence allows the use of the W-T comparison method, and says nothing about zeroing. Everything about the second sentence – indeed, everything about Article 2.4 as a whole, including Article 2.4.2 – deals exclusively with the intermediate comparison stage of calculating a dumping margin.

B. There Is No "Mathematical Equivalence"

4. The Appellate Body has already rejected the mathematical equivalence argument *twice*, for the reason of the logical flaw in the U.S. argument – the reliance on assumptions that create the equivalent results. If one simply changes those assumptions made by the United States, the equivalence collapses and the two comparison methods yield different results. The U.S. assertion that the W-W and W-T comparison methods will always yield identical results is therefore simply not factually correct.

5. In further support of these prior AB findings, Korea has provided an expert affidavit by Professor Thomas J. Prusa, provided as exhibit KOR-93. His affidavit explains why the alleged mathematical equivalence is completely a construct of the narrow U.S. view about how to calculate dumping margins under the exceptional method. Importantly, Professor Prusa *also* specifically disproves the U.S. argument that mathematical equivalence can be seen in the specific facts of the *Washers* original investigation. Korea has therefore established conclusively that, as a factual matter, there is no mathematical equivalence.

6. Korea has also demonstrated how and why the U.S. legal argument to justify zeroing fails. The U.S. legal argument of the need to "unmask" rests on several false premises. First, the U.S. argument implicitly assumes the second sentence is about obtaining higher dumping margins. That assumption is simply wrong. The zeroing methodology as employed by the USDOC does not contribute to "unmasking" targeted dumping, because zeroing is not used to determine whether there is a "pattern of prices which differ significantly." Next, the U.S. argument assumes that without zeroing, the W-T comparison has no purpose. Again, this assumption is simply wrong because there is no mathematical equivalence and because the USDOC assumes the only purpose of a W-T comparison is to focus on how the "individual export transactions" are aggregated into a single dumping margin. To the contrary, there are other reasons the authority would use the

W-T comparison to allow more careful consideration of the export prices that differ significantly. Once the authority is considering individual export transactions, a different form of weighted average normal value might well make sense. For example, the authority might switch from an annual average normal value to a monthly average normal value.

7. Finally, the U.S. argument that Article 2.4.2 requires an investigating authority to adopt identical basis for calculating normal value between W-W and W-T is simply wrong. Article 2.4.2 does not tie the hands of the investigating authority in the manner suggested by the United States. There are legitimate reasons why an investigating authority might wish to change its approach to normal value.

8. As importantly, the Appellate Body has effectively already rejected the U.S. argument that the W-W and the W-T comparison methodology have to utilize the exact same normal value. Indeed, when offered the explicit chance to rule that the calculation of normal value was required to be the same under W-W and W-T (when applying the second sentence), the Appellate Body declined to do so in two different cases.

C. There Is No Need To Turn To Negotiating History

9. The U.S. argument that the negotiating history supports the use of zeroing when implementing the second sentence should also be rejected. First, because the terms of Article 2.4.2 are unambiguous, resort to negotiating history is not needed. Second, although the United States asserts that this provision is a "compromise," the United States has not provided any evidence that the second sentence was adopted as a compromise. Indeed, the real compromise was to put the term "fair comparison" into the Anti-Dumping Agreement, not "zeroing." If the drafters of the Anti-Dumping Agreement had intended to allow the use of zeroing in the second sentence, they would have included the term in the text or more clearly expressed this wish. The U.S. FWS suggests that, during the negotiations, Japan supported the concept of zeroing when implementing the second sentence. Japan flatly rejects the notion that Japan supported the use of zeroing in the implementation of the second sentence. The same can be said of Hong Kong's position.

II. USDOC'S WTO-INCONSISTENT USE OF ARTICLE 2.4.2

A. The United States Has Misinterpreted The Pattern Clause

10. The text requires the analysis to be based on the actual "export prices" themselves. It is the "export prices" that must "differ significantly," not the averages of those export prices. There is no textual basis to disregard certain differences as "meaningless," while focusing on other differences as somehow being "meaningful." The U.S. approach creates bias in the conclusions being drawn by understating the variance.

11. The text also requires the analysis to consider the export prices "among different purchasers, regions or time periods." These three categories are each analytically distinct, and are separated by the disjunctive "or." Moreover, the purpose of these categories is not simply to accumulate differences into an undifferentiated group, but rather to identify price differences within each category that might constitute a "pattern" of such differences within that category. That "dumping" requires consideration of the product as a whole does not mean that price differences can be combined into an undifferentiated group.

12. Pursuant to the second sentence, the process to determine whether the price differences really are "significant" and actually constitute a "pattern" should be both qualitative and quantitative. The USDOC never actually tests any aspect of the prices other than their magnitude – whether they are "large" price differences, rather than whether the differences are meaningful or notable price differences. Prices do not differ "significantly" if the differences are simply the natural and completely expected reactions to normal commercial considerations. Korea is not arguing that the authority must consider the exporter's subjective intent. Rather, the issue is whether price differences are "significant" in the specific context of a particular industry and particular market situations.

13. The text also requires that the export prices that differ significantly within each category must collectively constitute "a pattern." The frequency of export prices that "differ" is the starting point but not the ending point of a proper analysis of "pattern." There have to be enough prices that "differ significantly" to reasonably preclude the possibility of random price differences. In this regard, the factual context, such as normal commercial conditions, does matter. A better description of what the USDOC does is to test for the number of prices that differ. Another problem is the U.S. argument that both higher and lower prices can be part of the "pattern." The United States allows a "pattern" to be any collection of differing prices that exceeds some minimal threshold based on the number of transactions.

1. Inconsistencies in the *Washers* original investigation

14. There are several problems in the *Washers* original investigation. First, the USDOC calculated standard deviations based on average export prices, not the actual "export prices" themselves. Second, the USDOC improperly found the export prices to "differ significantly" by using the average prices, which necessarily made the standard deviations smaller, arbitrarily increasing the possibility of finding a pattern. Third, the USDOC made no effort to consider the reasons for price differences, instead dismissing such arguments. Fourth, the USDOC improperly found the "pattern" to include all sales, and applied the exceptional method even to non-patterned sales.

15. To document these errors in more detail, Korea has provided an expert affidavit by Professor Prusa explaining and confirming these problems. First, the affidavit stresses that the *Nails* test is "biased towards finding evidence of targeted dumping." Second, the affidavit documents the effect of this bias. If the biased approach was corrected in the *Washers* original investigation, the USDOC could not have found the "pattern" because about 98% of the export sales had prices that did not differ significantly.

16. In addition, there is no evidence that the USDOC actually tested for a "sufficient volume" in any of its calculations in the *Washers* original investigation. The USDOC never explicitly found or explained why it deemed so few export sales to be "sufficient volume."

2. Inconsistencies in the differential pricing methodology

17. The differential pricing methodology is also inconsistent with the second sentence. First, the USDOC improperly ignores the necessary distinctions among the groups, combining them all into an undifferentiated group. Second, the USDOC improperly finds the export prices to "differ significantly," making no effort at all to consider the reasons for price differences, instead dismissing such arguments out of hand. Third, the USDOC improperly finds the "pattern" to include all sales whenever more than 66% of the transactions pass the threshold test, and therefore applies the exceptional method to all sales in that situation. Finally, the USDOC finds prices to "differ significantly" relying on a misuse of the Cohen's *d* test, without reflecting the actual distribution in the prices – that Professor Cohen himself and other scholars have warned against.

18. To be clear, although the USDOC is trying to create the illusion of statistical validity, the Cohen's *d* test simply measures and standardizes the size of a difference between two mean values. The Cohen's *d* test is not a measurement of significance. Professor Cohen himself and a generation of scholars have stressed the importance of context and avoiding "mindless rigidity" in using the Cohen's *d* test. The United States has extensively studied the market for large residential washers. There is nothing "significant" in this market – nothing that is meaningful or noteworthy – about prices that vary over time, across customers, and across regions in this particular industry. Nor is there anything significant about prices being lower during a well-known holiday season sale period.

B. The United States Has Misinterpreted the Explanation Clause

19. Merely showing the difference of the results between W-W (without zeroing) and W-T (with zeroing) does not meet the textual obligation of "explanation." The investigating authority must provide the specific reason and "explain" why it must resort to the exceptional comparison method, and why it was not possible at all to account for these differences using the normal comparison methods. The use or non-use of zeroing cannot constitute a permissible "explanation"

because even a comparison between W-W with zeroing and W-W without zeroing will produce different results, even if the sales in both groups were the same.

20. The text also specifies that the authority "cannot" use the normal comparison methods. That using the normal comparison method might be more burdensome does not matter; rather, it must not be possible to use the normal comparison methods. The authority must explain why the normal methods are not sufficient to allow "appropriate" use of those methods.

21. The term "appropriate" requires the explanation to address why in a particular case the particular price differences are such that they cannot "be taken into account appropriately" through this normal comparison method. This phrase also requires some qualitative assessment of the objective circumstances of a particular product and industry. The text of the second sentence adds the term "appropriately" because even after all the adjustments for price comparability have been made, there still might be circumstances where price differences can be taken into account "appropriately" without the need to resort to the exceptional W-T comparison method.

22. The United States also ignores the express obligation to provide an "explanation" with reference to both of the normal comparison methods. The last part of the second sentence explicitly references the use of either W-W or T-T comparisons, requiring the authority to address both methods.

1. Inconsistencies in the *Washers* original investigation

23. The United States has confirmed that its "explanation" in the *Washers* original investigation consisted entirely of its findings that the overall dumping margins differed between W-W without zeroing and W-T with zeroing. There are two problems. First, the USDOC made no effort to explain why any differences could not be taken into account "appropriately.. Rather, the USDOC assumed without any explanation that if there was a difference in the overall margin, then the difference necessarily could not be taken into account. Second, the United States also argues that the "differences resulted in a change from a determination of no dumping to an affirmative determination of dumping." These differences are really just the difference between a margin based on zeroing and a margin not based on zeroing.

2. Inconsistencies in the differential pricing methodology

24. Under its differential pricing methodology, the USDOC continues to look exclusively to the differences in the margin and considers no other factors. The USDOC applies the same 25% threshold in every case regardless of the facts and regardless of how small the change in the margin might be. Even tiny shifts in the margin will be considered meaningful if they are larger than this fixed 25% threshold. Again, the USDOC continues to ignore the requirement to address the T-T comparison method in its explanations.

C. The United States Has Misinterpreted The Scope of The Exception

25. The United States incorrectly argues that no matter how few transactions meet the conditions, the exception can apply to all transactions. First, it ignores the logical relationship between a basic rule and an exception. Second, it ignores the textual reference to "such differences." Third, the Appellate Body in *US-Zeroing (Japan)* definitely stated that the phrase "individual export transactions" refers "to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited." The U.S. interpretation ignores this key finding.

1. Inconsistencies in the *Washers* original investigation

26. There is no dispute that the USDOC applied the W-T comparison method with zeroing to all of the sales by both of the Korean respondents, despite the fact that in the final determination in the *Washers* original investigation, the USDOC confirmed that the vast majority of the transactions – more than 90% – were found not to be "targeted."

2. Inconsistencies in the differential pricing methodology

27. Under the differential pricing methodology, the USDOC also does not properly limit the application of the W-T comparison method to those transactions found to meet the conditions. In the differential pricing methodology, if more than 66% of the sales pass the Cohen's *d* test, then the USDOC subjects all sales to the W-T comparison method with zeroing. This feature is part of the measure – the differential pricing test – that is used consistently in every USDOC original investigation and administrative review.

D. The United States Improperly Engages In Systemic Disregarding

28. Under the differential pricing methodology, the USDOC often creates subsets, applying a W-W comparison without zeroing to one subset and a W-T comparison with zeroing to the other subset. The USDOC sets any such negative margins in the W-W subset equal to zero, and ignores them when determining the overall margin of dumping. This systemic disregarding necessarily inflates the overall dumping margin, contrary to the concepts of "product as a whole." This systemic disregarding of negative margins is essentially a new form of WTO-inconsistent zeroing. The generic SAS code for differential pricing shows this methodology. And, the SAS code used in the preliminary determination in the *Washers* administrative review confirms the use of this generic SAS code.

E. Korea Has Properly Challenged The Differential Pricing Methodology

29. "As Such": Korea has summarized the substantial amount of evidence already provided to this Panel to demonstrate both (1) the precise content and (2) the general and prospective application of the differential pricing methodology. The evidence of the measure's general and prospective application thus occurred between March 2013 and December 2013, and then continued throughout all of 2014 and into early 2015. The evidence continues to accumulate to this day. Nothing in the Appellate Body decisions indicates that this Panel must ignore evidence of continuing application of a measure during the pendency of a dispute. If this Panel accepts the U.S. logic that since a measure might change it cannot be challenged, the Panel would make virtually it impossible to challenge any WTO-inconsistent measure "as such" or more generally. Such an approach would limit panels to the past application of a measure, and preclude any challenge to the ongoing measure. It makes no sense to open such a "back door" to allow WTO-inconsistent measure to escape meaningful review that might prevent the occurrence of future disputes.

30. The United States confuses the key distinction between applying the same differential pricing methodology in every instance, and what remedy is applied in each particular case given the results of the application of the methodology. The best analogy is the WTO dispute over zeroing. The fact that zeroing does not always show up in the results does not mean there is no zeroing methodology that may be challenged "as such." To the contrary, zeroing was challenged and found to be inconsistent "as such" with the Anti-Dumping Agreement. The same logic applies here.

31. "Ongoing Conduct": Korea raised an "ongoing conduct" claim because Korea knew that the differential pricing methodology would be applied to the Korean exporters in the first administrative review of the anti-dumping order. Precisely as Korea anticipated, the USDOC applied the differential pricing methodology in exactly the same manner in the preliminary determination recently announced in the *Washers* administrative review in March 2015. Korea is not seeking to challenge the differential pricing methodology as a future measure that has not yet occurred. Rather, this challenge is to the well-defined and consistently applied differential pricing methodology that already exists.

32. "As Applied": Korea's point about the preliminary determination in the *Washers* administrative review being subject to challenge "as applied" simply notes that the differential pricing methodology has in fact been applied yet again. First, the application occurred in the context of the very anti-dumping order that is the subject to this dispute. Although the USDOC has not yet published its final determination, that final determination will occur during the pendency of this dispute, before the Panel has to issue any findings. Second, the differential pricing methodology was very much subject to the consultations. The United States does not claim that

the differential pricing methodology applied in the preliminary determination in the *Washers* administrative review was in any way different. Third, although it is true that the differential pricing methodology does not *yet* have the same long, drawn-out history that the zeroing methodology has had in the WTO, as the United States notes in its argument, it is precisely these long, drawn-out disputes that Korea seeks to avoid. It would be contrary to Article 3.3 of the DSU and the principle of the "prompt settlement" of disputes to avoid the issue now.

III. THE USDOC'S CVD DETERMINATION IS INCONSISTENT WITH THE GATT 1994 AND THE SCM AGREEMENT

A. The USDOC's "Disproportionately Large Amount" Analysis Is Inconsistent With Article 2.1(c) of the SCM Agreement

33. The USDOC's continuing reliance upon the fact that Samsung received 24% of the total tax credit amounts to the mere conclusion that it received both a "large" amount and a "large proportion" of the total amount. The United States contends that the mere size of Samsung's credit compared to the size of the credit received by other companies speaks for itself because the size is "significant." However, size alone cannot be the measure of disproportionality, especially where the benefit is directly proportionate to the amount of the eligible investment.

34. The United States refuses to say what a "proportionate" amount would have been or what would have been expected under all the circumstances, which is a strong indication of the fundamental infirmity in its position. The United States also fails to explain why the USDOC would have expected the tax credits to be distributed "more evenly across the program's 11,764 recipients." In this regard, it wrongly equates an expected distribution with a more level distribution among all recipients.

35. In *U.S. – Large Civil Aircraft (2nd complaint)*, the United States contended that it was not possible to determine whether a subsidy was larger than it should be without first determining the relationship of the relative size of the subsidy compared to the total subsidy awarded to other recipients, i.e., the "first ratio," to some other measure of relative importance or significance. This relational concept requires use of a "second ratio." The United States stated that, "the numerator of the second ratio must consist of some information about Boeing, such as its size as measured by annual revenue, while the denominator must consist of comparable information about the group of recipients of the alleged subsidy as a whole."

36. The United States in *EC and certain member States – Large Civil Aircraft* continued to maintain its position that disproportionality could only be measured by use of a second ratio. The Appellate Body agreed with the United States that disproportionality could only be evaluated using a second ratio. Although, the Appellate Body rejected the second ratio that the United States proposed, the Appellate Body insisted on the need for an appropriate ratio before it could find that a subsidy was not disproportionately large. However, the USDOC failed to provide in the *Washers* case the type of evidence that both the Appellate Body and a Panel have found is essential in order to evaluate the issue of disproportionality.

37. The United States next contends that Korea has incorrectly asserted that RSTA Article 10(1)(3) provides tax credit benefits pursuant to a common formula. However, the United States impermissibly conflates the formula that a company uses to calculate the tax credit that it earns in a particular year with the amount that a company may claim on its tax return. The latter amount may be affected by tax planning considerations, including the effects of carry forward provisions and minimum tax requirements. However, these unrelated tax law provisions do not affect the amount of the Article 10(1)(3) tax credit that a company earns in a particular year, which is calculated using a formula that is common to all taxpayers. Moreover, there is no evidence that Korea designed or enacted this program to benefit large companies generally or Samsung specifically. Rather, Article 10(1)(3) benefits every company in the same way that invests in R&D activities, regardless of its size.

38. A WTO Panel found that the requirement in the final sentence of Article 2.1(c) is not dependent upon whether an interested party raised the relevance of the two factors - "length of time" and "diversification." Moreover, there is no question that Samsung raised the "length of

time" and "diversification" issues, but the USDOC failed to respond to them in its I&D Memorandum or in any other document, as required by WTO jurisprudence.

39. The United States' reliance on the findings in its redetermination upon remand from the U.S. Court of International Trade must also fail because, inter alia, the amount that a particular company claims on its tax return as a credit under Article 10(1)(3) is, in significant part, a function of tax planning. In fact, the percentage amount of the tax reduction that Samsung derived from Article 10(1)(3) is integrally related to the amount of tax credits that it earned and claimed on a wide variety of unrelated programs.

B. The USDOC Was Able To Tie Samsung's Tax Credits To Washer Production

40. The fatal flaw in the USDOC's calculation of the countervailing duties attributable to the tax credit benefits that Samsung received under Article 10(1)(3) and Article 26 is that it calculated the tax credit benefit that Samsung received on all of the products that it produced, not just the large residential washers that it produced, and then allocated a pro rata portion of that benefit to washers. As a result, the USDOC violated Article VI:3 and Article 19.4 by not calculating the tax credit that Samsung earned that was attributable solely to the washers that it produced in its Digital Appliance Division. Had the USDOC complied with its WTO obligations, it would have determined that the tax credits that Samsung received on its production of washers provided a *de minimis* benefit of less than 1% *ad valorem*.

41. Thus, the USDOC made no effort "to ascertain the precise amount of subsidy attributable to the imported products under investigation" as required by the Appellate Body. Nor did it "take all necessary steps to ensure" that the countervailing duty did not exceed the amount of the benefit that the tax credit conferred on Samsung's washers. Nor did it "actively seek out pertinent information."

42. The USDOC instead chose to remain passive based on an irrebuttable presumption that the tax credits could not be tied to a particular product category unless the intended uses of the tax credits "were known to the subsidy giver (in this case, the GOK) and so acknowledged prior to or concurrent with the bestowal of the subsidy." Under Korea's tax credit laws, it was impossible for Samsung to satisfy this requirement, which made the USDOC's presumption irrebuttable. This is because the government of Korea chose not to require taxpayers to identify in their tax returns the amount of any particular expenditure that pertained to any particular product. However, the Appellate Body in *US – Countervailing Measures on Certain EC Products* has stated that an irrebuttable presumption may not be used in an investigation.

43. The very same types of records that the USDOC relied upon in the *Refrigerators* and *Washers* anti-dumping investigations formed the basis for Samsung's calculation of the eligible expenditures that entitled it to claim tax credits under Articles 10(1)(1), 10(1)(2) and 10(1)(3). It is clear from these records that Samsung could tie its eligible expenditures directly to the Digital Appliance Division.

44. Even if the USDOC's requirement does not constitute an impermissible and irrebuttable presumption, ample evidence shows the WTO-inconsistency of the USDOC's refusal to allow Samsung to demonstrate that it could tie its Article 10(1)(3) and Article 26 tax credits to the eligible expenditures made by its Digital Appliance Division. First, on the date that Samsung filed its tax return for tax year 2010, Korea's National Tax Service had the legal ability to know exactly which tax credits were earned on those investments made by Samsung's Digital Appliance Division. There is no dispute that Samsung maintained these records, which the USDOC refused to examine when Samsung presented them at the verification of its questionnaire responses. There is also no dispute that the Korean tax authorities could have examined these records at any time, either before or after Samsung filed its tax return. Second, the United States cannot articulate what purpose would have been served by requiring Samsung to submit these records to the Korean tax authorities, or a summary of them, at the same time as it filed its tax return. Third, when Samsung did submit evidence of its "tying" of expenditures under Articles 10(1)(1) and 10(1)(2), which showed that the expenditures were made on R&D activities other than those related to washers, the USDOC refused to examine that evidence.

45. The United States nevertheless asserts that the SCM Agreement does not require it to "trace which portions of the total subsidies were related to underlying expenditures in Samsung's Digital Appliance business unit." However, the USDOC's analysts in fact had traced R&D expenditures on digital appliance products to the books and records of the Digital Appliance Division on two separate occasions. Accordingly, all of these circumstances meant that the USDOC could not ignore the evidence Samsung provided and offered to provide, which allowed the tying that Article VI:3 and Article 19.4 require.

C. The Calculation of the Denominator Should Include The Sales Value Of Global Production, Not Just Production In Korea

46. In its countervailing duty investigation in the *Refrigerators* case, the USDOC used Samsung's global sales value, not the value of its sales within Korea, in order to calculate the *ad valorem* benefit of the Article 10(1)(3) tax credit. In contrast, in the *Washers* investigation, the USDOC reversed its position and found, without any factual basis, that the very same types of R&D investments and resulting tax credits benefited only Samsung's local production and sales.

47. The United States' claim that "Korea offers no evidence of these supposed overseas effects" is contradicted by the USDOC's own findings in the *Refrigerators* subsidy investigation, where the USDOC found that R&D activities had effects on overseas production both with respect to R&D tax credit programs and R&D grant programs. The United States should not be allowed to escape the consequences of its own inconsistent findings.

48. The United States contends that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "do not require Members to take into account products manufactured outside the territory of a subsidizing Member when calculating subsidy rates." This assertion is simply wrong because it violates the matching principle and, for this reason, the United States is unable to identify any investigation or administrative review in which the USDOC has held that the benefits of a countervailable subsidy may never benefit overseas production. Moreover, if the United States' position were correct, then the denominator that it would use to calculate the subsidy margin for any particular program could never be a company's worldwide sales of its global production. However, as noted above, in the *Refrigerators* subsidy investigation, the USDOC used Samsung's global sales, not its local sales, on numerous occasions.

49. The United States argued in its FWS that it would have been too burdensome for the USDOC to trace the effects of R&D subsidies. This argument is contradicted by the USDOC's use in the *Refrigerators* subsidy investigation of the global sales denominator, as well as by the USDOC's findings in both the *Washers* and *Refrigerators* anti-dumping investigations that the R&D activities that Samsung conducted in Korea benefited worldwide production and sales.

D. The Tax Credits That Samsung Received Under RSTA Article 26 Do Not Constitute Specific Subsidies Within The Meaning Of Article 2.2 Of The SCM Agreement

1. It is without dispute that RSTA Article 26 does not impose limitations on the location of the enterprises receiving the subsidies

50. RSTA Article 26 subsidies are available to enterprises located anywhere in Korea. The provisions of Article 26 and the Enforcement Decree do not specify, either *de jure* or *de facto*, any limitations on the location of the enterprises receiving the subsidy. The enterprises earning the tax credits may be located anywhere in Korea.

2. The United States seeks to improperly expand the scope of Article 2.2 of the SCM Agreement

51. Article 2.2 of the SCM Agreement is not intended to be a broad "catch all," as the United States would have it, but rather, is narrowly concerned with geographical limitations on the location of the enterprises that are eligible to receive the subsidy. Other types of limitations are addressed by Article 2.1, which covers a different range of circumstances that could lead to a finding of specificity. Article 2.2 is very precise in defining the type of limitations that it addresses. Unlike Article 2.1 which broadly addresses limitations on the enterprises receiving the subsidy,

Article 2.2 is specifically and exclusively concerned with limitations on the location of the enterprises. Article 2.2 is further narrowed by specifying that the limitations must be related to the geographical location of the enterprises.

52. The Appellate Body interpreted the term "enterprise" to mean "[a] business firm, a company." The United States appears to rely on the compound term, "certain enterprises," and the definition of this term provided in the chapeau of Article 2.1. However, the fact that the drafters expressly referred to aggregate forms of enterprises in the definition of "certain enterprises" but did not refer to sub-divisions of such enterprises, strongly suggests that they did not intend the term to be expansive, as argued by the United States. In addition, Article 6.1(c) indicates that the term "enterprise" refers to a business organization that maintains its own accounting and reports its own operating profits and losses. Such description would not be fitting for facilities or investments. Moreover, paragraph (e) of the Illustrative List of Export Subsidies refers to the "exemption, remission or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises." The use of the term "enterprise" in this context also denotes an operating business organization. Indeed, this paragraph indicates that an enterprise is an entity capable of directly paying taxes and social welfare charges.

53. Importantly, the SCM Agreement draws an express distinction between "enterprises" and "facilities." Article 8.2(c) is specifically addressed to "assistance to promote adaptation of existing facilities to new environmental requirements." The drafters, therefore, used the term "facilities" when they intended to refer to particular operations or manufacturing plants that belonged to an enterprise. Article XVII of the GATT 1994 also uses the term "enterprise" to refer to the broader business organizations maintained or established by States. The reference is to the overall business organization and not to particular operations or investments of such enterprise.

3. The United States fails to demonstrate that RSTA Article 26 "designates" a geographical region where enterprises receiving the subsidy must be located

54. RSTA Article 26 does not designate or affirmatively identify a geographical region within the jurisdiction of the granting authority. To the extent that Article 26 designates any geographical region, it designated the region where investments will not be granted a subsidy.

55. Even if it were possible to designate the geographical region by implication -- a conclusion that is difficult to reconcile with the ordinary meaning of "designate" -- no such geographical region is designated by Article 26. The area outside the overcrowding control region of the Seoul Metropolitan Area constitutes 98% of Korea's land mass. The area essentially overlaps with the jurisdiction of the granting authority. It has no physical or natural features, or character, that distinguishes it as a "geographical region."

56. Korea is not putting forward a "size" defense as the United States inaccurately describes it. Rather, Korea's point is that, where there is no identifiable demarcation between the area in which a subsidy may be used and the broader jurisdiction of the granting authority, and where the degree of overlap between the two is almost total, there is effectively no limitation as to the geographical location of the enterprises.

4. The United States does not adequately respond to the policy concerns raised by Korea

57. Under the U.S. interpretation, subsidies provided for any investment made anywhere in the vast majority of a country's territory would be considered to be regionally specific. The U.S. position is too extreme, runs completely counter to the concept of "specificity," and yields outcomes that could not have been intended by the drafters of the SCM Agreement.

58. RSTA Article 26 is essentially a zoning regulation, and any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy. The U.S. approach to Article 2.2 would constrain WTO Members from pursuing policies to relieve over-congestion and income disparity in large urban areas, a problem that is common to most developing, and some developed, countries. Such limitations could not have been

intended by the drafters and would have a "chilling effect" on what are sensible and increasingly necessary policies given the growing number of megacities.

59. The circumvention concerns raised by the United States are also unjustified. Where a program allows investments essentially throughout the complete jurisdiction of the granting authority, there is effectively no limitation on the recipients of the subsidy. A further safeguard against circumvention is that eligibility under such programs would have to be subject to objective criteria, like RSTA Article 26. Any express limitations that do not meet the requirements of Article 2.1(b) of the SCM Agreement could give rise to a finding of *de jure* specificity under Article 2.1(a). Similarly, any indication that a program is *de facto* specific could be examined under Article 2.1(c). Accordingly, the circumvention concerns alluded to by the United States do not arise.

5. The U.S. position is internally inconsistent

60. The United States has argued that Article 2.2 does not require that the subsidy be limited to a subset of enterprises located with the designated geographical area. In its FWS, the United States simply chose to ignore the term "certain" from Article 2.2, as well as the definition of "certain enterprises" in the chapeau of Article 2.1, and instead argued that the subsidy that is available to all enterprises within a designated geographical region is nonetheless specific.

61. Yet, in responding to the Panel's questions, the United States relies heavily on "certain enterprises" in Article 2.1 and applies it to Article 2.2. The chapeau of Article 2.1 defines the term "certain enterprises" as "an enterprise or industry or group of enterprises or industries." As defined in Article 2.1, the term "certain enterprises" necessarily refers to a subset of enterprises. Otherwise, subsidies provided to all enterprises would be specific under Article 2.1(a).

62. Thus, if the United States relies on the definition of "certain enterprises" in Article 2.1 to interpret Article 2.2, then it must accept the full implications that flow from the application of that definition. In particular, the United States must accept that transposing the definition of "certain enterprises" from Article 2.1 to Article 2.2 necessarily means that only subsidies that are limited to a subset of enterprises located within a designated geographical region are specific for purposes of Article 2.2.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

1. The U.S. Department of Commerce ("DOC") has been using its new targeted dumping methodologies to circumvent WTO rulings that prohibit the zeroing methodology for all purposes. The DOC also applied the SCM Agreement arbitrarily and misunderstood the Korean government's legitimate policy tools.

2. The issues of zeroing and targeted dumping are closely related, but distinct issues. The U.S. has tried to blur these two issues, by arguing that since the second sentence of Article 2.4.2 of the Anti-Dumping Agreement ("the second sentence") is an exception, the use of zeroing is somehow the inevitable and exclusive remedy for targeted dumping. The U.S. has basically two arguments. First, the Appellate Body ("AB") has never before ruled on the application of W-T pursuant to the second sentence. Second, because of mathematical equivalence, the second sentence must allow zeroing.

3. Although the AB may not have ruled on this specific scenario yet, the logic of prior AB rulings – that "dumping margins" must reflect the product as a whole, and must reflect all of the exporter's prices, both dumped and non-dumped, applies with equal force to the second sentence. The use of zeroing in the context of targeted dumping ignores the same basic principles the AB has repeatedly applied to find zeroing WTO-inconsistent in all other contexts. The U.S. has provided no explanation of how the need to "unmask" allegedly targeted dumping in any way changes these basic principles.

4. The basic mechanism of zeroing is the same in all three comparison methods – W-W, T-T, and W-T – and thus, zeroing under all three of these comparison methods has been found to be WTO-inconsistent. There is no basis in the text of Article 2.4 or the AB interpretation of that provision to support the "exception" argument by the U.S. government.

5. The U.S. argues that W-T is an exception to W-W and T-T, and therefore, by logical extension, W-T should "lead to results that are systemically different." This argument seriously misconstrues the AB's findings. The AB has never said that the results of the symmetrical comparison methods (W-W and T-T) and the unsymmetrical comparison method (W-T) have to be different. Rather, the AB was merely addressing the logic of certain interpretative arguments made by the parties in those earlier disputes.

6. The U.S. further argues that without systemically different results, the second sentence cannot unmask targeted dumping and would thus be inutile. W-T is a different method, but that does not mean the outcome must be different. The outcome may or may not be different, depending on the facts and assumptions used. Also, the fact that W-T is a different method does not mean that the method necessarily needs to include the use of zeroing. The comparison methods employed in both T-T and W-T are basically identical in the sense that individual export prices are compared in both methods. Thus, if the use of zeroing is prohibited in the T-T comparison method that focuses on individual export prices, the use of zeroing in the W-T comparison method that also focuses on individual export prices must be prohibited as well.

7. Although the U.S. devotes much of its argument to mathematical equivalence, this argument has repeatedly been rejected by the AB. The U.S. makes specific assumptions that yield equivalence. But if one simply changes those assumptions, the equivalence collapses and the two comparison methods yield different results. Korea provides two expert opinions and actual examples from the *Washers* investigation that support the AB's findings.

8. Professor Thomas J. Prusa explains why the alleged mathematical equivalence is based wholly on assumptions the U.S. makes about how to apply the second sentence. He then gives several examples of alternative methods that do not yield equivalent AD margins. He also disproves the U.S. argument of equivalence in the specific facts of the *Washers* investigation. Professor Prusa and Ms. Anya Naschak show, using actual *Washers* price data, that once U.S. assumptions on calculating margins under different scenarios are changed, the equivalence disappears. The results confirm that under the same set of assumptions that the DOC consistently

uses in its standard administrative review methodology, the margins in the *Washers* investigations were different under the two comparison methods.

9. Even if the two comparison methods led to the same margin, the second sentence still does not become inutile. The exception in the second sentence allowing use of the "prices of individual export transactions" can also be given meaning through more detailed adjustments to ensure price comparability pursuant to the overarching obligation of "fair comparison" under Article 2.4.

10. The U.S. argues that the past AB decisions do not apply to this dispute, mainly because the DOC had never applied W-T in the context of the second sentence. But these prior AB findings in no way depend on the DOC having actually applied the second sentence. Again, the AB stated that the principles that "dumping margins" must reflect the product as a whole and must reflect all of the exporter's prices apply with equal force to the entire Anti-Dumping Agreement.

11. With respect to targeted dumping issue, Article 2.4.2, the second sentence requires three conditions. First, the investigating authority must find a "pattern" based on actual export prices that differ "significantly," not just a finding that export prices differ in some way that does not amount to a "pattern" and is not "significant." Second, the investigating authority must provide an "explanation" of why the W-T method is necessary, not just a statement that the result is different. Third, the investigating authority must limit the W-T comparison method to those sales that have actually met the conditions for invoking this exceptional method. The DOC violated all of these conditions in both its old *Nails* test and the current differential pricing test.

12. Both the *Nails* and differential pricing tests apply a purely mechanical and unfair methodology, contrary to the correct interpretation of the terms "pattern" and "significant." Such mechanical and overbroad tests are clearly inconsistent with the second sentence as well as Article 2.4.

13. Prices may "differ" but these differences do not constitute a "pattern" and do not differ "significantly" if the differences simply reflect normal commercial considerations such as price fluctuations of raw materials. The proper inquiry therefore must involve both qualitative and quantitative aspects, unlike the fixed quantitative methodology that is employed by the U.S. in its *Nails* and differential pricing tests. For example, in its *Nails* test, the DOC compressed the actual prices into a handful of average prices, and then ignored the actual export prices themselves. By doing so, the DOC found a pattern that did not exist at all because it was not reflective of actual prices. To explain this error, Korea submitted a second affidavit by Professor Prusa.

14. The U.S. claims that it does consider qualitative aspects. In reality, however, the U.S. attempts to identify small differences in prices as being "significant" without providing any meaningful reasons to support its claim. Contrary to U.S. arguments, Korea is not suggesting that the investigating authority must consider the exporter's subjective intent in setting prices. The issue under the second sentence is the pattern of prices that differ significantly and what those differences mean. If the prices differ for normal commercial reasons, then those prices do not constitute a "pattern" of prices that "differ significantly" within the meaning of the second sentence.

15. The DOC did not and still does not provide any meaningful explanation pursuant to the second sentence. The main U.S. argument is that the DOC has fulfilled the obligation of explanation by simply comparing the result of the W-T comparison method with zeroing and the result of the W-W method without zeroing. However, selective application of the zeroing methodology does not fulfill the obligation of "explanation." The investigating authority must provide the specific reason why it must resort to the "exception," as well as why it was not possible at all to account for these differences using the normal comparison methods. Korea emphasizes that the DOC has made no effort whatsoever to explain why the use of a T-T comparison cannot appropriately take into account such price differences.

16. There is no textual basis for the DOC to punitively apply the W-T comparison with zeroing to all of the transactions, whether or not they met the conditions under the second sentence. To defend its flawed interpretation of the term "pattern," the U.S. twists the issue by saying that a "pattern" necessarily involves all of the transactions, including those with higher prices and lower prices. In *Washers*, the DOC found about 90% of the sales by the Korean exporters not to satisfy the criteria for imposing the W-T comparison, but still imposed both the W-T comparison and the zeroing remedy to all the sales. However, the AB in *US-Zeroing (Japan)* clearly stated that it read "the phrase 'individual export transactions' in that sentence as referring to the transactions that fall within the relevant pricing pattern."

17. The differential pricing test artificially raised the possibility of finding a pattern by combining the purchasers, place, and time periods. This approach violates the plain language of the second sentence, which explicitly sets the categories with the conjunction "or": the pattern must exist for either purchasers, or for regions, or for time periods. Contrary to what the second sentence instructs, the DOC accumulates price differences from each category even when individually they would not meet the second sentence. The DOC then aggregates all three categories to create the appearance of meeting the second sentence criteria even when, in fact, they have not been met.

18. Furthermore, the DOC has invented a new type of zeroing when using the W-W comparison, which Korea refers to as "Systemic Disregarding." In the differential pricing test, the DOC disregards the negative margin of the W-W comparison and assigns a zero instead, when transactions fall between 33% and 66%. The negative margin comes from transactions not meeting the criteria of the second sentence.

19. The differential pricing test is a mandatory measure that is inconsistent "as such" with the second sentence. Korea showed how this measure meets each of the three elements identified by the AB. To further prove its claim, Korea provides an expert opinion by Ms. Anya Naschak, a former DOC official, on the nature and application of the new differential pricing test that confirms its precise content and consistent application in every case since its adoption. It specifically addresses and debunks the U.S. argument that the SAS code for the test may change from case to case.

20. Moreover, Korea has presented more than just a string of cases that coincidentally repeat the same actions. Korea is providing Exhibit KOR-95 showing all DOC decisions after the adoption of the new differential pricing test in March 2013. There were 138 proceedings where DOC had any need to test U.S. prices and thus had any reason to apply the test. Of those 138 proceedings, the DOC applied the test in all 138 proceedings – in 100 percent of those instances.

21. The U.S. confuses the distinction between, first, applying the same differential pricing test in every instance and, second, what remedy is applied in each particular case given the results of the application of the test. What remedy is applied may vary from case to case, but the test itself is identical in every case and is applied without exception or variation when the DOC determines that there are prices to be tested.

22. The differential pricing test also constitutes ongoing conduct that should be reviewed by this Panel. Korea's panel request specifically identified this test as one of the measures subject to the dispute, and also specifically included among its claims a challenge to the "ongoing practice" concerning targeted dumping and differential pricing.

23. Turning to the subsidy claims, Korea submits that the DOC's finding that Samsung received a "disproportionately large" amount of the total benefit under RSTA Article 10(1)(3) is inconsistent with Articles 1.2 and 2.1(c) of the SCM Agreement. While Samsung claimed on its 2011 tax return a larger amount of the tax credit than the average amount claimed by other Korean companies, the amount of the credit that Samsung received was solely determined based on the statutory formula. The U.S. approach replaces Article 2.1(c)'s "disproportionality" analysis with an absolute size analysis. However, the subsidy was proportionate to the amount of its investment. Any other company that made a similar sized investment would have received the same tax credit benefit. Therefore, the subsidy cannot be disproportionate.

24. Moreover, as was made clear by the AB in *US – Large Civil Aircraft*, an investigating authority conducting a "disproportionately large amount" analysis under Article 2.1(c) must compare the *actual* allocation of the subsidy to what would otherwise be *expected* if the statutory scheme were to be followed as it is stipulated. In its investigation, the DOC failed to conduct the inquiry that the AB has required. The test articulated by the AB in *US – Large Civil Aircraft* requires the investigating authority to compare the allocation against a second ratio reflecting the expected distribution of the subsidy as determined by the conditions of eligibility. The U.S. strongly contended in that case that a second ratio was required, but here the U.S. has abandoned the very test that it sought in *Large Civil Aircraft*. Furthermore, the DOC also failed to conduct the economic diversification and duration of the program analyses that are mandatory under Article 2.1(c).

25. Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement both require that countervailing duties be limited to offsetting the amount of subsidies *provided to the product subject to investigation*. The DOC simply disregarded this clear requirement. As a result, the DOC improperly attributed to washers a portion of the tax credits that Samsung received which were attributable to investments benefiting the production of *products other than* washers.

26. An accurate calculation of Samsung's subsidy margin for both the Article 10(1)(3) and Article 26 tax credits should have used Samsung's tax credit received on its Digital Appliance investments, including its large residential washers ("LRW") investments, in the numerator and Samsung's sales of Digital Appliances, including LRW, in the denominator, in order to calculate the *ad valorem* margin for the product under investigation. Because all of the information was readily available during the investigation, an accurate calculation would have been easy and simple. The DOC, however, refused to examine the detailed documentation of all of Samsung's R&D expenses and facilities investments. Instead, it calculated Samsung's *ad valorem* subsidy margin using the tax credits bestowed on *all* of Samsung's products in the numerator and its sales of *all* products in the denominator. The DOC's final margin calculation, therefore, assigned to subject merchandise a substantial amount of the tax credits earned by Samsung for eligible expenditures that benefitted the production and sale of products *other than* digital appliances.

27. The DOC's stated reason for refusing to receive, let alone examine or verify, Samsung's data and documentation was that it would allocate a subsidy to one or more specific products only upon a showing that the subsidy was "tied" to the production or sale of such products. Korea finds it ironic that the U.S. takes the position that it must be able to tie a subsidy to a particular product while at the same time it refuses to examine evidence that such tying can be made.

28. The DOC's finding that the Article 10(1)(3) tax credits benefited only the products that Samsung produced and sold in Korea is also inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. It is common sense that the results of R&D will normally benefit all operations of a company, wherever located, as Samsung demonstrated to the DOC. Before the *Washers* Final Determination, the DOC had determined that the R&D activities which rise to the Article 10(1)(3) tax credits benefited Samsung's worldwide sales and production. The DOC then changed its position with no supporting rationale.

29. Where, as here, it is determined that a subsidy is granted to a manufacturer to develop a particular product, the numerator in a countervailing duty investigation of that product would be the full amount of the subsidy. To calculate the *ad valorem* margin, that numerator would be divided by the total value of the recipient's sales of that product, regardless of where the product was produced or manufactured, and regardless of where the product was sold (the denominator). If the denominator were to consist only of some subset of the company's total sales of that product, the use of such a smaller denominator, relating to a different universe of sales than the universe included in the numerator, would artificially inflate the subsidy margin.

30. As regards regional specificity, the tax credits that Samsung received under RSTA Article 26 do not constitute specific subsidies within the meaning of Article 2.2 of the SCM Agreement. By the plain language of Article 2.2, in order for a subsidy to be specific, access to the subsidy must be "limited." In addition, this limitation must concern the location of the enterprises that are eligible to receive the subsidy, and the location must be a geographical region that is designated. RSTA Article 26 does not meet any of these requirements. RSTA Article 26 does not impose any type of limitation. It offers tax benefits to "domestic corporation[s]" across numerous industries. All such Korean enterprises have access to RSTA Article 26 subsidies, and these enterprises may be located anywhere in Korea's territory, and would still be eligible to receive RSTA Article 26 subsidies.

31. The accompanying Enforcement Decree identifies the "investments" that are eligible for the tax benefits as "business assets" that are located outside of the "overcrowding control region." Thus, to the extent that RSTA Article 26 incorporates a limitation, it is on the *investments* that give rise to the tax credits, not the location of the *enterprise* that benefits from the subsidy.

32. Korea further notes that Article 2.2 refers to "a designated geographical region within the jurisdiction of the granting authority." A "geographical region" is a subpart or subdivision of a larger, territorial unit. In considering the relevant "geographical region," one must take care to ensure that the subdivision at issue does not encompass the broader territorial unit of which it is a part. While there is necessarily overlap between the two, there will be a point in which the two may be so co-extensive that one can no longer reasonably refer to them as two units. It is also important to note that the "geographical region" under Article 2.2 must be a "designated" region. Designation is an act of identification by the granting authority. And it is done affirmatively, not by implication or suggestion.

33. The territory outside the overcrowding control region of the Seoul Metropolitan Area cannot constitute a "designated geographical region within the jurisdiction of the granting authority" because it constitutes 98 percent of Korean total landmass. Not only is this not a limitation pursuant to Article 2.2 of the SCM Agreement, but there is also no identifiable demarcation

between this geographical region and the broader jurisdiction of the granting authority. The degree of overlap is almost total and, thus, there is effectively no distinction between the area in which qualifying investments may be made and the jurisdiction of the granting authority of the tax credit program. RSTA Article 26 is essentially a zoning regulation, and any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy.

34. Korea further notes that Article 2.2 states that a subsidy must be "limited to certain enterprises" to be specific. While the U.S. suggests that the interpretative issues surrounding the term "certain enterprises" have been definitively resolved, the fact is that previous disputes have been determined under completely different sets of facts and the AB has not yet examined the type of issue Korea raises.

35. Finally, Korea submits that the imposition and maintenance of countervailing duties on imports of washers produced by Samsung are inconsistent with Articles 10 and 32.1 of the SCM Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE CLOSING ORAL STATEMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

Madame Chair and Distinguished Members of the Panel,

1. We would like to thank the Panel for a productive two days of meetings. We hope our answers today have helped clarify the issues and we look forward to your further questions. In closing, we would like to highlight a few key points.

2. On the issue of zeroing, we note the U.S. still has not addressed the overarching principles of the AB jurisprudence on zeroing. Instead, the U.S. focuses on drawing what it calls "logic extensions" from certain isolated statements. But in doing so, the U.S. argument ignores the important overarching principles the AB has applied. That is precisely why so many third parties agree with Korea that the logic of prior AB rulings condemning zeroing in all other contexts also applies to condemn zeroing in the context of the second sentence.

3. We also note that the U.S. has not and cannot prove mathematical equivalence. The U.S. agrees mathematical equivalence is "critical," and that the U.S. must show that it applies "in all cases." What these admissions mean is that when mathematical equivalence fails, the entire U.S. interpretative argument also fails. The AB has already found repeatedly that equivalence depends on the assumptions made. The U.S. has tried to defend those assumptions, but the U.S. arguments are based entirely on arguments about what an authority might reasonably choose. But those choices by the authority are not required by the text of Article 2.4.2. The authority could – consistently with Article 2.4.2 – make other choices and that is the point. The U.S. cannot show that Article 2.4.2 explicitly precludes these other choices, and so any equivalence based on those choices must fail. Korea has shown just that point, both in general and in the context of the *Washers* investigation.

4. Based on these arguments, we believe that the Panel must conclude that the DOC's use of zeroing is inconsistent with the Anti-dumping Agreement. The Panel should also conclude that the DOC's interpretation and application of the second sentence, apart from zeroing is also, inconsistent with the Anti-dumping Agreement.

5. The one point on which all parties agrees is that this case represents the very first time a WTO panel will render a decision concerning the actual application of the second sentence. It is for this reason that Korea urges the Panel to reach a clear decision on this issue, and when doing so to base its analysis on the actual text of the second sentence. Korea is forced to reiterate this obvious legal point because the U.S. interpretation ignores key terms of the second sentence.

6. Take the term "significantly." The U.S. adopts a purely quantitative interpretation. Indeed, under the U.S. approach as long as a particular category of prices is more than some portion of a standard deviation from the average selling price, the second sentence has been met. However, the actual meaning of the word "significantly" in all three languages makes clear that the analysis require more than application of a numerical criterion. Context is absolutely required. Prices in the fourth quarter of the year may actually be more than one standard deviation below those of earlier in the year, but such difference is not significant for the purposes of the second sentence if prices for the raw materials used to produce the merchandise decreased by an even greater amount. In its opening statement the U.S. stated emphatically that the reason for the difference in prices does not matter. Such an interpretation of the second sentence is contrary to the very meaning of "significantly" and therefore cannot be sustained.

7. Turning now to the subsidies issues, we can confidently state that the oral remarks of the U.S. yesterday failed to undermine any of Korea's claims.

8. On the issue of whether Samsung received a disproportionately large amount of the Article 10(1)(3) subsidy, the U.S. incorrectly continues to rely solely on the fact that Samsung

received a much larger amount of the subsidy than any other Korean company. This is the "size defense" of the U.S., not Korea. The problem with this defense is that the U.S. is forced to ignore the position it took in *US – Large Civil Aircraft* where the U.S. stated the following:

> the fact that a company receives more of the subsidy because it engages in more eligible activity cannot amount to a finding that this company has received disproportionately large amounts of subsidy.[1]

9. In the *Large Civil Aircraft* case, Boeing and Spirit had received over 60 percent of the total industrial revenue bond subsidy awarded to all recipients. Yet, the U.S. contended that this was not a disproportionately large amount. The AB agreed, stating that the issue of disproportionality could only be evaluated by comparing the relative size of the subsidy to a "second ratio". This is what the AB meant when it said that the issue of disproportionality is a "relational" concept. In other words, the relative size of a subsidy must be related to something else before one can decide if the subsidy is proportionate or disproportionate.

10. Yet, in its oral statement yesterday, the U.S. failed to acknowledge that the AB endorsed the original U.S. interpretation of Article 2.1(c). Instead, the U.S. has been compelled to ignore that interpretation. The Panel should recognize that the AB's ruling is dispositive. For this reason, the Panel should find that the DOC's finding of disproportionality lacked the type of evidentiary support that the AB has required. No amount of stacked up automobiles can overcome this fatal flaw.

11. On the tying issue, the U.S. ignores two critical points. First, it ignores the AB's holding that an investigating authority has an affirmative obligation to ascertain the precise amount of the subsidy on the investigated product.[2] Second, the U.S. ignores the fact that Samsung maintained and presented to the DOC records that showed the precise amount of R&D expenditures on digital appliances, including washers. All expenses are aggregated at the Digital Appliance level, but Samsung's R&D expenses are first collected on a project-specific basis.

12. The 200 pages of documentation that Samsung presented, but that the DOC's analysts refused to examine, listed every single R&D project conducted by the Digital Appliance division. Had the DOC's analysts examined those records, they would have easily been able to determine that none of the projects pertained to products produced outside the Digital Appliance Division. This was not a difficult task, despite the U.S. contention to the contrary, which it fails to support with any evidence. Rather, it is the type of task that the DOC routinely performs.

13. But, by failing to examine Samsung's detailed records, the U.S. violated the AB's requirement that an investigating authority can impose countervailing duties on only those subsidies that benefit the product under investigation. As noted by the Panel in *China – Broiler Products*, an investigating authority "must actively seek out pertinent information and may not remain passive in the face of possible shortcomings in the evidence submitted."[3]

14. On the denominator issue, the U.S. position defies logic and common sense. When Samsung conducts R&D in Korea, it does not limit the results of the R&D to its Korean production facilities. No rational company would ever restrict the benefits of its efforts to its local facilities when it produces the very same products in overseas facilities. Equally important, the DOC itself stated in the antidumping case on refrigerators that Samsung made in Mexico that:

> As the Department explained in the Preliminary Determination, the R&D expenses incurred by SEC {in Korea} benefitted Samsung's production {in Mexico} of the merchandise under consideration.

15. In light of the DOC's direct acknowledgement that Digital Appliance division R&D expenses incurred in Korea benefit digital appliance production in Mexico, the U.S. had no factual basis in the *Washers* case for claiming that such benefits should not be allocated to both domestic and overseas sales. The DOC's own finding that the R&D projects that Samsung conducted in Korea benefited its overseas production flatly contradicts the position that it has taken in this dispute.

[1] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 185.
[2] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139.
[3] Panel Report, *China – Broiler Products*, para. 7.261.

16. Finally, Korea has argued that RSTA Article 26 benefits do not meet the regional specificity standard in Article 2.2 because the benefits are not limited "by reason of the geographical location of the beneficiaries."[4] The U.S. has conceded that the eligibility requirements for Article 26 concern the use of the investment and are not tied to the location of the enterprises receiving the benefits.

17. The U.S. incorrectly attempts to portray Korea's claim as involving issues that have already been resolved. However, Article 26 could not be more different from the measure that was found to be regionally specific in *US – Antidumping and Countervailing Duties (China)*. In that case, eligibility was limited to enterprises located within a small industrial park. Article 26 does not have any limitations on the location of the enterprises receiving the subsidy.

18. Even if one considers the limitations on the use of the investment, the contrast could not be sharper. Contrary to what the U.S. suggests, Article 26 does not designate or even identify "any … tract of land". Article 26 simply excludes investments in a minuscule area representing no more than 2% of Korea's total land mass. Any notion that the area excluded should be treated the same way as the area designated for eligibility is simply wrong.

19. The legal theory put forward by the U.S. is too extreme. Under that theory, should the U.S. provide subsidies to enterprises making investments anywhere in its territory, but for Washington, D.C., the subsidies would be considered to be specific under Article 2.2. Korea does not believe that this is the outcome intended under Article 2.2. Article 2.2 does not constrain WTO Members from pursuing policies to relieve over-congestion and income disparity in large urban areas, a problem that is common to most developing, and some developed, countries.

20. That completes Korea's statement, and we thank the Panel for its attention.

[4] Appellate Body Report, *U.S. – Anti-Dumping and Countervailing Duties (China)*, para. 413.

ANNEX B-5

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF KOREA AT THE SECOND SUBSTANTIVE MEETING

I. ANTI-DUMPING ISSUES

A. The U.S. Has Improperly Reintroduced WTO-Inconsistent Zeroing

1. The Appellate Body has repeatedly condemned zeroing in W-W, T-T *and specifically* W-T comparisons as contrary to Articles 2.4, 2.4.2, 9.3 and 11.3 of the AD Agreement. There is nothing in the language of the second sentence that suggests that zeroing should be allowed in that context, when the Appellate Body has found zeroing to violate the AD Agreement under all three comparison methodologies.

2. Korea agrees that the second sentence is an exception to the first sentence of Article 2.4.2. But that exception, by its terms, has to do only with comparison methodologies – that is, the W-T comparison methodology is an exception to the "normal" methodologies of W-W and T-T comparisons.

3. The U.S. tries to stress the "limited nature" of prior Appellate Body decisions, and constructs "logical extensions" from some specific bits of language in those decisions. But under repeated Appellate Body decisions, any finding of "dumping" must be based on the product as a whole for an exporter, and cannot be based on price differences at the level of intermediate comparisons. That is why zeroing is not allowed under any comparison method – including W-T comparisons – because zeroing takes a price difference at the intermediate level out of the context of the product as a whole. That a specific price might be lower than some threshold is not "dumping" and zeroing cannot make it into dumping. The U.S. never explains why or how the application of the W-T methodology in the context of the second sentence overcomes these general principles for finding zeroing to be WTO-inconsistent.

4. Even assuming that the purpose of the second sentence is to "unmask" lower export prices charged to certain purchasers or in certain regions or during certain time periods, the second sentence explicitly does so by the W-T comparison method. The "unmasking" is to be achieved by the second sentence undertaking a more detailed examination of individual export prices.

5. The application of W-T without zeroing *does not always produce the same result* as W-W comparisons without zeroing. The Appellate Body has made this point twice, and the U.S. efforts to distinguish these cases fail. Korea noted that specifically in the case of *Washers*, a different result would be produced if different, namely, monthly, normal values had been used in the W-T comparisons. We also noted that changing other assumptions, such as using individual transaction adjustments rather than average adjustments, can also produce different results. Finally, Korea reinforced these Appellate Body findings with an expert affidavit by a noted scholar of anti-dumping measures. Moreover, we note that the U.S. argument about mathematical equivalence ignores T-T comparisons, which would not be equivalent in virtually all cases.

6. There is nothing in the language of the second sentence of Article 2.4.2 that remotely suggests that, as an exception, the provision should lead to "systemically" different results. The U.S. essentially extrapolates from a single statement from one Appellate Body decision (in *Softwood Lumber V*) to infer a meaning that is not in the Appellate Body's statement itself.

7. The U.S. seems to argue that even if the use of the W-T methodology in the second sentence of Article 2.4.2 *can* produce different results, if it does not do so "systemically" then it is rendered *inutile*. To be *inutile*, a provision must always and everywhere have the same effect as some other provision. By conceding that there are some cases in which a W-T methodology can produce a different result from a W-W methodology without zeroing, the U.S. effectively admits that the second sentence cannot be *inutile*.

8. The purpose of the second sentence of Article 2.4.2 is not to create larger dumping margins, but to examine a pattern of differing prices individually, so as to determine whether those

individual transactions are further below normal value than the average taken as a whole. The U.S. discussed the margin results from the preliminary determination in the *Washers* administrative review. Under certain assumptions there may be equivalent results, but that does not establish that equivalence always occurs. That is why the second sentence is not *inutile*, even without zeroing.

9. Negotiating history is recognized as a very limited tool for interpreting the provisions of a treaty, and thus, it *cannot* be used to contradict the plain meaning of a provision or to supply a meaning that is not even implicit in the treaty's terms. The negotiating history cited by the U.S. does not present a clear statement of the intent of the negotiating parties. What Hong Kong and Japan meant by their statements is far from clear and is not evidence that there was agreement by all members.

10. The language of the second sentence of Article 2.4.2 is clear on its face. It establishes an alternative methodology, namely, W-T, for examining "dumping" where a pattern of significantly differing prices exists. The Appellate Body has repeatedly held, however, that the W-T methodology does not permit zeroing because it is contrary to the requirement that "dumping" be found for the product as a whole. The ambiguous, limited negotiating history cannot be used to permit a methodology that is contrary to the very definition of dumping as set forth in the AD Agreement.

B. The Second Sentence Can Be Invoked Only When Certain Conditions Have Been Met

11. In the *Washers* case – even using the biased *Nails* test – only about 13 percent of the export prices were found to differ at all. An even fewer two percent of export prices would have differed under an unbiased test based on actual export prices. So few export sales and so little explanation does not properly establish a "pattern" of prices that "differ significantly".

12. The U.S. argues that the second sentence does not require the focus to be on individual prices. This approach is not difficult to administer, since the DOC currently uses Korea's approach in its differential pricing test. There is nothing "logical" about using average prices that obscure rather than reveal any "pattern". The U.S. tries to dismiss Professor Prusa's affidavit, but this affidavit is in fact credible "evidence" on which the Panel can rely. The U.S. has provided no other reason to reject this expert statement. Moreover, the U.S. has provided no alternative expert statement. Korea is very confident that any WTO statistician would quickly and easily validate Professor Prusa's basic points and his reliability as an expert on this issue. If the authority chooses to use a standard deviation, it must do so in a manner that makes sense. Ignoring the individual prices and calculating the standard deviation based on average prices makes no sense, as Professor Prusa's expert affidavit explains at some length.

13. Moreover, the *Nails* test addresses only the size of the price differences and disregards the reasons for the price differences. An authority cannot find differences to be "significant" based solely on quantitative criteria with no consideration at all of the qualitative factual context – the reasons why prices might be differing.

14. In the *Washers* case, the DOC relied exclusively on the difference in the results between W-W and W-T, and provided no other explanation as to why the W-W comparison would not work. The DOC did not even use the word "appropriately" in its determination, let alone explain why the W-W method could not be used – other than to say the margins were different. And the DOC failed to consider the T-T comparison method at all. The failure to do so ignores the express requirement of the second sentence. The proper reading of the second sentence is that both options must be considered and included as part of the explanation.

15. The U.S. approach renders the "explanation" requirement meaningless. The requirement is not whether W-W and W-T yield different results. The requirement is to "explain" why the W-W method "cannot" take differences into account appropriately. The authority must have some reason other than the effect of zeroing to show that the W-W or T-T comparison cannot address the pattern of prices that differ significantly. It would be circular to allow zeroing itself to justify the use of zeroing.

16. The DOC's application of the exception to be overbroad, since it applies the exception to all transactions and not just to those transactions found to meet the requirements of the exception. Having found alleged targeting for about 10% of the sales, the DOC applied the exceptional

W-T comparison method to all sales, including the almost 90% of the transactions not found to be targeted in any way. The U.S. arguments continue to ignore the text of the second sentence and clear Appellate Body guidance.

C. The Differential Pricing Methodology Is A Measure

17. The U.S. seems to believe that by changing certain aspects of its policy every few years, the U.S. can forever evade any meaningful WTO review. The Appellate Body, however, has recently confirmed that the scope of measures that can be challenged is "broad," and rejected artificial limitations on the scope of challengeable measures.

18. The differential pricing methodology can be challenged "as such". Korea has demonstrated the precise content and general and prospective application of the differential pricing policy. Korea has documented the existence of this measure extensively, providing the standard SAS code that the DOC applies to every case without change, citing hundreds of cases that applied the new policy, and confirming these facts with the DOC's own description of its new policy and with expert testimony. The U.S., on the other hand, has provided no contrary evidence.

19. The differential pricing should be reviewed as "ongoing conduct" precisely because the differential pricing methodology had been adopted, was being applied by the DOC in every case, and Korea knew that this methodology would be applied to any Korean exporters participating in the administrative review process.

20. Korea challenges the differential pricing methodology that has now been applied in the first administrative review "as applied". That methodology existed at the time of the panel request, and has been exhaustively documented.

D. The Differential Pricing Methodology Also Ignores the Key Conditions for Invoking the Exceptional Comparison Method Under the Second Sentence

21. Under the differential pricing methodology, the DOC continues the key WTO inconsistencies from the *Nails* test. The DOC does not properly find a "pattern" of "significant" price differences, relies exclusively on a difference in the size of the dumping margins, and applies the remedy too broadly.

22. The DOC has made the pattern test even worse: nowcollecting random price differences and then deeming them to be a "pattern" without indicating a pattern of what. Differences by purchaser, by region, by time period are accumulated into an undifferentiated mass.

E. It Is Also WTO-Inconsistent To Disregard the Negative Margins When Combining the Separate Results

23. "Systemic disregarding" is a particularly egregious violation. Indeed, the preliminary determination in the *Washers* administrative review provides the most extreme example. For the product as a whole, LG would have had no dumping margin, even when using W-T comparisons and even with the application of zeroing for the W-T comparisons. Yet by ignoring the negative margin for those products subject to the W-W comparisons – setting that potential offset to zero – the DOC has created a "dumping margin" that should not exist.

II. SUBSIDY ISSUES

A. Samsung Did Not Receive a Disproportionately Large Amount of Tax Credit

24. Samsung received a large amount of the total tax credit. The credit that Samsung received was proportionate to the amount of the investment that it made in eligible R&D activities. That is how the tax credit program works; meaning that the more a company spends, the larger the credit that it receives.

25. The U.S. denies that Samsung earned a proportionately large credit, but if it is going to take that position, then it must at least be able to explain the conceptual difference between a proportionately large tax credit amount and a disproportionately large tax credit amount.

26. In both *US – Large Civil Aircraft* and *EC – Large Civil Aircraft*, the U.S. stated that an absolute precondition under Article 2.1(c) to finding that a company had received a disproportionately large amount of a subsidy was the use of a second ratio that would allow the

investigating authority to determine whether a seemingly large subsidy amount was in fact disproportionate to what would be expected. The Appellate Body agreed that disproportionality could not be evaluated without the calculation of two ratios.

27. The Appellate Body found that the first ratio only provides a basis to investigate further the issue of disproportionality so long as the amount of a company's benefit has been calculated in accordance with the conditions of eligibility, which is indisputably the case for Samsung. In the *Washers* case, the DOC relied solely on its first ratio calculation, and the U.S. continues to maintain that position here.

28. The U.S. also contends that the large amount of the subsidy that Samsung received "deviated from what would be expected." Yet, the U.S. continues to be unable to articulate what should have been expected, and the record contains no evidence as to what would be expected other than what Samsung actually received.

B. The DOC Failed to Consider Evidence that Tied Samsung's Investments

29. The fundamental principle that underlies Korea's position is that an investigating authority may only countervail the benefits that a government confers on the merchandise that is the subject of an investigation.

30. Samsung's Digital Appliance Division regards the investments that it makes as equally benefitting all of the products that it produces, and the DOC agreed that the proper way to attribute R&D costs to washers is to treat the Digital Appliance Division's R&D costs as benefitting washers and all other products within the Digital Appliance Division on a *pro rata* basis.

31. Samsung made a *prima facie* showing of its tying ability, which then triggered the DOC's obligation to examine the accuracy of the representations that Samsung made.

32. Nevertheless, the DOC chose to invoke an irrebuttable, and therefore impermissible, presumption that, in order to tie a subsidy to a particular product, the "intended use" of the subsidy must be known to the subsidy giver and "so acknowledged prior to or concurrent with the bestowal of the subsidy."

33. However, the supporting examples of prior knowledge that the DOC provided in its Issues and Decision Memorandum pertained solely to grants and loans, not tax credits. Unlike grants and loans, prior knowledge cannot exist in a tax credit situation where the subsidy giver decides to bestow the benefit automatically when the tax return is filed. In addition, the requirement that Korean taxpayers maintain the tying information, which is available at all times both before and after the tax return is filed, is a completely suitable alternative to the DOC's filing requirement. By focusing solely on what Korea's National Tax Service might constructively, not actually, have known on the date of bestowal, the U.S. impermissibly seeks to avoid its obligation to examine the evidence that supported the tying claim.

C. The Correct Denominator Should Be Samsung's Worldwide Production

34. The R&D activities in which a company engages benefit the production of the merchandise to which the activities apply, no matter where that production occurs. It would be illogical for a company to confine the results and benefits of its R&D activities to its Korean facility and withhold those same benefits from its other facilities around the world.

35. The U.S., in a publicly released Issues and Decision Memorandum in the *Refrigerators* antidumping investigation, stated that Samsung's "Digital Appliance business' related R&D activities benefitted all of its subsidiaries that also produced and sold its digital appliance products." This statement constitutes a conclusive and unqualified statement by the U.S. government that the R&D activities that Samsung conducted in Korea benefited its production in all of its worldwide facilities.

36. The U.S. speculates about a difficult, if not impossible, "tracing exercise" as a practical bar to the use of a worldwide sales denominator. Yet, the DOC did in fact conduct this tracing by concluding that R&D benefits, as it found in the *Refrigerators* antidumping case as well, extended to all production facilities around the world.

D. The Article 26 Tax Credit Is Not a Regionally Specific Subsidy

37. The existence of limitations on the location of the enterprises eligible to receive the subsidy is a necessary element of a finding under Article 2.2. Article 26 imposes no such limitations. The affirmative identification of a geographically distinct area where the enterprises eligible to receive the subsidies must be located is another necessary element, which again is not met by Article 26.

38. Where there is no identifiable demarcation between the area in which a subsidy may be used and the broader jurisdiction of the granting authority, and the degree of overlap between the two is almost total, there is no "designation" of a geographical region and there is effectively no limitation as to the geographical location of the enterprises.

39. The term "enterprises" refers to a business firm or company, and not to its facilities. Where the drafters intended to refer to facilities, they did so explicitly, as they did in Article 8.2(c).

40. If an "enterprise" exists everywhere that a recipient has facilities, investments, or local production, then any Korean company that has a sales office or a bank account in Seoul is an enterprise "located" in Seoul and, thus, is ineligible for RSTA Article 26 credits. That is, of course, absurd. RSTA Article 26 does not deny subsidies to an enterprise on the basis of its location.

41. Any express limitations that do not meet the requirements of Article 2.1(b) of the SCM Agreement could give rise to a finding of *de jure* specificity under Article 2.1(a). Similarly, any indications that a program is *de facto* specific could be examined under Article 2.1(c). Thus, the circumvention concerns alluded to by the U.S. simply do not arise.

42. Any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy. A subsidy available for investments made anywhere in a country's territory, except for a national park, would be regionally specific according to the U.S.. Such an extreme outcome could never have been intended by the drafters of the SCM Agreement.

ANNEX B-6

CLOSING ORAL STATEMENT OF KOREA AT THE SECOND SUBSTANTIVE MEETING

1. Madame Chair, distinguished members of the Panel, members of the Secretariat, Korea would like to thank you for the time and attention that you are devoting to assisting the parties in resolving this dispute. Korea would also like to thank our colleagues on the U.S. delegation. We hope to continue working together to find a prompt resolution to this matter.

2. Korea believes that this meeting has been very helpful in clarifying the issues raised under the AD Agreement. Korea has raised issues under the SCM Agreement that are equally important and looks forward to the opportunity to further clarify the issues through the written questions.

3. In our concluding remarks, Korea would like to emphasize a couple of points. This dispute involves the proper interpretation of key treaty provisions. Korea believes that the U.S. interpretations of the AD and SCM Agreements are not permissible interpretations. If the DOC's determinations are to be permitted by the WTO, the seasonal Black Friday sales could be found to be a targeted dumping; a legitimate policy tool of preventing urban sprawl could be found to be a regionally-specific government subsidy. These kinds of WTO-inconsistent measures by a WTO Member are particularly problematic, because legitimate commercial practices are allowed to that Member's domestic industries, but not to foreign exporters, resulting in the distortion of international trade.

4. Concerning the antidumping issues, I recognize that there has already been a lot of discussion. However, I want to make a few additional observations.

5. In its Opening Statement the U.S. side spent quite a bit of time attempting to discredit the integrity of Professor Tom Prusa. This is not right. Professor Prusa is the Chairman of the Economics Department of a major U.S. university whose expertise is the economics of international trade regulation. Professor Prusa has repeatedly been invited by the WTO to speak at different conferences. Professor Prusa is truly an expert in these matters. Moreover, a very major conclusion that Professor Prusa offered to the Panel about DOC's antidumping practice was previously published by Professor Prusa long before he was asked to assist in this case. We are happy to debate with the U.S. side about the legal significance of the factual findings set forth in two Professor Prusa Affidavits offered to the Panel. However, we do not believe it is proper to cast aspersions on Professor Prusa's integrity.

6. In my view, the lasting image about antidumping issues over the last two days was the discussion yesterday afternoon about the *Nails* test. Notwithstanding that for virtually every other question, the U.S. side was ready with a quick reply, when asked to defend one aspect of the *Nails* test, the U.S. side was rendered utterly speechless. We agree that it is impossible to defend the validity of the Nails test under the AD Agreement.

7. Korea's last comment about antidumping issues concerns the increasing frequency of the DOC's application of the second sentence. As the U.S. side itself admitted, such change in the U.S. approach is a conspicuous attempt to circumvent the WTO rulings prohibiting the zeroing methodology. No other reason can sufficiently explain the change from the reasonable regulation promulgated in 1997 to the new methodologies applied by the DOC that automatically examine the existence of targeted dumping in all antidumping allegations made by the U.S. domestic industries, and do so in a biased way designed to find targeted dumping in a larger percentage of cases.

8. This is not right. And Korea is not the only WTO Member to be concerned. As evident by the number of third parties that are participating, Korea believes many other Members are also concerned with this Panel's decision. The mechanical and quantitative-only approach claimed by the U.S., if allowed to take hold, will initiate a new period of repeated WTO-litigation.

Korea believes there is a shared systemic concern to minimize the risk of further burdening the system with another decade of WTO litigation over zeroing.

9. With respect to the subsidy issues, Korea would make only the following brief points in order to demonstrate that the U.S. has failed to support any of the four determinations that Korea has challenged.

10. First, on the disproportionately large amount issue, the U.S. has once again demonstrated that it remains either unable or unwilling to describe what a proportionately large amount of the Article 10(1)(3) tax credit would have been for Samsung. It remains equally unable or unwilling to describe what amount of the tax credit should have been expected for Samsung. Also, it continues to misread the Appellate Body's decision in *US – Large Civil Aircraft*. If the U.S. reading is correct, then the Appellate Body would have stopped its analysis and found disproportionality once it found that Boeing had received 69% of the total Wichita, Kansas bond subsidy. The fact that it went much further by discussing the merits of the second ratios that the parties proposed necessarily means that much more is required under Article 2.1(c) than the mere 24% calculation that the DOC relied upon in Samsung's case.

11. Moreover, the U.S. has impermissibly attempted to shift the burden to Samsung to demonstrate what the second ratio should have been. However, the DOC had the burden to demonstrate disproportionality, which it failed to do. Moreover, the DOC never asked Samsung for any evidence concerning the second ratio, so Samsung cannot be criticized for failing to submit required evidence.

12. Second, on the tying issue, it is absolutely clear that Samsung has always had the ability to tie its tax credits to the products that its Digital Appliance Division produced. But, the DOC refused to examine the tying evidence that Samsung submitted even though, in the antidumping context, the DOC said that the Digital Appliance Division's R&D pertained equally to all digital appliance products. It is astonishing to Korea that the U.S. would now ignore its own directly relevant findings in a published, non-confidential document that remains a highly relevant administrative precedent, just like any other case precedent upon which a party is entitled to rely.

13. Third, on the denominator issue, the Opening Statement of the U.S. deliberately ignored the factual finding that the DOC itself made in its Issues and Decision Memorandum in *Refrigerators* antidumping case. The DOC said there that, "[Samsung's] Digital Appliance business' related activities benefitted all of its subsidiaries that also produced and sold it digital appliance products". The Panel should regard this statement as dispositive of the denominator issue because it compels the conclusion that R&D tax credits, just like the R&D activities that generate those credits, pertain to worldwide production, not just local production in Korea.

14. Finally, on the regional specificity issue, the U.S. alleges that Korea misconstrues the text of Article 2.2. However, the reality is the inverse and it is the DOC that has failed to adhere to the requirements expressly set out in Article 2.2. In its Opening Statement, the U.S. recognized that Article 2.2 expressly makes the existence of limitations on the location of the enterprises eligible to receive the subsidy a necessary condition for a finding of regional specificity. While the U.S. claimed in its Opening Statement that the DOC's finding met this requirement, the inescapable fact is that it did not.

15. Korea invites the Panel to review the DOC's finding on regional specificity in the Issues and Decision Memorandum. As the Panel will confirm, the DOC did not identify specific limitations imposed on the location of the enterprises receiving the RSTA Article 26 subsidies, much less make a finding that such limitations were a condition for Samsung to have received the tax credits. Thus, the DOC determination fails to meet the requirements of Article 2.2 even under the overly expansive interpretation of "enterprise" put forward by the U.S., which, in any case, finds no support in the SCM Agreement.

16. The U.S. has described Korea's interpretation of "enterprises" as "untenable".[1] Yet, the interpretation advocated by Korea closely matches the definition that the U.S. has consistently

[1] U.S. Opening Statement at the Second Panel Meeting, para. 56.

included in its free trade agreements, where "enterprise" has been defined as an "entity constituted or organized under applicable law…, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization". The U.S. has included this definition of the term "enterprises" in at least 12 free trade agreements, as indicated in Exhibit KOR-133. Thus, the interpretation of "enterprises" put forward by the U.S. in this case is not only contradicted by the text and context of Article 2.2, it is also contrary to U.S. practice.

17. The U.S. cites approvingly the Panel Report in *US – Upland Cotton* and that panel's conclusions that the assessment of specificity must be made on a case-by-case basis and that, at some point, "a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products."[2] Korea recalls that Article 26 tax credits were available to all enterprises wherever located making any investments throughout 98 percent of the Korean landmass. The facts of this case therefore clearly show that the tax credits provided under Article 26 were broadly available and did not benefit a particular limited group of producers of certain products. Consequently, Article 26 tax credits are not specific under the approach articulated by the *US – Upland Cotton* panel and endorsed by the U.S. in this dispute. This conclusion is entirely reasonable. By contrast, the interpretation of Article 2.2. put forward by the U.S. is extreme as illustrated by the examples that Korea has posited and that U.S. simply refuses to address.

18. In conclusion, Korea reiterates its appreciation to the Panel and the Secretariat and looks forward to your written questions. Korea would like to wish everyone a safe journey home.

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[2] Panel Report, *US – Cotton (Panel)*, para. 7.1142; U.S. First Written Submission, para. 375 and U.S. response to Panel Question 3.11, para. 155.

ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. This dispute presents novel questions of legal interpretation that have not previously been considered by the Appellate Body or any WTO panel. In its first written submission, Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from the customary rules of interpretation of public international law. The Panel should find that all of Korea's proposed interpretations of the covered agreements simply are not supported by the ordinary meaning of text of those agreements, in context, and in light of the object and purpose of the agreements. Accordingly, all of Korea's legal claims lack merit, and should be rejected.

II. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

2. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination." It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Accordingly, Korea, as the complaining party, must establish a *prima facie* case before the United States, as the defending party, has the burden of showing consistency with that provision.

III. KOREA'S CLAIMS UNDER THE AD AGREEMENT ARE WITHOUT MERIT

3. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement are questions of first impression for the Panel. Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." Through its "as applied" and "as such" challenges in this dispute, Korea seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement. The Panel should not countenance Korea's efforts in this regard.

Korea's "As Applied" Claims Related to the Washers Antidumping Investigation

4. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

5. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, *should* "lead to results that are systematically

different" from the two "normal" comparison methodologies when the conditions for its use have been met.

The "Pattern Clause"

6. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

7. Korea argues that, because of the qualitative connotations of the terms "pattern" and "significantly," the differences in export prices "must not be the result of some random, or exogenous cause, but in fact reflect what reasonably can be inferred to be targeting conduct." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. That latter question is not germane to an application of the "pattern clause." Additionally, Korea's reasoning is unsound. "'[L]ow' prices of sales," if they are below normal value, still constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. The "reason" for the low prices changes nothing.

8. Korea argues that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the washers antidumping investigation because it "evaluated whether the prerequisites for invoking [the alternative comparison methodology] had been met exclusively through the use of a computational analysis of the difference in exporters' prices." The USDOC was not obligated to examine *why* there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 of the AD Agreement by not doing so.

9. In the washers antidumping investigation, the USDOC applied a two-part test – the *Nails* test – to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed. In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by Samsung and LG. As reflected in the discussion in the final issues and decision memorandum, the USDOC undertook a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. In addition to explaining its analytical approach, the USDOC addressed numerous arguments raised by interested parties concerning the methodology applied in the examination of the existence of a pattern of export prices. Accordingly, the USDOC did not act inconsistently with the requirements of the "pattern clause" in Article 2.4.2.

The "Explanation Clause"

10. The second condition in the second sentence of Article 2.4.2, the "explanation clause," provides that an investigating authority may utilize the alternative comparison methodology only "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average and transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss the both the average-to-average and transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

11. In the washers antidumping investigation, the USDOC considered whether observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC evaluated the difference between what the weighted average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-

to-transaction comparison methodology. The USDOC concluded that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method. The USDOC provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Accordingly, the "explanation" that the USDOC provided in the washers antidumping investigation is not inconsistent with Article 2.4.2.

Application of the Average-to-Transaction Comparison Methodology to All Sales

12. Korea's claim that the USDOC acted inconsistently with Article 2.4.2 by "apply[ing] the [average-to-transaction] comparison methodology to all of LG's and Samsung's sales, not merely to those transactions which it found to constitute a pattern of export prices that differed among purchasers, regions and periods of time" lacks merit. When the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is constrained as Korea proposes. The Appellate Body did not definitively declare in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions.

13. Korea's proposed interpretation of Article 2.4.2 is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping." "Masked" or "targeted dumping" involves both sales below normal value, which are evidence of dumping, as well as sales above normal value, which may mask such dumping. "Targeted dumping" is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced sales, and by ensuring that the higher-priced sales do not offset dumping that properly should be evidenced by the lower-priced sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

Zeroing in Connection with the Average-to-Transaction Comparison Methodology

14. Korea's claims that the USDOC acted inconsistently with Articles 2.4.2 and 2.4 of the AD Agreement by using zeroing in connection with the average-to-transaction comparison methodology are without merit. Prior Appellate Body reports are not "dispositive of the question of whether zeroing is permitted." The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met.

15. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes. That the average-to-transaction comparison methodology is an exception to the comparison methodologies, and that it can be used to "unmask targeted dumping" is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law, in particular the "principle of effectiveness."

16. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results. This is true because, for both methodologies, all of the normal value and export price data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. Those

mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. Mathematical equivalence can be demonstrated using hypothetical examples, but the problem is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the washers antidumping investigation, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes, but the factual situations of those disputes can be distinguished from the factual situation here, and the Appellate Body's prior consideration of the argument neither supports nor compels rejection of the argument in this dispute.

17. The meaning of the second sentence of Article 2.4.2 can be confirmed through recourse to documents from the negotiating history of the AD Agreement, which reflect that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked and that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

18. Korea also claims that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4. Korea overstates the Appellate Body's findings in previous disputes related to zeroing and Article 2.4. The Appellate Body has not found that zeroing breaches Article 2.4 without having first found a breach of another provision. The Panel should recognize the limited nature and application of the Appellate Body's previous findings. Furthermore, there is no basis for finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is not "fair." It is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased.

Korea's "As Such" Claims Related to Zeroing

19. Korea's "as such" claims related to zeroing rely on the same arguments that Korea advances in support of its "as applied" claims. For the reasons given above, those arguments are without merit. Korea's claims under Articles 1, 2.1, and 9.3 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 are dependant upon or consequential of its claims under Article 2.4.2 and 2.4, and thus also should be rejected.

Korea's "As Such" Claims Related to the "Differential Pricing Methodology"

20. Korea seeks to "establish that the differential pricing methodology is a measure challengeable in WTO dispute settlement, 'as such'." Korea's effort fails. The evidence Korea adduces to support its claim is insufficient. Korea is inviting the Panel, contrary to the admonition of the Appellate Body, simply to divine the existence of a measure in the abstract on the basis of a string of cases, or repeated action. The Panel should decline Korea's invitation.

21. Assuming *arguendo* that the Panel accepts Korea's claim that the "differential pricing methodology" is a measure that exists and can be subject to an "as such" challenge, for Korea to succeed in its "as such" claim against the alleged "differential pricing methodology" measure, Korea must demonstrate that the "differential pricing methodology" necessarily causes a breach of Article 2.4.2 of the AD Agreement. Korea has failed to do so. Korea has provided no basis to conclude that a differential pricing analysis breaches Article 2.4.2 because it has turned an exception into a "rule," and Korea's contentions are belied by the facts. At the time Korea submitted its panel request, the USDOC had actually used the exceptional, average-to-transaction methodology only about 11 percent of the time as a result of the application of a differential pricing analysis.

22. Korea advances two groups of complaints about the "differential pricing methodology." First, Korea contends that the "differential pricing methodology" is inconsistent with Article 2.4.2 of the AD Agreement, "as such," for the same reasons that it argues that, in the washers antidumping

investigation, the USDOC acted inconsistently with Article 2.4.2, on an "as applied" basis. For the same reasons given above, Korea's arguments lack merit.

23. Second, Korea sets forth a number of criticisms that it argues are specific to the "differential pricing methodology." However, Korea has failed to present legal arguments and evidence sufficient to make a *prima facie* case of a breach of Article 2.4.2 of the AD Agreement. Korea premises its arguments exclusively on hypothetical scenarios. Korea makes no reference to any actual evidence. Accordingly, Korea has failed to adduce evidence sufficient to make out a *prima facie* case that the "differential pricing methodology" breaches Article 2.4.2 of the AD Agreement, "as such."

Korea's "Ongoing Conduct" Claims

24. Korea's "ongoing conduct" claims are without merit. The purported "ongoing conduct" "measure" cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU. Additionally, the facts in this dispute do not support the conclusion that the challenged practices "would likely continue to be applied in successive proceedings." Not even one administrative review of the washers antidumping order has been completed. Thus, it is impossible for Korea to establish the "string of determinations, made sequentially. . . over an extended period of time" that would be required to support its claims related to alleged "ongoing conduct," as that concept has been elaborated by the Appellate Body.

Korea's Claim under Article 1 of the AD Agreement

25. None of the antidumping measures challenged by Korea in this dispute is inconsistent with Article VI of the GATT 1994 or any provision of the AD Agreement. Accordingly, the Panel should deny Korea's request for a finding that the challenged U.S. measures are inconsistent with Article 1 of the AD Agreement.

IV. KOREA HAS FAILED TO ESTABLISH THAT THE USDOC'S COUNTERVAILING DUTY DETERMINATION WAS INCONSISTENT WITH THE SCM AGREEMENT OR GATT 1994

26. Korea asserts that the USDOC incorrectly found that subsidies under RSTA Article 10(1)(3) were *de facto* specific – despite overwhelming evidence that Samsung received disproportionately large amounts of these subsidies. Korea's second claim – i.e., that RSTA Article 26 subsidies are not specific – fares no better. This subsidy program falls squarely within Article 2.2 of the SCM Agreement, and is limited to a designated geographical region.

27. In addition, Korea challenges the method by which Samsung's subsidy rate was calculated. Korea attempts to introduce obligations into the SCM Agreement and GATT 1994 that are not set out in the text. There is nothing in these agreements that requires an investigating authority to treat subsidies as "tied" to a product, based on how a recipient chooses to "use" the benefit that it receives and any alleged effects of that use on a product. And the agreements do not require authorities to apply this use and effects inquiry to include offshore manufacturing.

RSTA Article 10(1)(3)

28. The USDOC's findings are fully consistent with the text of Article 2. Korea errs in asserting that the specificity determination is somehow at odds with the Appellate Body's approach in *US – Large Civil Aircraft*. Two companies received a substantial share of all benefits disbursed under a subsidy program. The absence of any restrictions on eligibility means that benefits would have been expected to be distributed more evenly across the program's 11,764 recipients. Thus, there was a significant disparity between the expected distribution of subsidy based on those conditions of eligibility and the actual distribution.

29. Equally groundless is Korea's assertion that the subsidies were "proportionate" because they were calculated using the same formula available to all Korean companies. Use of a common formula could indicate "objective criteria or conditions," but an indication of non-specificity under

Article 2.1(b) does not preclude a finding of *de facto* specificity. At most, the exercise of discretion would be relevant to a different analysis under Article 2.1(c).

30. Likewise, there is no merit to Korea's suggestion that the distribution of benefits reflects the fact that Samsung is a large company, and that any tax credit reflects a large company's research and human resources development activities. Korea's hypothesis is unsupported by evidence. The fact that a company is large does not mean that, where it receives a subsidy that is larger, in relative and absolute terms, than that received by other recipients, such a subsidy inherently cannot be found specific under Article 2.1(c). The USDOC found that to accept such an argument would "undermine the purpose" of the disproportionality inquiry.

31. Here, neither of the two factors identified in the third sentence of Article 2.1(c) has any bearing on the specificity inquiry. The considerable age of this subsidy program eliminates certain complications that can arise with new programs. And the USDOC was aware of the publicly known fact that Korea is one of the wealthiest and most diversified economies in the world – a fact that Korea neither raised nor contested.

32. The USDOC's remand redetermination supplements and reaffirms these findings. The USDOC drew upon newly-obtained information to address Samsung's argument that its share of the tax credits merely reflected the large size of the company. Even among other large companies, Samsung's use of the program was "overwhelming[ly] disproportionate."

RSTA Article 26

33. The USDOC's specificity determination is a straightforward application of Article 2.2 of the SCM Agreement. The RSTA Article 26 program is expressly limited to investments in facilities located in a designated region – i.e., the territory of Korea that falls outside the Seoul overcrowding area.

34. To evade these findings, Korea attempts to rely on legal theories that have been rejected by WTO panels. Korea asserts that RSTA Article 26 subsidies are available to all enterprises located *within the designated region*. The panel in *EC – Large Civil Aircraft* refused to accept this argument, which would require specificity "on a double basis" within Article 2.2. As the panel observed, this interpretation would render Articles 2.2 and 8.2(b) redundant. More recently, the panel in *US – Anti-dumping and Countervailing Measures (China)* rejected the "double basis" interpretation of Article 2.2.

35. Equally deficient is Korea's argument that a finding of non-specificity under Article 2.1(b) trumps a finding of regional specificity under Article 2.2. This interpretation has no grounding in the text of Article 2 and would make Article 8.2(b) redundant.

36. Korea attempts to re-characterize the RSTA Article 26 subsidies. But this program does not address the "use" of a subsidy, and instead ties eligibility to the geographic location of facilities. The fact that the restriction in RSTA Article 26 is addressed to the location of the facilities, as opposed to the head office of the recipient, is of no moment. Article 2.2 does not impose a "head office" test or similar restriction.

37. Likewise, Article 2.2 does not require that any geographic region be designated "explicitly," as Korea suggests. Nor is there any basis for Korea's apparent attempt to limit Article 2.2 to situations of *de jure* specificity. It is of no moment that the language of the relevant law designates a geographical region through language of inclusion or exclusion.

38. There is also no basis for Korea's assertion that larger regions (which are subject to "exclusions" such as the Seoul overcrowding area) should be exempted from the disciplines of Article 2.2. Article 2.2 does not depend on the relative proportion of land mass covered or excluded by a region. Although Korea suggests that large regions with "sensible exclusions" do not distort trade, the inquiry under Article 2.2 is not one of trade distortion; that comes into play in the context of a panel's adverse effects analysis or an investigating authority's injury analysis. To provide an exemption for geographically limited programs would invite circumvention of the subsidy disciplines of the SCM Agreement. And the alleged "exception" at issue here – the Seoul overcrowding region – is hardly a negligible exclusion that should be overlooked.

39. Korea falls back on "policy" arguments, but essentially concedes that RSTA Article 26 is a regional assistance program. The RSTA Article 26 program falls squarely within the regional specificity provisions of Article 2.2.

The Calculation of Samsung's Subsidy Rate

40. Korea challenges the method by which Samsung's countervailable subsidy rate was calculated. But its arguments are not well-founded in any specific obligation, and it points to no error in the calculation of that rate. Nor has any previous panel or Appellate Body report endorsed the interpretations put forward by Korea.

Korea Seeks to Create Rules that Are Not Set Out In the Agreements

41. Korea hinges its claims on finding specific obligations in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement on how a Member should allocate the numerator and denominator when calculating CVD ratios. Yet these provisions do not dictate precisely how the rate of subsidization is to be calculated.

42. In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts relating to the granting authority's bestowal of the subsidy are a key consideration. A Member may examine a subsidy and determine that it is appropriate to treat that subsidy as essentially "untied" for attribution purposes. Alternatively, a Member may examine a subsidy and determine that there is a product-specific "tie." The Member may allocate the subsidy entirely to that product and divide the benefit by only the sales of the product that it views as "tied" to that subsidy.

43. The use of both approaches is reflected in Annex IV of the SCM Agreement, which informs serious prejudice analysis. The Informal Group of Experts ("IGE") established by the Committee on Subsidies and Countervailing Measures developed recommendations to address when a subsidy is "tied" for purposes of paragraph 3. One acceptable method is to determine whether "the intended use of a subsidy is known to the giver, and so acknowledged, prior to or concurrent with the subsidy's bestowal." The IGE report also recommends that research and development subsidies presumptively be treated as untied. Other relevant context suggests the appropriateness of an approach that looks to the conditions of the granting of the subsidy.

Attribution of Subsidies On A "Tied" Basis

44. According to Korea, in apparently every case, a Member must analyze the actual use and effects of a subsidy in connection with a particular product, and apply a "tied" attribution methodology. But the terms of the SCM Agreement and the GATT 1994 do not impose a specific test for determining when a subsidy is "tied" to the production or sale of a particular product – either the approach employed by the USDOC or alternatives.

45. Korea's approach may yield results that are speculative and arbitrary. Adoption of Korea's use/effects approach could impose significant administrative burdens, and may be difficult or impossible to implement in a meaningful way.

46. Korea also relies on inapposite jurisprudence to support its position. Here, there are no allegations of pass-through or privatization, and it is undisputed that the RSTA subsidies at issue exist and benefit the products.

47. It was appropriate for the USDOC to employ an untied approach on the facts of this case. The design, structure, and operation of these RSTA programs do not suggest a product-specific tie. To the extent that the RSTA programs induce investment *ex ante* (i.e., by encouraging companies to invest in anticipation of receiving tax credits) they would not do so at the product level. Indeed, companies only receive credits for a percentage of their aggregate investment costs. The aggregate tax credits received by the company are more appropriately viewed as fungible, benefitting the entire company. Even if Samsung maintained underlying records to support the expenses it claimed in its return, in case the Korean authorities decided to conduct an audit, the Korean authorities did not receive or review these underlying documents in connection with the bestowal of the subsidies, and did not acknowledge any product-specific tie.

Sales of Products Manufactured Outside Korea

48. Equally, there is no basis for Korea's assertion that the USDOC was required to include in the denominator the sales value of products manufactured *outside Korea*. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require Members to take into account products manufactured outside the territory of the subsidizing Member when calculating subsidy rates. Members generally grant subsidies to generate benefits within their borders.

49. The USDOC explained that it was not appropriate to attribute subsidies to overseas production. There was no evidence that the granting Member intended to subsidize overseas production, and no connection between the structure and operation of the subsidy program and overseas production.

50. Korea asserts that the USDOC failed to "match" the elements in the numerator and denominator. This "matching" argument rests on a flawed premise – namely, that the inquiry hinges on the possible indirect effects of subsidies overseas. But even if an investigating authority were required to consider effects-based considerations for purposes of attribution, Korea offers no evidence of these supposed overseas effects.

51. Korea wrongly criticizes the USDOC for its alleged use of a presumption in favor of attributing subsidies to domestic sales. WTO panels and the Appellate Body have endorsed the use of presumptions where they are reasonable and rebuttable. Here, the USDOC will examine any relevant evidence and can draw the opposite conclusion. The record was devoid of evidence establishing that the grant of subsidy was intended to benefit overseas production.

52. Finally, Korea fails to account for the administrative burden associated with its overseas effects theory. Taken to its logical conclusion, Korea's theory would mean that Members would have to evaluate which sales of goods produced overseas were linked in some way to the subsidy, on a country-by-country basis, to determine the denominator in the subsidy ratio.

Korea's Claims Under Articles 10 and 32.1 of the SCM Agreement

53. Korea has failed to establish that the USDOC's specificity determinations and subsidy rate calculations are inconsistent with Article VI:3 of the GATT 1994 or Articles 1.2, 2 and 19.4 of the SCM Agreement. Accordingly, the USDOC's determination is not inconsistent with Articles 10 or 32.1 of the SCM Agreement.

V. CONCLUSION

54. For the foregoing reasons, the United States respectfully requests that the Panel reject Korea's claims.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. Korea continues to offer the Panel highly charged rhetoric rather than sound legal reasoning. Korea also continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law. The U.S. first written submission demonstrates why Korea's claims fail. Statements and written filings Korea has made since filing its first written submission have not improved Korea's case.

II. KOREA'S CLAIMS UNDER THE AD AGREEMENT ARE WITHOUT MERIT

2. The U.S. first written submission explains why the Panel should conclude that the measures challenged by Korea are not inconsistent with Article 2.4.2 of the AD Agreement or any other provisions of the covered agreements. Korea's legal arguments remain fatally flawed. The interpretations that the United States proposes are those that result from the proper application of the customary rules of interpretation of public international law. Korea's proposed interpretations, on the other hand, are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely.

3. While Korea and a number of the third parties attack the *Nails* test applied by the USDOC in the washers antidumping investigation, as well as the differential pricing analysis applied by the USDOC in the preliminary results of the first administrative review of the washers antidumping order, neither Korea nor any of those third parties describes how, in their view, an investigating authority *should* discern whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

Korea's Arguments Related to the "Pattern Clause" Are without Merit

4. When the USDOC undertook analyses pursuant to the "pattern clause" in the washers antidumping investigation, it took into account all of the "actual export prices" reported. Korea simply is incorrect when it suggests that the USDOC did not "evaluate actual export prices." Korea also is incorrect when it contends that the "pattern clause" requires investigating authorities to examine export prices on an individual basis. The text of the second sentence of Article 2.4.2 of the AD Agreement actually supports the opposite proposition.

5. Korea likewise is incorrect when it argues that the use of average prices rather than so-called "actual prices" "ignored basic principles of data analysis and common sense." The USDOC did not look to price variance (*i.e.*, as quantified by the standard deviation) at the transaction-specific level because the second sentence of Article 2.4.2 is concerned with export prices that "differ significantly *among* different purchasers, regions or time periods." Using weighted-average export sales prices allows the USDOC to disregard variations *within* a purchaser (or region or time period) and focus instead on uncovering a pattern of export prices which differ significantly *among* groups. Korea's proposed transaction-based variance calculation would not only be difficult to administer in most cases (if not impossible), but it also is at odds with the text of the second sentence of Article 2.4.2.

6. Korea objects to the USDOC's alleged "misuse of the standard deviation in the *Nails* test," and, in addition, Korea advances a numbers of statistics-based arguments. Korea's statistical arguments are without merit. The "pattern clause" does not require the use of any specific type of statistical analysis, and the USDOC has not misused standard deviations. Further, although the USDOC did, in a generic sense, analyze certain statistics, *i.e.*, weighted-average export prices, in the washers antidumping investigation, the "pattern clause" does not require the use of formal statistical techniques.

7. The premises of Korea's statistical arguments are flawed. As a legal matter, the term "significantly" in the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to utilize statistical analyses when examining export prices to determine whether there exists "a pattern of export prices that differ significantly among different purchasers, regions or time periods." The basic logical premise of Korea's arguments is equally flawed. Korea contends that the *Nails* test applied by the USDOC in the challenged antidumping investigation is not suitable to perform a particular type of statistical analysis. However, the *Nails* test does not involve the type of statistical analysis discussed by Korea. Korea's statistical criticism of the *Nails* test simply is inapposite. Korea seeks to replace the USDOC's balanced approach with one of the extremes noted by the USDOC in its determination, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is Korea's insistence on the use of a particular type of statistical analysis, which the AD Agreement does not require.

8. Korea's argument that the USDOC's examination of a "pattern" in the washers antidumping investigation is inconsistent with the "pattern clause" because the USDOC did not examine what Korea terms "qualitative aspects" continues to lack merit. In Korea's view, even after the investigating authority has found a pattern, the investigating authority must then conduct a second, independent investigation of what those differences mean and why they exist. Nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. Korea's proposed interpretation is untenable.

Korea's Arguments Related to the "Explanation Clause" Are without Merit

9. In its statements at the first panel meeting and in its responses to the Panel's questions, Korea offers the Panel no compelling reason to find that the USDOC's explanation in the washers antidumping investigation is inconsistent with the "explanation clause." It is not the case that the investigating authority must explain why it is not possible *at all* to take into account significantly differing export prices using one of the two normal comparison methodologies. Rather, the investigating authority must explain why the significant differences in export prices cannot be taken into account in a manner that is "proper," "fitting", or "suitable" using one of the normal comparison methodologies. Additionally, the term "appropriately" does not alter the meaning of the terms of the "pattern clause." Korea's proposed reading of the term "appropriately" simply is nonsensical.

10. Korea makes clear its view that "whatever their trends or variations" and "regardless of the size of the price differences," the normal comparison methodologies can take into account "appropriately" any "pattern of export prices which differ significantly among different purchasers, regions, or time periods." This plainly is yet another attempt by Korea to read the second sentence of Article 2.4.2 out of the AD Agreement entirely, using the term "appropriately" as leverage to do so. Korea's proposed interpretation is untenable.

11. Korea argues that "[t]he term 'appropriately' indicates that an adjustment of the W-W method might be sufficient to allow the W-W method to take differences into account with the W-W method, without the need to resort to the W-T comparison method." Korea offers no explanation, however, for why the presence of the term "appropriately" in the second sentence of Article 2.4.2 should be read as altering the application of the comparison methodologies set forth in the first sentence of Article 2.4.2.

12. Korea argues that the USDOC "does not make any effort to consider particular circumstances." Korea's contention is baseless. The USDOC, based on information provided by the respondents, determined what the margins of dumping would have been for LG and Samsung, both using the normal average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology. The USDOC compared the results and discerned that there was a "meaningful difference" in the margins of dumping calculated using the different methodologies. In this way, the USDOC explained why, within "the factual context of a particular case," *i.e.*, the washers antidumping investigation, the average-to-average comparison methodology could not take into account appropriately the pattern of export prices that differ significantly.

13. Korea continues to argue that "the authority must always consider the possibility of a [transaction-to-transaction] comparison." Nothing in the text of Article 2.4.2 supports Korea's proposed interpretation.

Application of the Average-to-Transaction Comparison Methodology to All Sales

14. Korea offers little new argumentation to support its claim that the United States has breached the second sentence of Article 2.4.2 as a result of the USDOC's application of the alternative average-to-transaction comparison methodology to all sales in the washers antidumping investigation. Korea appears to argue for the application of the alternative, average-to-transaction comparison methodology only to certain types or models of the product under investigation. However, applying the alternative, average-to-transaction comparison methodology on such a model-specific basis would appear to be directly contrary to what the Appellate Body said about the so-called "targeted dumping" provision in *EC – Bed Linen*.

Zeroing in Connection with the Average-to-Transaction Comparison Methodology

15. The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. The Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection. The Panel should recognize the limited nature and application of the Appellate Body's previous findings related to zeroing and the "fair comparison" language in Article 2.4 of the AD Agreement. The logical extension of the Appellate Body's reasoning that the alternative, average-to-transaction comparison methodology is an exception to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should *not* "lead to results that are systematically different" – is that the alternative comparison methodology *should* "lead to results that are systematically different," *when the conditions for its use have been met*.

16. When the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, those interpretations, on a basic level, are rooted in the text of Article 2.4.2 of the AD Agreement. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions." The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis." There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

17. The U.S. first written submission demonstrates "mathematical equivalence," using both hypothetical scenarios and the actual data from the washers antidumping investigation. It also is the case that the actual preliminary result in the first washers antidumping administrative review, if zeroing is prohibited under both methodologies, would be that the average-to-average and the alternative, mixed comparison methodologies would yield mathematically equivalent results. This is further evidence of the veracity of mathematical equivalence. Korea's arguments do not leave mathematical equivalence "broken."

Korea's Claims Regarding the "Differential Pricing Methodology" Are without Merit

18. Korea has given the Panel no reason to find that any so-called "differential pricing methodology" – or any measure in which the USDOC applied a differential pricing analysis – is inconsistent with Article 2.4.2. As we have demonstrated, no "differential pricing methodology" measure exists, and thus no such measure can be found inconsistent with Article 2.4.2, either "as such" or as "ongoing conduct." Additionally, we have shown that the preliminary results of the first administrative review of the washers antidumping order are not within the Panel's terms of reference, so those results, too, cannot be found inconsistent with Article 2.4.2, "as applied." Nevertheless, we address Korea's substantive arguments.

19. The differential pricing analysis the USDOC applied in the first administrative review sought to identify a "pattern," but did not require a "target." A "target" is just one example of a "pattern." While the second sentence of Article 2.4.2 has been described as a provision that addresses "targeting" or "targeted dumping," that is a shorthand reference to the terms of the second sentence of Article 2.4.2. The terms "targeting" and "targeted dumping" are not present in Article 2.4.2 or anywhere else in the AD Agreement.

20. Under the "targeted dumping" approach that the USDOC applied in the washers antidumping investigation, the "target" concept focused only on lower-priced export sales. However, Article 2.4.2 does not require this particular approach to a "pattern" analysis. The differential pricing analysis that the USDOC applied in the preliminary results of the first administrative review looked for export prices to a purchaser, region, or time period which are either significantly higher or significantly lower than the export prices to other purchasers, regions, or time periods. The conceptual framework of that analysis is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2, which calls upon the investigating authority to find "export prices which differ significantly," but which does not require a focus either on lower-priced or higher-priced export sales.

21. The legal premise of Korea's vertical variation argument is flawed. A "target" analysis is just one kind of analysis an investigating authority might undertake when searching for "a pattern of export prices which differ significantly among different purchasers, regions or time periods." Korea is incorrect when it suggests that the USDOC did not evaluate "*all* of the exporter's export prices for the product under investigation." In the preliminary results of the first administrative review, after making comparisons between different purchasers, regions or time periods on a model-specific basis, the USDOC aggregated the results of these model-specific comparisons to establish that 47.12 percent of LG's export sales passed the Cohen's *d* test and that this supported the conclusion that there existed conditions indicative of a pattern of export prices that differed significantly among different purchasers, regions, or time periods. Aggregating the results of the model-specific comparisons among different purchasers, regions, or time periods ensured that the "pattern" identified was for the product under investigation as a whole and was based on the exporter's overall pricing behavior in the U.S. market.

22. Korea contends that the USDOC's differential pricing analysis improperly combines price variation across different purchasers, regions and/or time periods to identify a pattern. However, there is no textual support in Article 2.4.2 for Korea's contention. To identify "a pattern" for the exporter and product as a whole, it may be appropriate for an investigating authority to consider all of that exporter's export prices to discern whether significant differences in the export prices are exhibited collectively among different purchasers, or different regions, or different time periods. In other words, the text of the "pattern clause" contemplates a holistic analysis of the exporter's pricing behavior for the product as a whole, or, in other words, the very "horizontal" analysis to which Korea objects.

23. Korea's argument related to so-called "cross-category" variation fails for the same reason that its "horizontal" variation argument fails. Nothing in the text of the "pattern clause" suggests that the significant export price differences among purchasers (or regions or time periods) cannot be cumulated with the significant differences in export prices among other categories (*i.e.*, purchasers, regions, or time periods) when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." The USDOC undertakes a similar process when measuring the amount of dumping. Specifically, the USDOC makes comparisons between normal values and export prices for comparable merchandise, and then aggregates those intermediate comparison results to determine the amount of dumping for that exporter and for the product as a whole. In this way, the use of the Cohen's *d* and ratio tests as part of the USDOC's differential pricing analysis is in accord with prior findings of the Appellate Body elaborating on the obligations set forth in Article 2.4.2.

24. Korea's "systemic disregarding" contention just amounts to another phrasing of Korea's argument that zeroing is always impermissible. However, zeroing is permissible – indeed, it is necessary – when applying the alternative comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. Additionally, because the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology to all sales is permissible, there is no basis for finding that what Korea calls "systemic disregarding" is impermissible. Nothing in the text of the second sentence of Article 2.4.2 supports

Korea's claim. When the results of the two comparison methodologies used in a mixed application are aggregated, it is necessary to ensure that the results of the average-to-transaction comparison methodology are not masked or offset by the results of the average-to-average comparison methodology, and the USDOC ensures that that does not happen by not offsetting a positive comparison result of the average-to-transaction comparison methodology with a negative comparison result of the average-to-average comparison methodology.

III. KOREA HAS FAILED TO DEMONSTRATE THAT THE USDOC'S COUNTERVAILING DUTY DETERMINATION IS INCONSISTENT WITH THE *SCM AGREEMENT* AND THE *GATT 1994*

25. Korea has failed to demonstrate that the USDOC's CVD determination is inconsistent with U.S. obligations under the GATT 1994 and SCM Agreement. Korea's first claim – *i.e.*, that RSTA Article 10(1)(3) subsidies are not *de facto* specific – is legally and factually untenable, and its second specificity claim is equally flawed.

26. Likewise, there is no merit to Korea's assertion that the USDOC should have calculated the subsidy ratios for RSTA Article 10(1)(3) and 26 subsidies using a novel variation of the "tied" approach to attribution. Korea's expense-driven theory has nothing to do with the *bestowal of subsidies*, and fails as a consequence. Korea's belated attempt to introduce materials from separate antidumping investigations cannot rescue this theory.

27. Equally without merit is Korea's assertion that the USDOC should have incorporated revenue from overseas manufacturing into the denominator of the subsidy ratio for RSTA Article 10(1)(3). Here, again, Korea relies on a theory that has no basis in the bestowal of subsidies.

The USDOC's Disproportionality Determination Is Consistent With Article 2.1(c) Of The SCM Agreement

28. Korea asserts that, in *US – Large Civil Aircraft*, the Appellate Body "endorsed" and "implicitly agreed with" the argument that a panel must base its determination on a "second ratio reflecting the expected distribution of the subsidy." Korea mischaracterizes the Appellate Body's findings.

29. The Appellate Body found that it would have expected a "wider distribution" of benefits, given open eligibility criteria and notwithstanding the fact that not every company would be in a position to take advantage of the program. Having found that there was "reason to believe that the IRB subsidies were granted in disproportionately large amounts," the Appellate Body turned to the explanations offered by the parties. The Appellate Body found that the European Communities' "second ratio" was not relevant, as it was not an explanation for the distribution. The Appellate Body also could not accept the United States' explanation based on qualifying investments. The Appellate Body considered the United States' final explanation, which was predicated on the significance of Boeing and Spirit to the Wichita economy, but rejected this defense. The Appellate Body did not "endorse" or even suggest that a disproportionality analysis must include a "second ratio."

30. Korea also continues to cling to arguments that the USDOC appropriately considered and rejected. Korea points to the fact that the "amount of the credit that Samsung received was solely determined based on the statutory formula," and argues that as a result its "subsidy is proportionate to the amount of its investment." This "common formula" argument reflects a misreading of Article 2.1. The disproportionality inquiry cannot be reduced to the question of whether subsidies are distributed automatically, without the exercise of discretion. Korea's position distorts the inquiry under Article 2.1(c) and would invite ready circumvention of subsidy disciplines. Here, as well, RSTA Article 10(1)(3) does not even contain a single "common formula."

31. Equally groundless is Korea's continued reliance on its "size defense." The fact that Samsung and LG are "large" companies does not explain the skewed distribution evident here. Nor can large size shield recipients from scrutiny under Article 2.1(c) of the SCM Agreement.

32. This was the extent of Samsung's "size defense" before the USDOC – *i.e.*, that, in general, "large" companies will "typically" invest more in research and human resources development than "smaller" companies. To the extent that Samsung was attempting to establish a "second ratio"

that would explain the disproportionate subsidy distribution found by the USDOC, it failed to do so. The USDOC also found that this theory was fundamentally at odds with the purpose of the disproportionality inquiry.

33. Here, again, the *US – Large Civil Aircraft* dispute is instructive. The fact that Boeing and Spirit were "large" companies with larger investments in commercial and industrial property than "smaller" companies was not found to explain the disparate distribution and could not avert a disproportionality finding. The Appellate Body did not accept a "size defense" in that case, and the Panel should not do so here. And even assuming some connection between size and R&D activity, this general correlation would not explain the *extent* of the disparity evident here.

34. Nor does the relative size of participants in the RSTA Article 10(1)(3) program explain this disparity. Korea has offered extra-record evidence on Samsung's size relative to the next largest company in Korea, but does not compare participants in the Article 10(1)(3) program. The only known RSTA 10(1)(3) participants for which there is information on the record regarding size are the two companies under investigation – Samsung and LG. Throughout the 2007-2009 period, Samsung and LG both received very large amounts of subsidy. But this information shows a disparity that cannot be explained by relative size. And the disparity in subsidy distribution cannot be explained by the amounts of eligible investments.

35. Other record evidence confirms that this pattern – *i.e.*, the concentration of subsidy benefits in a very small number of recipients – is long-standing. The distribution with respect to RSTA Article 10 is consistent with a broader pattern of concentration of tax benefits in the top "chaebol."

36. In its redetermination, the USDOC further confirmed that Samsung's status as a "large" company cannot explain the distribution of RSTA Article 10(1)(3) subsidies. Korea dismisses the USDOC's redetermination, apparently based on the assertion that the USDOC's findings did not constitute a "second ratio." But the Appellate Body did not require a "second ratio." Korea falls back on the argument that data in the redetermination, which is based on taxable income and tax savings, is "irrelevant," because it may reflect a company's tax planning strategy. But this does not render the data irrelevant, particularly at the level of an aggregate comparison between Samsung and the other 99 companies.

37. Finally, in its first written submission, the United States observed that Korea had failed to make a *prima facie* case with respect to the final sentence of Article 2.1(c) of the SCM Agreement. Korea has failed to cure the deficiencies in its case. Korea asserts that "there is no evidence" that the USDOC took into account the diversification of the Korean economy. To the extent that Korea is asserting that this factor must be addressed explicitly, Korea is incorrect. It is a "publicly-known fact" that Korea is one of the wealthiest, most diversified economies in the world. And because of limitations in the evidence that the GOK provided, the extent of diversification of the economy was not at issue.

The USDOC's Determination That RSTA Article 26 Subsidies Were Regionally Specific Was Consistent With Article 2.2 Of The SCM Agreement

38. Korea also failed to establish that the USDOC's specificity determination with respect to RSTA Article 26 subsidies is inconsistent with Article 2.2 of the SCM Agreement.

39. Korea offers a narrow, results-driven interpretation of the term "enterprise" in Article 2.2. Yet when the term "certain enterprises" is read in context with Article 2.2, it is clear that a firm, industry, or group thereof may be "located" in a variety of places, including the site of a head office, branch, manufacturing facility, or other asset or investment.

40. Korea casts a wide net, hoping to find support for its interpretation in other provisions of the SCM Agreement and the GATT 1994. This effort fails. The sharp distinction that Korea seeks to draw between "enterprise" and "facility" defies logic. It is unclear where an enterprise would be located, if not in facilities of some kind. Manufacturing and production does not occur in a vacuum, but instead is undertaken by enterprises in manufacturing facilities.

41. Korea asserts that the Article 26 program "does not impose any limitation on the location of the enterprise that receives the subsidy." But the geographic limitation in the RSTA Article 26

program is imposed with respect to the location of "facilities" in which investments are made. The fact that a company such as Samsung has multiple locations – that fall both within and without a designated region – is of no moment. And Korea's interpretation would create a major loophole in subsidy disciplines.

42. In addition, Korea continues to rely on failed legal theories that have no basis in the text of Article 2.2. Korea clings to its "double basis" theory, yet two panels that have addressed this theory rejected it. Korea also asserts that a geographic region under Article 2.2 must be designated "affirmatively, not by implication or suggestion." But Article 2.2 does not contain the word "explicit," and does not require that a region be "affirmatively" designated. Here, RSTA Article 26 incorporates an express geographic limitation.

43. Korea's continued reliance on its "large region" defense is equally without merit. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large. And it would be particularly inappropriate to overlook the geographic limitation imposed here.

44. Finally, Korea's resort to "policy" arguments also cannot avert a finding of specificity. In fact, these policy arguments confirm that the RSTA Article 26 program is regionally specific.

The USDOC Appropriately Treated RSTA Subsidies As "Untied" When Calculating Subsidy Ratios

45. Korea criticizes the USDOC's calculation of the subsidy ratios for RSTA Articles 10(1)(3) and 26. Yet Korea's claim is legally untenable. There can be no doubt that the R&D and facilities subsidies at issue are not "tied" to particular products.

46. Korea distances itself from its previous "retroactive use" theory, but fails to offer a coherent alternative. Korea's attribution theory hinges on *expenditures* that were incurred by the subsidy recipient. Although Korea grounds its theory in expenditures that it says "benefit" production, it uses this term in a way that has no basis in Article 1.1(b) of the SCM Agreement. To the extent that Korea is using the term "benefit" as a short-hand reference to the effect of an expenditure, this too would be inconsistent with the SCM Agreement. Treating expenses as synonymous with subsidies is also inappropriate here, given the structure, architecture, and design of the subsidies at issue.

47. Korea relies heavily on Samsung's internal expense records, which it argues allow Samsung to "'tie' the tax credits that it received to the washers that it produced in its Digital Appliance Division." Korea's focus on record-keeping is misplaced, however, as the attribution of subsidies is not a function of the effect of expenses, but rather the bestowal of the subsidies. So the internal records of these expenses would not provide a basis for calculating subsidy ratios.

48. The record-keeping requirements for RSTA Article 10(1)(3) also do not support Korea's view. Korea admitted that companies are not required to file a form or report as part of their tax return that shows how expenses eligible for Article 10(1)(3) tax credits are associated with particular merchandise. Korea points to Korea's Basic Act on National Taxes, which requires all taxpayers to "prepare and keep faithfully books and documentary evidence related to all transactions." But this is a cross-cutting requirement, applicable to all taxpayers in all contexts.

49. Moreover, Samsung did not submit any records – internal or otherwise – to the granting authority, the Government of Korea ("GOK"), that would have shown which expenses were allegedly spent in connection with a particular product. Korea has conceded that even the "detailed breakdown" of expenses that it touted in its first written submission was never presented to the GOK. Likewise, it is undisputed that the "200 page document" (which Korea says the USDOC should have reviewed) was never submitted to the GOK, and did not inform the bestowal of the subsidies. Korea asserts that such a product-specific breakdown would not be possible because of the way Samsung does business. But, if this is so, even Samsung is unable to provide what Korea argues is *required* to be analyzed under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

50. Finally, even if Samsung had submitted a product-by-product breakdown in its tax return to the GOK, this would not necessarily be a sufficient basis for finding that the RSTA Article 10(1)(3) and 26 subsidies were "tied" to particular products. There is no merit to Korea's assertion that the USDOC's treatment of subsidies under RSTA Articles 10(1)(1) and 10(1)(2) as "untied" was somehow "inconsistent" with its treatment of RSTA Article 10(1)(3) subsidies – which were also treated as untied. The USDOC found that there was no evidence in the tax returns themselves to indicate that RSTA Article 10(1)(1) and 10(1)(2) subsidies were tied to specific products.

51. Korea attempts to buttress its expense-driven tying theory by adducing materials from two separate antidumping investigations. Yet the verification reports and verification exhibits that Korea submitted from these proceedings were never a part of the washers CVD record. These materials are also irrelevant on their face, as they do not refer to or address the RSTA Article 10(1)(3) subsidy program. Moreover, Korea attempts to rely on these documents to support a legal theory the United States has previously explained is erroneous. Cost accounting principles used in antidumping proceedings are an inappropriate basis for attributing subsidies.

52. Finally, Korea offers a flawed and incomplete description of the USDOC's cost accounting in these AD investigations. Korea fails to mention that the USDOC presumptively follows the investigated company's books and records in carrying out this calculation. Korea likewise fails to mention that U.S. courts have imposed a substantial evidentiary hurdle and strict requirements for departing from an investigated company's books and records.

Korea's Overseas Effects Theory Is Groundless

53. Equally, there is no merit to Korea's argument that the USDOC should have incorporated overseas manufacturing into the denominator of the subsidy ratio for RSTA Article 10(1)(3). The obligations that Korea grounds its claim in – Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement – do not support its theory, and focus exclusively on domestic production. Nor do these provisions support an effects-based attribution theory.

54. In addition, Korea's approach is at odds with the facts here, which confirm that Korea bestowed RSTA Article 10(1)(3) subsidies on domestic production – not overseas manufacturing. Korea impugns the USDOC for alleged inconsistency in its approach. But the alleged "change in position" between the USDOC's preliminary and final determination reflected the correction of Samsung's misreported data.

55. Korea argues that "[i]t is common sense that the results of the R&D will normally benefit all operations of a company, wherever located." Korea fails to support this conclusory assertion with any evidence.

56. Korea further argues that, for the USDOC to attribute subsidies to domestic production, it must prove that the effects of R&D "were limited to washer production in Korea." Korea's approach would distort the provisions on which it grounds its claims. Korea also fails to address the troubling implications of its approach, which would inject an overseas dimension into subsidy attribution, with potentially far-reaching consequences.

57. Korea again takes refuge in antidumping proceedings. But these involved a different product and different jurisdiction, and have no bearing on the attribution of RSTA Article 10(1)(3) subsidies. In fact, Korea's reliance on a royalty payment made by Samsung undercuts its overseas attribution theory.

IV. CONCLUSION

58. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject Korea's claims.

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. This dispute places before the Panel a number of important questions concerning the proper interpretation and application of the AD Agreement, the SCM Agreement, and the GATT 1994. Resolving this dispute will require the Panel to discern the meaning of various provisions of these agreements through the application of the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU. Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from those rules.

I. KOREA'S CLAIMS UNDER THE AD AGREEMENT ARE WITHOUT MERIT

A. Zeroing Is Necessary for the Alternative, Average-to-Transaction Comparison Methodology To Have Any Effect

2. The Appellate Body has explicitly stated that it "has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2." Of course, the United States recognizes that a number of Appellate Body and panel reports include findings that bear on the interpretive questions before the Panel. None of those findings compels the Panel to find against the United States. On the contrary, when understood in the context in which they were made, the logical extension of the Appellate Body's zeroing findings is that zeroing is permissible – indeed, it is necessary – under the alternative, average-to-transaction comparison methodology.

3. The second sentence of Article 2.4.2 describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." The Appellate Body has found that Members must offset positive and negative comparison results when using the "normal" comparison methodologies, and must calculate an aggregate margin of dumping for an exporter for the product as a whole. However, in a situation where a pattern of significantly different export prices is observed among different purchasers, regions, or time periods, such offsetting may "mask" what has been referred to as "targeted" dumping. Unmasking such dumping requires not offsetting the lower-priced export sales with the higher-priced export sales; that is, it requires zeroing. The Appellate Body has further observed that the third methodology is an "exception" to the comparison methodologies that "normally" are to be used. As an exception, the third methodology, logically, *should* "lead to results that are *systematically* different" from the two "normal" comparison methodologies when the conditions for its use have been met.

4. The concept of mathematical equivalence is critical to the resolution of the interpretive questions before the Panel because, if a proposed interpretation of a provision of the AD Agreement would lead to the alternative comparison methodology set forth in the second sentence of Article 2.4.2 yielding, in all cases, results that are identical to the results of the average-to-average comparison methodology, then that proposed interpretation cannot be accepted. Such an interpretation would render the second sentence of Article 2.4.2 ineffective, which would be inconsistent with the customary rules of interpretation. That is precisely what would happen under Korea's proposed interpretations. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology will always yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all.

5. Japan, China, and Korea suggest that the Appellate Body has already rejected the mathematical equivalence argument in the past. The Appellate Body's prior consideration of the

mathematical equivalence argument neither supports nor compels rejection of the mathematical equivalence argument in this dispute.

6. Japan, China, and Korea further suggest that the mathematical equivalence argument must fail because it rests on particular "assumptions." With respect to export prices, limiting the application of the alternative, average-to-transaction methodology only to the "targeted" export sales raises at least two potential concerns. First, doing so in a way that would exclude entirely from the dumping calculation other "non-targeted" sales would result in the calculation of even higher dumping margins. Second, applying the alternative, average-to-transaction comparison methodology to the "targeted" sales while applying the "normal" average-to-average comparison methodology to the remaining sales, without zeroing, would also lead to a result that is mathematically equivalent to the application of the average-to-average comparison methodology to all export sales. The identification of this assumption is no answer to the mathematical equivalence argument.

7. Likewise, identifying an assumption about the calculation of normal value does not mean that the mathematical equivalence argument fails. There is no reason why a weighted average normal value would be calculated any differently when applying the average-to-average comparison methodology pursuant to the first sentence of Article 2.4.2 and when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2. Neither Japan nor China explains *why* manipulation or adjustment of the calculation of normal value, which is based on sales prices in the *home* market, would be appropriate to address a potential issue where there is a pattern of prices that differ significantly in the *export* market. The lower-price *export* sales are "masked" by other higher-price *export* sales. How would calculating *normal value* differently help "unmask targeted dumping"? Logically, using different normal values would not help "unmask targeted dumping" at all, and the identification of the normal value assumption is no response to the mathematical equivalence argument.

B. If Application of the Alternative, Average-to-Transaction Comparison Methodology Is Limited Only to Lower-Priced Sales, then the Exceptional Methodology Would Have No Effect

8. If zeroing is prohibited, then it does not matter whether the average-to-transaction comparison methodology is applied to all or just some export sales. If zeroing is prohibited, then, after the intermediate calculations are aggregated, the mathematical result will be the same as it would be if the "normal" average-to-average comparison methodology had been used. Assuming that zeroing is permissible, then it must also be permissible to apply the average-to-transaction comparison methodology not only to the export sales that are at significantly lower prices, but also to the higher-priced export sales that may "mask" the dumping evidenced by the lower-priced export sales.

C. The "Pattern Clause"

9. The conclusion that flows from an analysis in accordance with the customary rules of interpretation is that the "pattern clause" requires a finding of a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent among different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically. As we have demonstrated, that is precisely what the U.S. Department of Commerce ("Commerce") did in the washers antidumping investigation.

10. Korea urges that an analysis pursuant to the "pattern clause" must take into account the qualitative, in addition to the quantitative significance of any observed differences. Korea means that the differences in export prices must "reflect what reasonably can be inferred to be targeting conduct." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. The "reason" for the low prices changes nothing.

D. The "Explanation Clause"

11. The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear the reason that it is not possible in the dumping calculation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average or the transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

12. In the washers antidumping investigation, Commerce evaluated the difference between what the weighted-average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. The "explanation" that Commerce provided in the washers antidumping investigation is not inconsistent with Article 2.4.2 of the AD Agreement.

E. Korea's "As Such" Claims Related to the "Differential Pricing Methodology"

13. Korea has failed to adduce evidence sufficient to support its claims regarding the alleged "differential pricing methodology." While the United States does not agree that there is any validity to Korea's claims with respect to the so-called "differential pricing methodology," we continue to consider that Korea has not made a *prima facie* case of inconsistency.

II. KOREA'S CLAIMS UNDER THE SCM AGREEMENT AND GATT 1994 ARE WITHOUT MERIT

14. Korea's challenge to Commerce's countervailing duty determination is equally without merit. Contrary to the rhetoric in Korea's submissions, Commerce's findings were thoughtful, reasoned, and grounded in the evidence. It is Korea who has pushed the envelope in this dispute, offering strained, results-driven interpretations of the relevant obligations and Appellate Body guidance, while presenting a distorted picture of the factual record. The Panel should decline Korea's invitation to import new obligations into the SCM Agreement or GATT 1994, and to substitute its own assessment of the facts for that of the investigating authority.

A. The Department of Commerce's Findings on Disproportionality Were Reasoned and Adequate, and Supported by Positive Evidence

15. Turning to Korea's first claim, the evidence amply supports Commerce's determination that subsidies conferred on Samsung under RSTA 10(1)(3) were *de facto* specific. Samsung received a large percent of all subsidies distributed in 2010, out of nearly 12,000 participants. By comparison, the average recipient obtained a very small percentage. Commerce found that this disparity was contrary to what would be expected, and indicated disproportionality – an approach that is fully consistent with the text of Article 2.1(c) of the SCM Agreement and the Appellate Body's findings in the *US – Large Civil Aircraft* dispute.

16. Korea's primary argument – i.e., its "size" defense – has no basis in law or fact. Commerce observed that, even if Samsung's size argument were factually accurate, it would still not apply this standard because to do so would "undermine the purpose" of the disproportionality inquiry.

17. Korea has submitted a copy of a redetermination that the Department of Commerce conducted pursuant to remand from a domestic court. While that redetermination occurred well after this Panel was established, it nonetheless further supports the conclusion that Commerce's specificity findings were not in error.

B. Subsidies Conferred Under RSTA Article 26 are Regionally Specific

18. Equally, there is no basis for Korea's assertion that the significant amount of facilities subsidies received under RSTA Article 26 should avoid scrutiny under the SCM Agreement. Eligibility is expressly limited to investments located in a designated geographic region – the area

falling outside the Seoul overcrowding area. Korea's claim rests on legal theories that have no grounding in the text of the SCM Agreement, and have been repeatedly rejected by WTO panels.

19. Korea falls back on the argument that subsidies limited to large designated regions are not regionally specific. But Article 2.2 does not privilege or exempt certain categories of region. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large. And it would be particularly inappropriate to overlook such geographic limitations here. The area excluded from eligibility includes Seoul, the capital of Korea and site of a large proportion of Korea's economy and population.

C. Commerce Appropriately Found that RSTA Subsidies Were Not "Tied" to Particular Products, and Calculated the Subsidy Ratio Accordingly

20. Likewise, there is no basis for Korea's criticism of the ratios calculated with respect to subsidies received by Samsung under RSTA Articles 10(1)(3) and 26.

21. Korea attempts to ground its preferred approach in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. These provisions do not support Korea's arguments, but instead undermine them because they do not specify particular attribution methodologies, much less Korea's.

22. Absent rules on applying specific methodologies, an investigating authority must determine an appropriate approach. As explained in the U.S. first written submission, an investigating authority may derive guidance from certain provisions. Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that in determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts surrounding the Member's "bestowal" of the subsidy will be a key consideration. Annex IV of the SCM Agreement indicates that both "tied" and "untied" approaches to attribution are, in principle, compatible with the SCM Agreement. The Informal Group of Experts ("IGE") report to the Committee on Subsidies and Countervailing Measures is instructive, although not binding. Commerce's determination was consistent with these sources, and grounded in the facts relating to the bestowal of subsidies on Samsung.

23. Korea nonetheless argues that Commerce should have adopted a novel variation of the "tied" approach to attribution, based on the "retroactive" use and effect of the subsidy. And Korea criticizes Commerce for declining to accept and review accounting records that it says would have helped Commerce implement this approach by quantifying the amount of underlying expenses with some connection to washers. These arguments fail, for several reasons.

24. First, Korea has offered no basis in the SCM Agreement to consider that investigating authorities are compelled to calculate subsidy ratios based on how a portion of the benefit is "used."

25. Second, the structure, architecture, and design of the RSTA subsidy programs do not reflect a product-specific tie. Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on formulas that related to *aggregate* and *average* expenses for the *corporation as a whole*. It is not meaningful to attempt to trace a given KRW of tax credit received to any KRW of underlying expense, much less to a particular product.

26. Third, even aside from the legal flaws in Korea's argument, it also rests on a flawed factual premise. RSTA tax credits do not "retroactively" reduce expenses, much less those related to a particular product.

27. Finally, the documents that Korea refers to have nothing to do with the "bestowal" of the subsidy. It is undisputed that the granting authority, Korea, was not presented with these documents when it bestowed the tax credits. And even under Korea's theory, these documents would not enable Commerce to derive a meaningful subsidy ratio that carves out expenses and sales information for washers – as opposed to the entire Digital Appliances unit, which includes a range of product lines, such as refrigerators. Even Korea is unable to undertake the kind of forensic analysis that it suggests is needed for a "retroactive" approach. All of this confirms that Korea's preferred approach is not a more "precise" way to attribute subsidies.

D. Korea's Overseas Effects Theory Has No Basis In Law or Fact

28. Korea's final attempt to impugn Commerce's attribution methodology fares no better than its earlier attempts. Korea argues that the denominator in the subsidy ratio for RSTA 10(1)(3) should have included sales of merchandise produced outside Korea.

29. This argument has no legal basis. Consistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, Commerce attributed subsidies based on the way in which they were bestowed on Samsung. Korea argues that Commerce instead should have calculated the subsidy ratio based on the possible knock-on effects of subsidies on overseas manufacturing. But it is unclear why this effects-based investigation is required to ensure that the elements in the numerator "match" those in the denominator. Korea's proposed effects-based inquiry would also impose a considerable administrative burden on investigating authorities, with no apparent advantage. Needless to say, neither the Appellate Body nor any WTO panel has ever imposed the requirement that Korea suggests.

30. It is significant that Korea does not challenge Commerce's attribution of RSTA Article 26 facilities subsidies to domestic production. Korea asserts that "R&D" subsidies are different, and that they "normally" benefit overseas production. This argument has no basis in the bestowal of the subsidy. But even on a purely effects-based reasoning, Korea's argument is unsupported and untenable.

III. CONCLUSION

31. As we have demonstrated in the U.S. first written submission and again this morning, Korea's claims are without merit, and the United States respectfully requests that the Panel reject them.

ANNEX C-4

CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. In light of the late hour, the United States will limit ourselves to offering just a few short closing comments. This dispute, like all WTO disputes, is about the meaning of the covered agreements and the content of the obligations that WTO Members have accepted and agreed to in those agreements. Korea seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement, including, *inter alia*, by reading out of the AD Agreement an entire sentence.

2. During the course of this proceeding thus far, including in its first written submission, in its opening statement, and when pressed today during the back-and-forth of the question and answer session, Korea has utterly failed to offer the Panel anything that approaches a plausible interpretation of the second sentence of Article 2.4.2 of the AD Agreement; one that is rooted in the ordinary meaning of the terms of that provision, in their context, and in light of the object and purpose of the AD Agreement. Korea nowhere even suggests that the prohibition on zeroing it asks the Panel to impose on the second sentence of Article 2.4.2 could be based on the terms of that provision itself. Korea attacks the U.S. application of, *inter alia*, the terms "pattern," "significantly," and "explanation," all in an effort, not to give meaning to the terms of the second sentence of Article 2.4.2, but to deprive it of any meaning whatsoever.

3. Korea's claims under the SCM Agreement are equally without merit. We could not help noticing this morning that not one of the third parties offered any comments on the subsidy issues in this dispute during the third party session. The issue of zeroing obviously is quite charged and can perhaps overshadow the other issues in a dispute such as this one. We appreciate the Panel's questions this afternoon and the careful attention the Panel has already given to the important questions at issue in this dispute under the SCM Agreement. At stake is the ability of Members to address massive amounts of injurious subsidization to what Korea itself agrees is the largest company in Korea. Just like the antidumping issues, the resolution to Korea's subsidy claims will come from a proper application of the customary rules of interpretation; it will not be found in an argument made by the United States in a previous dispute, which was rejected by the Appellate Body. When the Panel undertakes the interpretive analysis for itself, it will find that Korea's proposed interpretations of the SCM Agreement are strained and results-driven, and when the Panel examines the facts, it will find that Korea's presentation of the factual record is distorted.

4. Pursuant to the DSU, this Panel's charge is to make an objective assessment of the matter before it and to clarify the *existing* provisions of the covered agreements in accordance with customary rules of interpretation of public international law. At the beginning and at the end of the panel's analysis is the text of the covered agreements. The terms. We agree with and appreciate the interventions of the third parties this morning that the terms of the agreement are what matters, not characterizations of the terms or even generally accepted notions about the purpose of provisions. Common words and phrases that have been used widely, like "zeroing," "masking," and "targeted dumping," may be helpful in enhancing understanding of the terms, but they also could prove a distraction. It will be critical for the Panel to ground its own interpretive analysis and its legal findings in the terms of the agreements themselves.

5. The United States recognizes that the Panel is only at the beginning of its work, and we hope that our first written submission and our presentation over these past two days have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavor to provide responses that bring clarity and understanding to the many complex issues in this dispute. Ultimately, we seek to aid the Panel in arriving at the correct conclusions, based on proper interpretations of the covered agreements. We are confident that, if we are successful in that effort, the Panel will find in our favor and dismiss Korea's claims.

6. Once again, the United States thanks the Panel members, and the Secretariat staff, for their time and attention to this matter.

ANNEX C-5

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. The United States has demonstrated that Korea has failed to establish any breach of any provision of any of the covered agreements. In this statement, we draw to the Panel's attention and correct a number of the misstatements made by Korea during these proceedings.

1. Korea Misstates the Appellate Body's Previous Zeroing Findings

2. From the outset, Korea has misstated the nature and extent of prior Appellate Body findings relating to the use of zeroing in connection with the alternative, average-to-transaction comparison methodology. We are confident the Panel will agree that the question of whether zeroing is permissible in connection with the alternative, average-to-transaction comparison methodology, applied pursuant to the second sentence of Article 2.4.2, is a novel one; one that has not been decided by the Appellate Body previously, either explicitly or implicitly.

2. Korea Fails to Identify Anything in the Text of the Second Sentence of Article 2.4.2 of the AD Agreement that Prohibits the Use of Zeroing

3. Korea distorts the findings of the Appellate Body because it can find no support for its argument in the text of the second sentence of Article 2.4.2. The prohibitions on zeroing that the Appellate Body has found in the past are rooted firmly in the text of the first sentence of Article 2.4.2. The Appellate Body has found that its textual interpretations are supported by contextual analysis of other provisions of the AD Agreement, including, *inter alia*, the terms "dumping" and "margin of dumping." But the obligations – the prohibitions on zeroing that the Appellate Body has found – are in the text of the first sentence of Article 2.4.2. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

3. Korea Has Not "Broken" Mathematical Equivalence, and the United States Has Not Abandoned that Argument

4. Rather than being broken, mathematical equivalence has been confirmed by Korea's own paid consultant. As Korea's consultant demonstrates, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the washers antidumping investigation, and also using hypothetical data.

5. Korea suggests that the United States has abandoned the mathematical equivalence argument, and goes as far as characterizing certain passages of the U.S. responses to the Panel's questions as an "abrupt change in the U.S. position." Korea has misunderstood the U.S. responses to the Panel's questions. When the U.S. arguments are examined, it is evident that Korea is asserting that the U.S. arguments convey the opposite of their actual meaning by selectively quoting U.S. statements, divorced from their context.

6. The dispute at this point is not about math. The parties agree on the math. The dispute is about so-called "assumptions" about the calculation of normal value, the export transactions used in the different comparison methodologies, and whether different adjustments may or should be made to export prices. The United States does not see why an investigating authority would calculate normal value differently, examine a different universe of export transactions, or make the kinds of adjustments that Korea proposes. In any event, these are questions of legal interpretation, and such questions are for the Panel to resolve itself. Korea's consultant has inadvertently waded into legal interpretation waters that are beyond the depth of his expertise.

4. Korea Misrepresents the U.S. Arguments Relating to the Negotiating History of the AD Agreement

7. Documents from the negotiating history of the AD Agreement confirm that the use of zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. Korea misrepresents the U.S. arguments related to the negotiating history of the AD Agreement.

8. Korea suggests that the United States "maintain[s] that Japan and Hong Kong approved the use of the zeroing practice when implementing the second sentence." This distortion of the U.S. position is plainly contradicted by what the United States actually argued in the U.S. first written submission. What is established by the negotiating history documents is that the concern about and opposition to asymmetrical comparisons and zeroing were connected. Neither Japan nor Hong Kong mentioned "zeroing" in their proposed changes to the Antidumping Code. One view of the negotiating history is that neither viewed doing so as necessary. That is, they could have considered it sufficient that the revised Code require the use of symmetrical comparisons, which would, by necessity, in their view, preclude the use of the zeroing methodology about which they had expressed concerns.

9. The cited negotiating history documents are consistent with the view that the use of zeroing is impermissible in connection with the application of the symmetrical comparison methodologies, but its use is allowed in connection with the application of the alternative, asymmetrical comparison methodology. The compromise is evidenced on the face of Article 2.4.2, and is confirmed by reference to documents from the negotiating history.

5. Korea's Statistical Arguments Rest on Flawed Premises and Mischaracterizations of what Commerce Actually Did

10. Korea has recognized that "there is no single 'right way' to determine a 'pattern'" and that "[t]he text does not specify any specific method." This recognition, however, has not prevented Korea from elaborating rigid, specific requirements that it contends Article 2.4.2 of the AD Agreement imposes on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. The obligations Korea asks the Panel to find simply are not supported by the text of the second sentence of Article 2.4.2, and Korea's arguments are based on flawed premises and mischaracterizations of Commerce's analysis.

11. The "pattern clause" of Article 2.4.2 of the AD Agreement does not require the use of any particular formal statistical techniques. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause." Korea mischaracterizes the *Nails* test, which does not involve the type of statistical analysis discussed by Korea. Korea also incorrectly alleges that Commerce "ignores actual market prices." Commerce most certainly does not ignore actual market prices. Commerce's analysis is based on an examination of all of the actual export prices reported by the respondents.

6. Korea's Arguments Related to the "Explanation Clause" Are Aimed at Depriving the Second Sentence of Article 2.4.2 of any Meaning

12. Korea's arguments related to the "explanation clause" would again read the second sentence of Article 2.4.2 out of the AD Agreement, contrary to the principle of effectiveness, and are at odds with the Appellate Body's recognition that the second sentence provides Members a means to "unmask targeted dumping" in "exceptional" situations. Korea openly invites the Panel to find that such exceptional situations simply never would arise. The Panel should decline Korea's invitation.

7. Korea Has Failed to Establish the Existence of any So-Called "Differential Pricing Methodology" Measure

13. Korea has failed to establish the existence of any "differential pricing methodology" measure, and thus Korea's "as such" claims relating to such a purported measure must fail. Korea seeks to minimize the U.S. arguments, suggesting that the lone basis for the U.S. position is that "Korea cannot challenge the differential pricing methodology in general because there is always

some chance the USDOC might change the policy in the future." Korea again misunderstands and misstates the U.S. arguments, which speak for themselves.

14. Korea has presented the Panel with little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be challenged "as such," but the Appellate Body has warned that panels may not simply divine the existence of a measure in the abstract on the basis of such a string of cases, or repeated action. In light of Korea's characterization of the measure it seeks to challenge, the Appellate Body's analysis in the zeroing disputes of the evidence necessary to establish the existence of a measure of this nature would appear to be most apt. Unfortunately for Korea, Korea has failed to adduce evidence here that is comparable to the evidence presented in the zeroing disputes.

8. Korea's Criticisms of the Cohen's d Test Are Exaggerated

15. In its second written submission, Korea contends that Commerce's use of the Cohen's *d* test as part of its differential pricing analysis reflects the use of "arbitrary benchmarks" with "little inherent value." As with its other arguments, Korea overstates what the evidence on the record of this dispute actually supports. Despite Korea's suggestion that "the Cohen's *d* test is not an accepted measure of 'significance'," academic literature in fact recognizes the usefulness of effect size, which can be measured by the Cohen's *d* coefficient, in measuring significance. Moreover, the thresholds associated with the Cohen's *d* test have been "widely adopted" and "provide a good basis for interpreting effect size and for resolving disputes about the importance of one's results."

9. Korea Also Misstates Prior Appellate Body Findings Related to the Disproportionality Analysis and Introduces a New, Largely Incomprehensible Argument

16. Korea similarly misunderstands and misstates the Appellate Body report in *US – Large Civil Aircraft (Second Complaint)* to support its claims under the SCM Agreement. Korea does not rely on the Appellate Body's findings in *US – Large Civil Aircraft (Second Complaint)* so much as it relies on arguments the United States made in that dispute, arguments that the Appellate Body rejected. To be clear, the United States argued that the subsidy at issue was not *de facto* specific, and the Appellate Body upheld the panel's finding that the subsidy was *de facto* specific. The U.S. arguments on which Korea relies were not successful.

17. On facts very similar to those in this dispute, the Appellate Body found that the subsidy challenged in *US – Large Civil Aircraft (Second Complaint)* was *de facto* specific because Boeing received a disproportionately large amount of the subsidy. On the basis of the Appellate Body's interpretation and application of Article 2.1(c) of the SCM Agreement, the Panel should find that Commerce's determination that RSTA Article 10(1)(3) was *de facto* specific because Samsung and LG received a disproportionately large amount of the subsidy is not inconsistent with Article 2.1(c).

18. Korea also advances a puzzling new argument that is premised on mischaracterizations of the facts and U.S. arguments, and on a misreading of Article 2.1(c). Korea now argues that the Panel should "focus upon" the amount of tax credits *earned* during the period of investigation rather than the amount of tax credits *granted*. However, this does not align with Article 2.1(c) of the SCM Agreement, which refers to the *granting* of disproportionately large amounts of the *subsidy*. Furthermore, the tax credit earned under RSTA Article 10(1)(3) in a given year is not the amount of subsidy granted. The amount of subsidy granted is the amount of revenue foregone by the Korean government. Korea mischaracterizes the facts of its own subsidy program and the argument of the United States.

10. Korea Misconstrues the Text of Article 2.2 of the SCM Agreement and the U.S. Arguments Regarding RSTA Article 26

19. Korea seeks to avoid the disciplines of the SCM Agreement by relying on irrelevant policy justifications and by advancing an overly restrictive – and ultimately untenable – interpretation of the term "enterprises." Korea suggests that the term "enterprises" in Article 2.2, which is collocated with the term "certain," somehow should not be read as "certain enterprises," which is defined for purposes of the SCM Agreement in Article 2.1 as "an enterprise or industry or group of enterprises or industries." Korea's suggestion simply is not credible. The Panel should reject

Korea's approach and find that Commerce's regional specificity determination reflects a straightforward application of Article 2.2 of the SCM Agreement that is not inconsistent with that provision.

11. Korea's Arguments against Commerce's Tying Analysis Rely Increasingly on Irrelevant Non-Record Evidence and Mischaracterizations

20. Korea's arguments regarding Commerce's attribution of subsidies similarly rely on misstatements and extraneous evidence and arguments. First, Korea persists in its misguided effort to color this dispute with the introduction of non-record evidence from separate antidumping proceedings that were subject to rules that are distinct from those that govern Commerce's countervailing duty investigation of washers from Korea. Second, Korea is not taking a principled stand in support of a requirement that investigating authorities tie subsidies to a particular product. Korea is simply advocating a subsidy calculation at a level of generality (the corporate division level) that is somewhat lower than the level of generality of Commerce's subsidy calculation (the company level). Third, Korea asserts that Commerce was "passive" when presented with evidence allegedly germane to the tying analysis. In reality, Commerce did not act passively, but appropriately focused on evidence relevant to the issue at hand. Finally, Korea again misunderstands and misstates that Commerce's tying analysis in the washers countervailing duty investigation was an "irrebuttable presumption." Commerce's approach did not presume that the subsidies were tied or untied; it simply provided a means of classifying the programs based on the nature of the programs themselves.

12. Korea Misstates the Facts Concerning Commerce's Determination of the Denominator Used to Calculate Samsung's Subsidy Rate

21. Korea continues to misconstrue Commerce's determination in the refrigerators countervailing duty investigation. Commerce did not make an affirmative finding that RSTA Article 10(1)(3) benefits should be attributed to Samsung's global sales in the refrigerators investigation. Commerce simply made a mistake based on Samsung's erroneous reporting of data. To demonstrate this, we are providing Exhibit USA-86, an excerpt of Samsung's response to the USDOC's initial questionnaire in the refrigerators countervailing duty investigation, which shows that Commerce instructed Samsung to "not include the volume and value of merchandise produced outside of Korea" in its reported sales data.

22. Korea also asserts that Samsung raised the "royalty payment" issue with Commerce during the washers countervailing duty investigation. This is yet another mischaracterization of the record by Korea. During the washers investigation, neither Samsung nor Korea argued that these royalty payments also supported a finding that RSTA Article 10(1)(3) benefits should be attributed to global production, and Commerce had no reason to consider them in that context.

13. Conclusion

23. The United States has set out in some detail in this statement numerous errors made by Korea in this proceeding, including interpretations that are divorced from the text of the agreements and misunderstandings, misstatements, or mischaracterizations of the facts and determinations made by Commerce, the arguments of the United States, and prior findings of the Appellate Body.

24. As we have demonstrated in the U.S. written submissions, statements, and responses to the Panel's questions, all of Korea's claims are without merit, and the United States respectfully renews its request that the Panel reject them.

ANNEX C-6

CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. You have heard extensive arguments from both sides in our written submissions and oral presentations. And you have told us that you have focused on those arguments and read our submissions numerous times. That certainly is reflected in the questions you have asked. Given that, we will not repeat the arguments we have already made.

2. We would simply acknowledge that the legal and interpretative issues before you are challenging and complex. In particular, a short sentence in the AD Agreement[1] setting forth an alternative comparison methodology that may be used under certain conditions sits squarely in the middle of a broad landscape of interpretative analyses by the Appellate Body concerning an issue that, to understate the matter, has been of great interest to WTO Members. Reconciling the terms, the purpose of that provision, and the object and purpose of the AD Agreement itself, as well as the many relevant findings of the Appellate Body will be no small undertaking. The probing questions of the Panel over the past two days, as well as the set of questions the Panel posed in connection with the first panel meeting, indicate that you well understand the difficult task the parties have asked you to undertake. So, thank you for agreeing to take on that task.

3. As the issues in dispute are novel, the Panel has the intellectually tantalizing opportunity, but also the weighty burden to be the first to reveal your solution to the puzzle presented by the second sentence of Article 2.4.2 of the AD Agreement. Of course, that solution must follow from an application of the customary rules of interpretation. That means, as the Panel well knows, a good faith reading of the ordinary meaning of the terms of that sentence in their context and in light of the object and purpose of the AD Agreement.

4. Additionally, the interpretative solution to the puzzle also must be a general solution, and a number of your questions recognize that. While this is a dispute between Korea and the United States in which Korea asks the Panel to make findings about certain U.S. measures (or alleged measures), the preliminary step for the Panel is to do that interpretative analysis to ascertain what the obligations are.

5. As we have argued, the Panel should find that the text of the AD Agreement cannot be read as narrowly and rigidly as Korea proposes. Rather, the agreement text affords investigating authorities in all Members, around the world, quite a bit of flexibility to approach the analytical questions in a variety of ways.

6. In that regard, I was struck by an observation by Dr. Cohen in the excerpt of the treatise that Korea has submitted to the Panel. In discussing the size conventions he developed, he noted that "the difference in size between apples and pineapples is of an order which hardly requires an approach via statistical analysis."[2]

7. The approaches to the application of the "pattern clause" that the U.S. Commerce Department has developed over time are, admittedly, quite complicated. The complexity, though, is borne of an effort to deal with thousands of transactions in numerous investigations in an objective, transparent, predictable way. Commerce has undertaken a good faith effort to grapple with the complexities that can arise from an analysis pursuant to the second sentence of Article 2.4.2, particularly in light of the Appellate Body's many interpretative findings related to zeroing.

8. Another investigating authority, though, might take a different, simpler approach. Perhaps that investigating authority handles antidumping investigations very rarely, or the investigations it handles involve far fewer imports.

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] Exhibit KOR-120, p. 13.

9. The interpretation of the second sentence of Article 2.4.2 of the AD Agreement must provide space for both kinds of approaches, by both kinds of investigating authorities.

10. As another observation about the interpretation of the second sentence of Article 2.4.2, it will be useful for the Panel to determine for itself and keep firmly in mind what it is that the second sentence is attempting to accomplish. You have our arguments on that. If you agree with us, and with the Appellate Body, that the purpose of the second sentence is to provide an investigating authority with the ability to unmask targeted or concealed dumping, then it is critical that the interpretation of that provision actually permits that to happen. It should not be the case that higher-priced export transactions, following an application of the second sentence, continue to obscure and mask lower-priced export transactions.

11. If the Panel agrees with that premise, which we urge you to do, then that explains why the alternative, average-to-transaction comparison methodology operates as we argue it does. That explains why combining the results of the alternative and normal methodologies in a mixed approach operates the way we argue it does.

12. Over the past two days, Korea's arguments have been exposed. Korea simply does not make sense of the second sentence of Article 2.4.2. As we have shown, Korea's arguments and its proposed interpretations, in fact, read the second sentence of Article 2.4.2 out of the AD Agreement. Korea's proposed interpretations just are not tenable.

13. For the reasons we have given, we again ask the Panel to reject Korea's claims and find that the challenged antidumping measures are not inconsistent with the provisions of the covered agreements.

14. As we have not discussed Korea's SCM claims[3] during the question and response portion of this meeting, we will not touch on our arguments related to those claims. We would note again, though, that we appreciate the Panel's flexibility in terms of extending the schedule for responding in writing to the Panel's written questions on the SCM issues. We look forward to addressing the Panel's questions in an effort to help the Panel better understand those issues.

15. In closing, the United States once again would like to thank the Panel members, as well as the Secretariat staff, for your time and for the careful attention you are giving to this matter.

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[3] Claims made under the *Agreement on Subsidies and Countervailing Measures*.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. This dispute is the first one to directly challenge "zeroing" in situations where dumping is targeted to particular purchasers, regions or time periods. It is important to recognize that these situations are very specific factual situations the contours of which are far from being clear, not only because the text of the second sentence is concise but also because recourse to it by the majority of the WTO Members has been relatively sparse so far. Considerable uncertainties exist as to when the second sentence of Article 2.4.2 could be invoked, how the comparison method provided in that sentence should be operated in practice and whether "zeroing" would be exceptionally permitted under the situation described in this second sentence.

(i) The third method should be an exception

2. A reading of Article 2.4.2 as a whole leads inevitably to the understanding that the third method is not expected to be routinely used. The adverb "normally" in the first sentence of this Article conveys an explicit instruction that the use of the third method (W-T) should not be the first option of investigating authorities. It may be used only if the authorities find a pattern of export prices which may indicate targeted dumping and are able to explain why the differences in prices cannot be taken into account appropriately by the "normal" methods (W-W or T-T). This understanding is reinforced by the auxiliary verb "may" in the second sentence of Article 2.4.2 as opposed to "shall" in the first sentence of this Article. Investigating authorities "may" have recourse to the W-T comparison method, i.e. this method is a mere possibility, not an obligation, and is certainly not automatic, contrary to the recourse to the W-W and T-T methods, which "shall normally" be used. The Appellate Body has already pronounced itself in the sense that the use of the W-T should be an exception.[1]

(ii) Not all "pattern[s] of export prices which differ significantly" matter for the purposes of resorting to the third method

3. With respect to the first condition for the use of the third method - that "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods" - Brazil understands that it is not all "pattern[s]of export prices which differ significantly" that matter for the purposes of resorting to the third method.

4. According to the United States, "[t]he relevant pattern at issue in the second sentence of Article 2.4.2 is that of export prices "which differ significantly…"[2], and this pattern is interpreted as being "a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as between different purchasers, regions or time periods"[3]. As Korea puts it, "[t]he focus […] is on *any* differences in pricing, irrespective of whether the pricing differences are *above* or *below* the average"[4]. Consistent with this interpretation, the USDOC, in its "Differential Pricing Methodology", considers not only low priced sales but also high priced sales when determining the comparison methodology to apply to the sales. In Brazil's view, the tests applied by the USDOC do not reveal a "pattern of export prices which differ significantly", as required by Article 2.4.2. They simply measure the percentage of sales that have passed the "Cohen's *d*" test and that, therefore, according to that methodology, are deemed to have a differential pricing. They do not consider whether the aggregate of those sales, i.e. the sales below the 0.8 and the sales above 0.8, form a pattern of export prices relevant for the purposes of the second sentence of Article 2.4.2. In addition, the tests seem to ignore the magnitude of the variations above and below 0.8.

5. Although an important variation in prices, both above and below the average, may be taken into consideration in assessing why the regular comparison methodologies would not be able to

[1] Appellate Body Report, *US – Zeroing (Japan)*, para. 131.
[2] U.S. First Written Submission, para. 60.
[3] U.S. First Written Submission, para. 65.
[4] Korea's First Written Submission, para. 114.

unmask the dumping, the mere existence of such variations is not sufficient to meet the conditions required by Article 2.4.2. The patterns of price variations that matter for determining the margin of dumping in the situations foreseen in that provision are, in normal circumstances, only those that are significantly *below* the price for the tested purchaser, region or time period. Patterns of price variations *above* that price *should not be considered relevant*, in principle, for the application of the third method, because in this case, no evidence of targeted dumping will normally have been found[5]. To allow a pattern of higher than average export prices to trigger the application of the third method seems not only contrary to the specific purpose of the second sentence of Article 2.4.2, which is to "unmask" "targeted dumping", but is also illogic in relation to the very purpose of the Anti-Dumping Agreement which is concerned with an specific price behavior that causes injury to the domestic industry of the importing country. It is important to recall that neither Article VI of the GATT 1994 nor the Anti-Dumping Agreement prohibit dumping "per se". In general, patterns derived from a subset of export prices whose average is higher than the overall average export price are not an issue in the Anti-Dumping Agreement, as the Agreement is concerned with such patterns of export price that a*re below the normal value and that cause injury to the industry*.

6. Therefore any decision about the existence of "a pattern of export prices which differ significantly" for the purposes of the second sentence of Article 2.4.2 must be based on criteria of analysis coherent with the object and purpose of the Anti-Dumping Agreement, which is to counteract dumping that causes injury. An interpretation of the "pattern clause" consistent with the object and purpose of the Anti-Dumping Agreement *is certainly not* one that mechanically considers patterns of price variations *above* the average *as relevant* for the application of the third method.

(iii) What type of explanation is to be provided?

7. With respect to the second condition for the use of the third method, Brazil interprets the requirement to provide "an explanation" as a central obligation in the context of Article 2.4.2 of the Anti-Dumping Agreement. This obligation must be understood as requiring from the authorities an elaboration on the reasons for the impossibility to use the symmetrical methods. It does not suffice to simply provide a reason without further explaining it and the "explanation" must have a "genuine explanatory value"[6].

8. Brazil is not convinced that the explanations given in the investigation at issue in this dispute have this genuine explanatory value. The existence of high priced sales in the non-targeted group that "mask" the low-priced sales in the targeted group cannot *per se* be the decisive factor for having recourse to the W-T method. Also, it is not even clear to Brazil that the W-W method will always conceal differences in export prices. On the contrary: the fact that Article 2.4.2 itself envisages the possibility that this method can take account of differences in export prices seems to deny this proposition. Similarly, to justify the recourse to the third method in function of a specific result, i.e. a higher margin of dumping obtained with the use of the W-T when compared to the margin obtained with the W-W or T-T methods, seems to fall short of what is required by the second sentence of Article 2.4.2. The use of the third method should be based on an analysis of the applicability of the symmetrical methods to a given factual situation and the corresponding conclusion that these methods cannot take into account the differences in

[5] Brazil would like to point out that it is possible to conceive, in theory, of a very specific set of factual circumstances that would justify the application of the third method based on a pattern where the average export price of the subset of "targeted" transactions is higher than the export price for the whole set of relevant transactions. Such situation might arise, for instance, if the normal values varied significantly – one could think of products subject to strong price variations due to seasonal fluctuations in supply and/or demand. To provide a mathematical example, consider a product whose normal values, by trimester, were 100, 40, 40 and 40 and whose export prices were 70, 50, 50 and 50 (assuming one transaction per trimester and equal quantities). Even though the export price for the first trimester is higher than the overall average export price in the example, the targeted dumping situation that might require, to be remedied, the application of the third methodology is the one manifested in that very same trimester (because then the normal value is so much higher than the export price). This is clearly a very specific situation in the context of the application of a trade policy tool which is already exceptional in itself. Brazil makes this observation essentially to underline the importance of investigating authorities to proceed rigorously with respect to suspected "targeted dumping" situations, analyzing the specific set of facts of each of these situations and providing the corresponding explanations.

[6] China's Third Party Submission, para. 28.

export prices. The results that would be obtained using the different methods, in themselves, do not seem to authorize the use of one or another method.

9. For Brazil, the adverb "appropriately" in the second sentence of Article 2.4.2 is linked contextually with the verb "taken into account", so that what should be assessed as "appropriate" is the application of the symmetrical methods to the concrete case and not the result of this application. In principle, the investigating authority should explain why the application of the symmetrical comparison methods was not appropriate to the circumstances of the case at issue, *independently of the final margin of dumping* (the result).

10. Brazil also thinks that the "explanation" to be provided must contemplate the reasons of why *both* symmetrical methods cannot be used. Had the drafters of the Anti-Dumping Agreement intended that an explanation be limited to only one of the symmetrical methods, they would have said so explicitly at the end of the second sentence by stating, for example " by the use of *one* of the symmetrical methods".

(iv) Operation of the third method in "targeted dumping" situations

11. With respect to how the W-T method should operate in practice once the conditions for its use are met, there seems to be considerable uncertainties in this regard. An interpretation of the second sentence of Article 2.4.2 that would limit the application of this method to the transactions within the pattern raises several doubts: how the results of the W-T (applied to the transactions within the pattern) and the W-W or T-T comparisons (applied to the rest of the transactions) would be combined for the purpose of calculating an overall dumping margin? Would it be possible to adjust the W-A normal values, so as to produce different mathematical results? The answers to these questions should be found on the basis of the text, object and purpose of the Anti-Dumping Agreement itself. In any case, this analysis should be subject to the provision governing fair comparison (Article 2.4), which emphasizes the need to justify, at the outset, that the reason for invoking the second sentence of Article 2.4.2 is fully consistent with this provision.

12. With respect to the adjustments that could be made in the W-A normal value to avoid mathematical equivalence of results between the W-W and the W-T methods, Brazil understands that if the same normal value data is used in both methods, it would be difficult to discard this argument. The alternative suggested by the *Appellate Body*[7], in Brazil's view, could only be performed when the differences in export prices occur among time periods. When the differences in prices occur among purchasers or regions, uncertainty would arise on *how* or even *if* this approach could be followed. Even the use of the same monthly W-A normal value under both methods would not produce different results, since both would be based in the same time periods. To be even more precise, the monthly W-A normal values in both methods and the monthly W-A export price in W-W or the individual export transactions in W-T would be weighted by the same quantities, what would produce the same result.

(v) The "as such" claim against the "Differential Pricing Methodology"

13. With respect to the Korean claim "as such" against the "Differential Pricing Methodology", it is well known that the legal standard for assessing the existence of an unwritten measure is firmly established and that panels "must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application"[8]. That being said, Brazil recalls, firstly, that the distinction between "as such" and "as applied" claims was a jurisprudential development to facilitate the understanding of the nature of a measure at issue. It neither governs the definition of a measure for purposes of WTO dispute settlement, nor does it define exhaustively the types of measures that are susceptible to challenge in WTO dispute settlement[9]. Secondly, the criteria set out in *US – Zeroing (EC)* must be assessed on a case-by-case basis, taking into consideration not only the characteristics and the nature of the measure that is being challenged *but also the period of time that the measure has been in place*. The amount of evidence that a complaining party must adduce against an unwritten measure that has been in place for several years is certainly not the

[7] *US – Stainless Steel (Mexico)*, AB report, para. 126.
[8] Appellate Body Report, *US – Zeroing (EC)*, para. 196.
[9] Appellate Body Report, *US – Continued Zeroing*, para. 179.

same as the one needed in relation to a measure recently put in effect, as is the case of the "Differential Pricing Methodology" that is being applied only since March 2013.

14. Last, but not the least, Brazil reminds the Panel that, although claims against unwritten measures must be carefully analyzed, these claims also "serve the purpose of preventing future disputes by allowing the root of WTO-inconsistent behavior to be eliminated"[10]. As they "seek to prevent Members *ex ante* from engaging in certain conduct"[11], these challenges are valuable in protecting the security and predictability needed to conduct future trade. "This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel"[12] independently of how they are categorized by the complainants ("as such", "as applied" or something else).

15. With this principle in mind, Brazil hopes that it will not be necessary another decade to obtain clarification on the use of the third method and especially on the use of "zeroing" in targeted dumping situations, in light of the disciplines of the Anti-Dumping Agreement.

(vi) The "systemic disregarding" in the "Differential Pricing Methodology"

16. Finally, with respect to what Korea calls the "systemic disregarding" in the context of the "Differential Pricing Methodology", Brazil understands that this practice seems to share the same rationale as that of "zeroing", inasmuch as it zeroes a negative result in the W-W comparison subset that could be used to offset the positive result in the W-T subset. And the effect also appears to be the same as that of "zeroing", found to be inconsistent in so many WTO disputes: it inflates the overall margin of dumping. Considering that the United States has not "respond[ed] to the substance of Korea's arguments that are specific to the "differential pricing methodology"[13], it would be important that the Panel further enquiries the United States as to the exact nature and precise content of this methodology. If the "systemic disregarding" is found to be like "zeroing", it would also not be consistent with the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement.

[10] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.
[11] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 172.
[12] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82, citing the Panel Report, *US – Superfund*, para. 5.2.2.
[13] United States' First Written Submission, para. 319.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. THE USE OF ZEROING WHEN APPLYING AVERAGE-TO-TRANSACTION METHODOLOGY IS AS SUCH INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. Canada submits that the use of zeroing when applying the exceptional average-to-transaction methodology is "as such" inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement.

2. When employing the average-to-transaction methodology, the USDOC calculates an intermediate result for each export transaction compared to the weighted average normal value. When aggregating these results, the USDOC does not offset the intermediate results of transactions for which the export price is lower than the normal value with intermediate results of transactions for which the export price is found to exceed normal value. Aggregation without offsetting is commonly referred to as "zeroing".

A. The use of zeroing violates the fair comparison requirement in Article 2.4

3. The Appellate Body has found numerous times that the practice of "zeroing" is inconsistent with the Anti-Dumping Agreement in the context of both the weighted average-to-weighted average ("average-to-average") and the transaction-to-transaction methodologies (*US – Zeroing (EC)*; *US – Softwood Lumber V (Article 21.5 – Canada)*; and *US – Zeroing (Japan)*). It also reached the same finding when considering the average-to-transaction methodology in the context of administrative reviews. (*US – Stainless Steel (Mexico)*, and *US – Continued Zeroing*)

4. The principles espoused in those decisions on zeroing demonstrate that zeroing is also not permissible even when an investigating authority employs the exceptional average-to-transaction methodology set out in Article 2.4.2 in the context of initial investigations.

5. The definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement applies throughout the Agreement. When examining the use of zeroing under the transaction-to-transaction methodology, the Appellate Body found that the concepts of "dumping" and "margins of dumping" can only be found to exist in relation to a product. Because the individual comparisons only yield intermediate results and not margins of dumping, margins of dumping cannot be found to exist under *any* methodology at the transaction level. (See *US – Zeroing (Japan)*, see also *US – Stainless Steel (Mexico)*, and *US – Continued Zeroing*)

6. This means that even when an investigating authority is justified in using the exceptional weighted average-to-transaction methodology, the results of the individual comparisons must be aggregated to determine the margin of dumping in accordance with Article 2.4.2.

7. The practice of zeroing during this aggregation is not only inconsistent with Article 2.4.2; it is also inconsistent with the obligation to make a "fair comparison" contained in Article 2.4. The chapeau of Article 2.4 requires that "[a] fair comparison shall be made between the export price and the normal value". The introductory clause to Article 2.4.2 indicates that the dumping calculation methodologies set out therein are subject to the fair comparison obligation in Article 2.4. (See *US – Softwood Lumber V* (Article 21.5 – Canada))

8. Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4.

9. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness, or lack of bias." (*US – Softwood Lumber V* (Article 21.5 – Canada))

10. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* stated that the use of zeroing can:

> In some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing [...] may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping. (footnote omitted)

11. When an investigating authority employs zeroing, it ignores the actual export price of a transaction made above normal value and rather, in effect, deems that the export price is equal to the normal value. The Appellate Body in *US – Softwood Lumber V* similarly observed that the practice of zeroing effectively treats certain export prices as less than they actually are.

12. Likewise, in this case, the USDOC practice of zeroing while employing the average-to-transaction methodology distorts certain facts related to an investigation and contains an inherent bias. It therefore cannot be described as "fair" in accordance with Article 2.4 of the Anti-Dumping Agreement.

B. The relationship between zeroing and mathematical equivalency

13. Regarding zeroing and mathematical equivalency, the United States argues that zeroing is permissible when applying the average-to-transaction methodology because failing to do so would lead to results that are mathematically equivalent to those obtained through the standard methodologies.

14. We note that the Appellate Body in *US – Softwood Lumber V* (Article 21.5 – Canada) has already rejected such reasoning. Moreover, it does not follow from the fact that a given methodology may yield a mathematical difference, that this methodology is permissible under the Anti-Dumping Agreement. This simple fact does not cure the deficiencies in the U.S. differential pricing methodology, including those we identify below.

II. THE USDOC DIFFERENTIAL PRICING METHODOLOGY IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

15. Canada submits that the USDOC differential pricing methodology is also "as such" inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

A. Article 2.4.2 of the Anti-Dumping Agreement only permits an investigating authority to rely on the average-to-transaction methodology in exceptional circumstances

16. Article 2.4.2 provides, in relevant part, that:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

17. This provision indicates that, in calculating a margin of dumping in an investigation, an investigating authority must normally employ either the average-to-average or the transaction-to-transaction methodology. The Appellate Body has stated that "[t]he asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which normally are to be used." (*US – Zeroing* (Japan), see also *US – Softwood Lumber V* (Article 21.5 – Canada))

18. Any methodology used to determine whether targeted dumping exists should be rigorous enough to reflect the fact that situations of targeted dumping are exceptional in nature. That methodology must also meet the criteria enunciated in the second sentence of Article 2.4.2.

19. Canada addresses two significant problems with the U.S. differential pricing methodology. First, the overly mechanical approach of the differential pricing methodology does not identify a pattern of export prices which differ significantly among different purchasers, regions or time periods. Second, no explanation is given for why such differences cannot be taken into account by one of the two symmetrical methodologies.

B. The USDOC differential pricing methodology does not establish the requisite pattern of export prices which differ significantly

20. In order to determine whether to apply the exceptional methodology in the second sentence of Article 2.4.2, the USDOC uses the Cohen's *d* test to identify transactions that have an effect size that is equal to or exceeds 0.8 or -0.8 on the Cohen's *d* scale and then applies a ratio test to determine the percentage of the overall value of sales that those transactions represent. (See *Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China:* Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. and Shandong Fufeng Fermentation Co., Ltd. (March 4, 2013), (KOR-33))

21. Canada submits that the application of the USDOC differential pricing methodology does not meet the requirement for a pattern contained in the second sentence of Article 2.4.2. The ordinary meaning of the word pattern includes, "[a] regular and intelligible form or sequence discernible in certain actions or situations". (*OxfordDictionaries.com)* This definition clearly implies a qualitative element.

22. Under the differential pricing methodology, the USDOC uses its ratio test to calculate the percentage of the volume of sales that have a Cohen's *d* result that equals or exceeds 0.8 or -0.8. If such percentage is greater than 33 percent the USDOC then concludes that there is a "pattern". (See *Differential Pricing Analysis; Request for Comments,* 79 Fed. Reg. 26720 (USDOC May 9, 2014))

23. To illustrate, let us consider a hypothetical investigation during which the differential pricing methodology is applied. Assume that three of the Cohen's *d* results calculated are 1.0, 2.1 and -1.5, and thus meet or exceed the "large effect" threshold. If those results represent 33 percent or more of the total volume of sales, the USDOC would find that there is a pattern of significant differences. But this not a pattern, it is merely a variance.

24. The USDOC methodology therefore does not include a proper assessment as to whether the variance in export prices follows any discernible sequence or "pattern" of price differences.

25. Moreover, Article 2.4.2 only permits the use of the average-to-transaction methodology when there is a demonstrated pattern of export prices which differ significantly "among purchasers, regions or time periods". Given the use of the disjunctive "or", these three categories are distinct. The USDOC, however, aggregates the results of its application of the Cohen's *d* test for all three categories before using this aggregated total to determine if the 33 percent and 66 percent thresholds are met. The use of this process to justify the application of the exceptional average-to-transaction methodology ignores the requirement to identify a pattern among purchasers, regions, or time periods set out in Article 2.4.2.

26. Consequently, the differential pricing methodology fails to identify a *pattern* of export prices which differ significantly *among purchasers, regions or time periods* and is therefore inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

C. The differential pricing methodology does not provide an explanation as to why one of the symmetrical methodologies cannot be used

27. An investigating authority must also explain why a pattern of export prices which differ significantly among different purchasers, regions or time periods cannot be taken into account appropriately by one of the two symmetrical methodologies before resorting to the average-to-transaction methodology. (See *US – Zeroing (Japan)*, see also *US – Softwood Lumber V* (Article 21.5 – Canada))

28. The USDOC provides no such explanation. Rather, it compares the dumping margins that would be obtained by using an average-to-average methodology to those that would be obtained by using the average-to-transaction methodology; if the differential is greater than 25 percent or if using the latter methodology results in an above *de minimis* dumping margin while the use of the former would not, then the USDOC uses the average-to-transaction methodology. (See *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26720 (USDOC May 9, 2014), (KOR-25))

29. This so-called "meaningful difference test" only demonstrates that using the two methodologies yields a different result, not that the difference in export prices cannot be taken into account by one of the symmetrical methodologies.

30. In addition, even if a mere difference could be seen as an explanation of why the use of the exceptional methodology could be justified, the use of zeroing in those calculations would still invalidate that test.

31. Korea has explained that the USDOC is using zeroing when applying its "meaningful difference test" pursuant to its differential pricing methodology. (Korea's first written submission, para. 197). This builds a bias into the system that makes it more likely that there will be a difference between the margin calculated pursuant to the average-to-transaction methodology and that calculated under the average-to-average methodology.

32. Canada notes that where a product is sold at a wide variance of export prices, with some above and others below normal value, even comparing the results calculated using the average-to-average methodology without zeroing to those obtained using the average-to-average methodology with zeroing could yield a substantial difference. Such a difference could exceed the 25 percent threshold established by the USDOC or result in a dumping margin exceeding the *de minimis* threshold in one case and no dumping in the other. This further demonstrates the inappropriateness of using zeroing in the "meaningful difference test".

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. ANTI-DUMPING ISSUES

A. Conditions on the Use of the Second Sentence of Article 2.4.2

1. The authority must identify a relevant pricing pattern

1. Article 2.4.2 of the *Anti-Dumping Agreement* establishes conditions that must be met before an investigating authority may resort to the exceptional W-T comparison methodology. "Normally" an authority must use one of the two symmetrical comparison methodologies (W-W or T-T) described in the first sentence of Article 2.4.2 in order to determine "margins of dumping" during the investigation phase of anti-dumping proceedings. The second sentence, however, allows an authority exceptionally to use the W-T comparison methodology if: (i) it establishes a "pattern of export prices which differ significantly among purchasers, regions or time periods"; and (ii) it provides "an explanation as to why such differences cannot be taken into account appropriately by use of a [W-W] or [T-T] comparison methodology".

2. Article 2.4.2, second sentence, requires that an investigating authority find a relevant pricing pattern of export prices which "differ significantly" among "different purchasers, regions or time periods". The individual export prices should not simply differ *per se*, but rather must form a discernible and intelligible "pattern" that can be distinguished from other prices falling outside the "pattern". Export prices in the pattern must differ "*significantly*", i.e., must differ in an "important, notable or consequential" way, which may have "both quantitative and qualitative dimensions".[1] The United States agrees that "significance" may have either quantitative or qualitative meaning. However, for the United States, it is enough for prices to differ on either basis to qualify as significantly different under Article 2.4.2. In other words, for the United States, large numerical differences satisfy this element even if they are *not* qualitatively significant, and conversely, qualitative differences pass even if they are numerically small. But this *uni-directional* approach to the question of "significance" is inconsistent with the requirements of Article 2.4.2 because, under a proper reading of this provision, relevant price differences must be meaningful in *both* senses of the word "significantly".

3. For China, *seasonality*, i.e., a regular and discernible cycle of prices over a period of time, is a qualitative dimension that must be taken into account by an authority. Numerically large differences in prices at different points in a seasonal cycle are not prices that "differ significantly" if the price difference is consistent with the regular fluctuation of the pricing cycle. This requirement of Article 2.4.2 finds support in Article 2.4 of the *Anti-Dumping Agreement*, which recognizes the fact that simply comparing market prices at different points in time can be an unfair comparison. The application of Article 2.4.2 is subject to Article 2.4.

2. The authority must provide an adequate explanation

4. Before using the W-T comparison methodology under the second sentence of Article 2.4.2, an authority must provide an *explanation* as to why a relevant pricing pattern cannot be taken into account appropriately through either a W-W or T-T comparison methodology. USDOC's brief acknowledgment in the *Washers* AD Determination that high prices may offset low prices (and *vice versa*), does not serve as an adequate explanation as to "why" *both* the W-W and T-T comparison methodologies cannot deal with the price differences identified. Rather, USDOC's explanation is devoid of explanatory content, fails to address the T-T methodology, and is a results-oriented justification of zeroing. As China explains below, zeroing is not permissible under the second sentence of Article 2.4.2. An explanation as to why zeroing is appropriate is thus not an explanation that accords with Article 2.4.2.

[1] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1272.

B. Limitations on the application of the W-T comparison methodology

1. Application to a limited group of sales within a "pattern"

5. Article 2.4.2 of the *Anti-Dumping Agreement* states that during the investigation phase, margins of dumping should "normally" be determined on the basis of the W-W or T-T comparison methodologies. Use of the W-T comparison methodology is *exceptional*. This means that the W-T comparison methodology may only be used on a limited basis. An investigating authority may only apply the W-T comparison methodology to those sales that comprise the relevant pricing pattern, with a "normal" comparison methodology used in relation to the remaining export sales. This is for several reasons.

6. *First*, the express textual connection in Article 2.4.2 between the concepts of the "export prices which differ significantly" and "the prices of individual export transactions" denotes a "parallelism" between the scope of those transactions which fall into the relevant pricing pattern and the scope of application of the W-T comparison methodology. This was confirmed by the Appellate Body when it said that:

> We […] read the phrase "individual export transactions" in [the second sentence of Article 2.4.2] as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.[2]

Thus, in order to determine a "margin[] of dumping" for the product as a whole, an authority first applies the W-T comparison methodology to the export prices that make up the pattern, then it aggregates these intermediate comparison results with those obtained from the transactions to which one of the symmetrical methodologies was applied.

7. *Second*, Article 2.4.2 limits the scope of application of the W-T comparison methodology to the extent necessary to "take into account appropriately" a relevant pricing pattern. The second sentence allows price differences to be taken into account "appropriately", and not in a generalized or excessive manner. Again, there is parallelism between the scope of the *problem* (a relevant pricing pattern that cannot be taken into account "appropriately") and the exceptional *remedy* provided. This is consistent with the fact that all comparison methodologies are subject to the "fair comparison" requirement of Article 2.4. An excessive use of the alternative comparison methodology, in response to a limited deficiency in the application of the symmetrical comparison methodologies, would not meet the requirement of "fair comparison".

8. *Third*, a general principle in WTO law is that an exception takes precedence over a general rule only to the extent of the conflict between the two provisions. Like other provisions of the covered agreements, Article 2.4.2 lays down a general rule that a symmetrical methodology should "normally" be used. The exception allowing use of the W-T methodology takes precedence over this general rule only to the extent necessary to "take[ ] into account appropriately" a relevant pricing pattern. For sales outside this pattern (for example, sales to customers, regions or time periods other than those found to be targeted, or sales of models or types of the product for which no relevant pricing pattern has been found), no conflict between the first and second sentences of Article 2.4.2 exists, and therefore, an authority must use a symmetrical comparison methodology.

9. *Finally*, China notes that a "relevant pricing pattern" necessarily can only exist in a subset all total export sales. The process of discerning a pattern – i.e., a "regular or intelligible form or sequence"[3] – serves to *distinguish* prices that fall within the pattern, on the one hand, from those that fall outside the pattern, on the other. Indeed, the United States' position that the pattern must include all sales because all sales are different from one another is at odds with the pattern

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[3] Definition of "pattern", Oxford English Dictionary Online (http://www.oed.com).

of prices actually identified by the *Nails Test* applied by USDOC in the *Washers* AD Determination. Under the *Nails Test*, the identified pattern did *not* comprise instances of dumping together with a group of higher priced sales which served to "mask" the low priced sales; instead it identified a specific *subset* of sales to certain customers, regions or time periods, within specific models of the product under investigation.

10. For all these reasons, there is no basis for USDOC to apply the W-T comparison methodology to all sales of an exporter.

2. Authorities cannot disregard or "zero" any intermediate comparison results in determining a "margin of dumping"

11. USDOC's practices of "zeroing" in conjunction with the W-T comparison methodology, and of the "systemic disregarding" of intermediate comparison results when it aggregates the results of W-W and W-T comparisons under the "differential pricing" methodology, cannot be reconciled with the requirement to determine a "margin of dumping". "Dumping" is *not* a transaction-specific concept, meaning transaction-specific comparisons are not, in themselves, "margins of dumping". Rather, both the *Anti-Dumping Agreement* and the GATT 1994 establish "dumping" as a "*product-related*" concept. The Appellate Body has thus concluded that "margins of dumping" may only be determined in relation to the product under investigation as a whole, encompassing *all of the export transactions* by an exporter.

12. Contrary to the United States' position, intermediate comparison results cannot constitute meaningful "evidence of dumping", because dumping only exists in the *aggregate* of all intermediate comparison results. The United States' analysis is fatally truncated. By focusing only on *some* transaction-specific results, the United States fails to acknowledge that transaction-specific comparison results in which export prices *exceed* normal value are evidence of an *absence* of dumping. Whether or not there actually is dumping can only be determined by aggregating all intermediate results together.

13. Thus, whatever method is used to calculate a margin of dumping, such a margin must be established for "the *product* as a whole".[4] As the meaning of "margins of dumping" is consistent across the entire *Anti-Dumping Agreement* (including, *a fortiori*, the two sentences of Article 2.4.2), all comparisons made between export price and normal value for individual *subsets* of the product subject to investigation must be aggregated in order to obtain a single margin of dumping. An authority is not permitted to disregard any comparison results by "zeroing" results where normal value *exceeds* export price, because this fails to generate a margin of dumping for the product as a whole. This applies equally to "systemic disregarding", whereby negative intermediate W-W comparison results are disregarded when aggregated together with the results of W-T comparisons.

14. The fact that the W-T comparison methodology is exceptional and only applies in limited circumstances does not provide a justification for the use of "zeroing". The second sentence of Article 2.4.2 provides an exception from the requirement, under the first sentence, to use a particular *comparison methodology* to determine the existence of "margins of dumping during the investigation phase". It thus allows use of a different *means* to find dumping. It does not modify the meaning of "dumping" or "margins of dumping" that applies throughout the *Anti-Dumping Agreement*.

15. Finally, a prohibition on the use of "zeroing" in conjunction with the W-T methodology does not, as the United States argues, reduce the second sentence of Article 2.4.2 to inutility. Where the conditions under the second sentence are met, the authority is permitted to use the alternative methodology when otherwise it would not be so permitted. Further, even if the second sentence is understood to require that there is a different *result* as between the W-W and W-T comparison methodologies, it is possible to obtain mathematically different results by varying the assumptions used in respect of each methodology. For example, if the temporal basis for the weighted average normal value is changed, mathematically different results generally arise.

[4] Appellate Body Report, *US – Zeroing (EC)*, para. 126.

II. COUNTERVAILING DUTY ISSUES

16. As to Korea's claim regarding the finding of *de facto* specificity, China notes that in *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body stated that the question whether a subsidy is "disproportionately large" depends, first, on whether "the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution"; and, second, on whether "the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy, in relational terms, to certain enterprises".[5] Thus, the question raised by Korea's claim regarding the finding of *de facto* specificity in relation to RSTA Article 10(1)(3) is whether USDOC's finding that Samsung received disproportionate amounts of the subsidy rested on more than a simple finding that Samsung received a greater share than other recipients. In China's view, the assessment of *de facto* specificity must be based on more than such a simplistic assessment.

17. With respect to Korea's claim regarding the amount of subsidy for the production of a certain product, China notes that, contrary to the United States' position that an authority is generally not obliged to determine the precise amount of subsidy directly attributable to a product, the Appellate Body in *US – Countervailing Measures on Certain EC Products* found that, subject to Article VI:3 of the GATT 1994, an authority must ascertain the precise amount of the attributable subsidy before imposing a countervailing duty. Therefore, USDOC was obliged to conduct a careful examination of all data submitted by the interested parties before determining a subsidy to be a "genuine and substantial cause" of a particular market effect observed for the product being investigated.

18. As to Korea's claim that USDOC failed properly to match the numerator and the denominator in its calculation of the *ad valorem* level of subsidy, China notes that the Appellate Body has expressly recognized that the elements taken into account in the numerator of a subsidy calculation must match those taken into account in the denominator.[6] An authority must base its determination on positive evidence. China is concerned that USDOC appears to have established a presumption that government subsidies benefit *solely* domestic production when, in fact, this may not be the case.

[5] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.
[6] Appellate Body Report, *US – Softwood Lumber IV*, footnote 196 to para. 164.

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THIRD PARTY RIGHTS

1. The EU requests that the rights of third parties be appropriately protected in this case. As notified to the DSB, the EU has a *substantial interest* in the matters before the Panel, within the meaning of Article 10.2 of the DSU, and we request that our interests as a Third Party (and by extension the interests of the other Third Parties) be *fully* taken into account throughout the panel process. In particular, given that the DSU Appendix 3 Working Procedures have been modified in a manner that risks to *diminish* the rights of the Third Parties as provided for in the DSU and the DSU Appendix 3 Working Procedures, we request that, at the same time, other appropriate modifications (outlined below) to the DSU Appendix 3 Working Procedures also be made in order to *re-balance* the Working Procedures, so as to *fully preserve* the rights of the Third Parties as provided for in the DSU and the DSU Appendix 3 Working Procedures. Consequently, given the introduction of such modification, in order to avoid the pronounced unfairness to the Third Parties that could otherwise result, the EU seeks the following *re-balancing* measures:

- Receipt by the Third Parties of submissions (including exhibits) to the Panel, that is, including first written submissions, rebuttals, preliminary or interim ruling requests and responses thereto, responses to questions and comments thereon and opening and closing oral statements.

- In addition to the Third Party session at the first meeting, the presence of the Third Parties during the rest of the first meeting, as well as at the second meeting.

- The opportunity to respond, orally or in writing, to any question the Panel might wish to address to all Third Parties or to the EU specifically, at the discretion of the Panel, and to indicate a desire to respond to a particular question addressed to a Party or other Third Party, subject to the Panel's agreement.

II. BCI PROCEDURES

2. The EU welcomes the adoption of BCI Procedures in this case. However, we have the following reservations about certain provisions. First, with reference to paragraph 2 of the BCI Procedures, we consider that a Member's right to submit information to a panel cannot be conditioned on the provision of such an authorising letter. Insofar as this rule represents an attempt to reflect Article 6.5 of the ADA, we point out that that provision does not govern the question, which is rather governed by Article 18 of the DSU and Article 17.7 of the ADA. Under the confidentiality regime established by those provisions, a Member's right to submit information to a panel cannot be fettered by a panel conditioning it upon authorization from a private body. Under Article 17.7, confidential information is provided to the panel by the litigating Member. The provision refers to a "person, body or authority" only to reflect the fact that, pursuant to Article 13 of the DSU, a panel may seek information from any individual or body it deems appropriate. Second, with reference to paragraph 1, we consider that designation is a matter, in the first place, for the Member providing the information. A Member may be encouraged to follow the designation used in the municipal proceedings, but cannot be obliged to do so from the outset. Third, linked to the preceding observation, we consider that designation is ultimately a matter for the Panel, at least in case of disagreement, and cannot be absolutely delegated to the investigating authority or any interested party. We therefore consider that the rules should contain a challenge clause by which the other party can challenge the designation proposed by the Member providing the information. Furthermore, in order to avoid a risk of over-designation in which neither party has a particular interest, the challenge clause should be open to both the Panel and Third Parties.

III. KOREA'S "AS APPLIED" CLAIMS AGAINST THE WASHERS ANTI-DUMPING DUTY ORDER

3. The EU considers that the purpose of the final sentence of Article 2.4.2 of the ADA, as reflected in the preparatory work, is to strike a reasonable compromise between two different points of view. The first point of view is that whether or not dumping exists must be measured by taking into account the average pricing behaviour of an exporter, in both domestic and export markets, as well as average costs, irrespective, on the export side, of the purchaser, region or time period. Thus, for this purpose, the data universe includes all export transactions to all purchasers and regions and in all time periods of the investigation period, to the full value of all export transactions, whether they are less or more than the normal value. This is so whether the comparison methodology is weighted average-to-weighted average or transaction-to-transaction. The second point of view is that whether or not dumping exists may be measured by comparing each export transaction with a normal value, and, if the export price exceeds the normal value, by recording a finding of zero dumping, that is, by not allowing any off-set between positive and negative results. The compromise, as enshrined in Article 2.4.2 of the ADA is that normally the first rule applies; but that exceptionally, if targeted dumping by purchaser, region or time period is demonstrated to exist, a normal value established on a weighted average basis may be compared to prices of individual export transactions.

4. Thus, what the final sentence of Article 2.4.2 of the ADA does is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. Thus, in the case of regional targeted dumping, a weighted average-to-weighted average comparison might lead to a determination of no dumping. However, a closer examination of one particular regional market within the importing Member might reveal that, in fact, the relatively low priced and dumped transactions are pouring into that region and devastating the local industry, and this is being off-set by relatively high priced transactions to other regions. In such a case, what the final sentence of Article 2.4.2 of the ADA does it to permit an investigating authority to respond to such a situation, by unmasking the targeted dumping. Instead of determining the existence and amount of dumping by reference to the entire territory of the importing Member, it is entitled instead to determine the existence of a pattern of export prices which differ significantly among different regions, and unmask the targeted dumping accordingly. The same observation applies, *mutatis mutandis*, with respect to targeted dumping by purchaser or time period.

5. In a normal anti-dumping calculation, that is, one that does not involve any determination of targeted dumping, an investigating authority is not required to assess the reason for which dumping is occurring. Rather, the determination of the existence and amount of dumping is based on an objective assessment of the data. If the export price is less than the normal value, then dumping exists. The EU fails to see why the situation should be any different under the final sentence of Article 2.4.2 of the ADA. In the case of regional targeted dumping, for example, the objective question is whether or not the product is being dumped into a particular region, based on an objective examination of the data. The reasons for which the dumping might be occurring, and specifically the reasons for the existence of the pattern and the use of the weighted average-to-transaction methodology, might be relevant to the explanation to be provided pursuant to the final sentence of Article 2.4.2 of the ADA, but such reasons are not relevant to the question of whether or not a pattern of relatively low priced exports by purchaser, region or time period, has been demonstrated to exist. We think that the terms "pattern" and "significantly" can be understood quantitatively; and we agree with the US' that the term can also be understood qualitatively.

6. The matter before the Panel has not already been decided by the existing case law on zeroing. On the contrary, in our view, panels and the Appellate Body have exercised considerable caution and judicial restraint in this matter, confining themselves to resolving the particular disputes that have come before them. Specific cases have addressed specific types of comparison methodologies in specific types of proceedings. However, a targeted dumping case has not previously come before any panel, and panels and the Appellate Body have been careful not to prejudge the issues related to targeted dumping. Thus, at most, what Korea and the US appear to be arguing is that the basic underlying logic that has been used to resolve previous disputes should be carried forward, in a systematic and consistent manner, in order to resolve the present dispute, and in such a way that Article 2.4 and particularly Article 2.4.2 are interpreted and applied coherently.

7. The EU disagrees that the final sentence of Article 2.4.2 requires that the existence and amount of targeted dumping, if any, must be calculated only on the basis of the export transactions passing the pattern and gap tests, as opposed to all transactions to or in the particular purchaser, region or time period. We fail to see how this would comport with the basic objective of the targeted dumping provision, which, as we have outlined above, is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. It is not clear to us how this can be achieved if the sole option open to an investigating authority would be to make a calculation only on the basis of the transactions that have passed the pattern and gap tests. The investigating authority must have the possibility of applying an appropriate methodology in order to address the targeted dumping, which can only mean that high priced export transactions to or in other purchasers, regions or time periods would not be allowed to offset the dumping amount.

8. The EU agrees with Korea that the Appellate Body has already decided that mathematical equivalence does not determine the matter, and that the explanations in the measure at issue make no reference to the possible use of the transaction-to-transaction methodology. The EU submits that the consistency of the measure at issue with the final sentence of Article 2.4.2 of the ADA should be assessed in that light.

IV. KOREA'S "AS SUCH" CLAIMS AGAINST THE NAILS II METHODOLOGY AND THE DIFFERENTIAL PRICING METHODOLOGY

9. The EU understands Korea's position to be that the Differential Pricing Methodology came into existence on 4 March 2013. We further understand that, consequently, as of that date, the Nails II Methodology has no longer been applied, and in fact does not exist. This Panel was established on 22 January 2014. Consequently, as of a date preceding this Panel's establishment, it appears that the Nails II Methodology no longer existed. This understanding appears to be generally shared by the US. In these circumstances, the EU considers that the Panel should not make any findings with respect to the Nails II Methodology.

10. The EU considers that it results from the different descriptions of the two methodologies provided by Korea itself that there are significant differences between them. In these circumstances, we consider that they are insufficiently similar to be treated as a single measure.

11. With regard to Differential Pricing Methodology and the first flaw, we share the view that a targeted dumping determination must ultimately be made with respect to the product as a whole (in relation to a particular exporter). With respect to the second flaw, we consider that, if there are, for example, 10 regions, and the relatively low priced transactions are distributed equally amongst them, there is no basis on which to find regional targeted dumping. However, if the relatively low priced transactions are in 2 adjacent regions, we consider that the transactions to the 2 regions may be cumulated for the purposes of determining whether or not there is a pattern of export prices which differ significantly among different regions. In effect, the 2 regions are treated as one. We would make the same remark with respect to related purchasers or adjacent time periods. With respect to the third flaw, we consider that it is difficult to understand the justification for combining data that are not generated on the basis of equivalent parameters.

V. KOREA'S CLAIMS UNDER THE SCM AGREEMENT

12. Korea argues that the USDOC miscalculated the amount of subsidisation with respect to the product concerned, and wrongly determined that the tax credits received by Samsung pursuant to Articles 10(1)(3) and 26 of the *Restriction of Special Taxation Act* (RSTA) were specific in accordance to Articles 1.2 and 2 of the SCM Agreement.

A. Calculation of the amount of subsidisation

13. The EU considers that Articles VI:3 of the GATT 1994 and 19.4 of the SCM Agreement require Members to accurately determine the per unit subsidy amount found to exist with respect to the product under investigation and not impose countervailing duties exceeding that amount. The inclusion of amounts that have been bestowed on products other than the product under investigation in the calculation of the amount of subsidisation of the product concerned would necessarily result in a breach of those provisions.

14. That being said, the EU further notes that, in practice, it may be very difficult to identify precisely the amounts that a company has received for the particular production or sale of the product concerned, especially when the company in question manufactures and sells a variety of products not covered by the investigation and which are made in the same production line. Likewise, when the subsidy found to exist is not granted on a product basis, but rather on a company basis, it may also be difficult to identify what portions were used by the company for manufacturing the product concerned as opposed to other products. In this respect, if the subsidy is clearly tied in law or in fact to the production or sale of a particular product, this may allow the investigating authority to allocate the amounts received by the company to those specific products and, thus, calculate the specific subsidisation for the product concerned. However, if the subsidy is not tied to any particular product (such as e.g. a tax reduction in the income tax of a company in a given year), it may be presumed that the company allocated this benefit across its entire production.

15. A relevant question for the Panel to examine appears to be whether RSTA Articles 10(1)(3) and 26 confer a subsidy with respect to a single or a variety of different products or whether they are granted on a company basis, provided that certain activities (such as investments on R&D or business assets) are conducted. In the latter case, when a company manufactures several products in addition to the product concerned, the specific amounts granted to the product concerned from a subsidy that is contingent upon certain activities conducted by that company may be more difficult to determine with precision. Indeed, since money is fungible and can be used to finance any cost incurred by the company, subsidies generally affecting the production or sales of any product may ultimately be used in the manufacturing or selling activities of many products. This is regardless of whether the subsidy covers costs relating to R&D activities already conducted or investments previously made. Likewise, the Panel may find it relevant to examine whether the Article 10(1)(3) tax credits were in law or in fact limited to benefit production or sales carried out in Korea. Whilst it appears that the subsidy was granted with respect to R&D activities conducted in Korea, this does not necessarily means that the subsidy benefitted only Samsung's domestic production, as the results of those activities could materialise in Samsung's total production (thus including exports).

B. Specificity

16. The EU recalls that Article 2 of the SCM Agreement has been the subject of clarifications provided by panels and the Appellate Body in recent cases, such as in *US-Anti-Dumping and Countervailing Duties (China)*, *EC – Large Civil Aircraft*, and *US – Large Civil Aircraft*. The EU suggests that the Panel consider the issues before it in light of the clarifications provided by these cases.

17. In particular, with respect to Korea's allegations regarding RSTA Article 10(1)(3) tax credits, the EU considers that the Panel should identify the amounts of subsidy granted to Samsung pursuant to that provision since its entry into force. Then, the Panel should determine whether those amounts are "disproportionately large" relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b). If there is a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, the Panel should also examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to Samsung. If, ultimately, the reasons for Samsung to obtain more tax credits than other eligible Korean companies is determined by the conditions for eligibility (i.e. qualifying investments in R&D activities), this may indicate that Samsung did not receive disproportionally large amounts for the entire period. Since the amount of subsidisation was established by reference to a particular year (i.e. 2011), the Panel may also look into whether Samsung received disproportionally large amounts of tax credits in that year as compared to other eligible Korean companies in the same period.

18. Turning to Korea's allegation regarding RSTA Article 26 tax credits, the EU considers that the Panel should examine whether the eligibility criteria in question are objective and neutral. It appears that, whilst the list of qualifying sectors covers many sectors, this does not necessarily imply that the eligibility criteria are neutral or objective, in the sense described in footnote 2 of the SCM Agreement. This list, however, could be more relevant to determine whether the subsidy appears to be non-specific in accordance with Article 2.1(a) of the SCM Agreement. Finally, with respect to Article 2.2 of the SCM Agreement, the EU considers it relevant to determine who the

granting authority is in this case. If the granting authority is the Government of Korea, then it would appear that companies located within the "overcrowding control region" of the Seoul Metropolitan Area and willing to make investments therein would be excluded from any tax credits pursuant to RSTA Article 26 and, thus, the subsidy would not be available to all enterprises within the jurisdiction of the granting authority.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Due to its systemic interest, Japan will address the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") as well as the conduct of the United States Department of Commerce (the "USDOC") with respect to the application of anti-dumping duties concerning *Large Residential Washers from Korea*.

II. THE USE OF ZEROING IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT INCLUDING WHEN APPLYING THE SECOND SENTENCE OF ARTICLE 2.4.2

2. The Appellate Body repeatedly found that zeroing is inconsistent with the relevant provisions of the Anti-Dumping Agreement. It emphasized that the concepts of "dumping" and "margins of dumping" do not pertain to individual transactions, but to a product under investigation as a whole.[1] Its decisions have been derived from the definition of "dumping" set out in Article 2.1 of the Anti-Dumping Agreement, which defines the determination of dumping in relation to "a product", as well as from Article VI:2 of the GATT 1994, which allows a Member and its authorities to levy anti-dumping duties with respect to "any [dumped] product" or "such product". The Appellate Body also clarified that the term "dumping" has the same meaning "in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper review, and periodic reviews",[2] and that the concepts of "dumping" and "margin of dumping" "should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[3]

3. While the second sentence of Article 2.4.2 permits an investigating authority to rely on a particular type of comparison methodology under exceptional circumstances, nothing in the provision allows the investigating authority to counteract the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-wide/specific, and not transaction-specific concepts. The second sentence states: "A normal value established on a weighted average basis may be compared to prices of individual export transactions". It does not contain any language that allows for a departure from the definition of dumping and margins of dumping. In this regard, the permission of the use of the asymmetric comparison methodology (W-T) as such by no means mandates or allows an investigating authority to apply zeroing. The Appellate Body clarified that the application of zeroing under the W-T methodology is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[4]

4. The USDOC's use of zeroing is also inconsistent with the fair comparison obligation under Article 2.4 of the Anti-Dumping Agreement. The Appellate Body stated that zeroing "cannot be described as impartial, even-handed, or unbiased" (i.e., "fair") in the sense of Article 2.4, because the use of zeroing "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[5] The Appellate Body found that zeroing in W-T comparisons in the context of periodic reviews and new shipper reviews is, as such, inconsistent with Article 2.4.[6] Nothing in the Anti-Dumping Agreement suggests that this well-established general proposition under Article 2.4 would not apply to the second sentence of Article 2.4.2.

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[1] Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 106.

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[4] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133.

[5] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142; Appellate Body Report, *US – Zeroing (Japan)*, para. 146.

[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 169.

5. As for the argument of mathematical equivalence, as the United States admits, it is premised on the assumption that "all of the normal value and export price data that are fed into the calculations … are identical".[7] This has no basis in the Anti-Dumping Agreement. The Appellate Body explained the U.S. argument in a previous dispute, stating it would apply only "under the specific assumptions of the hypothetical scenario".[8] The Appellate Body suggested that an investigating authority may unmask targeted dumping by "focusing" on (i.e., establishing the margin of dumping based on) only export transactions constituting a "pattern", stating that the "universe" of export prices in the second sentence "would necessarily be more limited" than the "universe" in the first sentence.[9] In addition, an investigating authority could refer to different pools of home market transactions when calculating the normal values for the different comparison methodologies under the first and second sentences. In such case, the outcomes of the comparisons may be different because the groups of transactions making up the normal value may differ. In particular, the T-T comparison methodology under the first sentence will almost certainly never yield the same results as the W-T comparison methodology under the second sentence. As such, the pricing data considered under the first and second sentences of Article 2.4.2 are systematically different, which makes the mathematical equivalence argument implausible.

6. Further, the United States' argument that the negotiation history of the Anti-Dumping Agreement confirms that zeroing should be permissible under the second sentence is not convincing. The only conclusion that can be drawn from the evidence submitted by the United States is that some Members had serious concerns as to the use of zeroing in W-T comparisons. In any case, the views expressed by some delegations hardly represent the common intention of WTO Members.

III. THE USDOC FAILS TO PROPERLY FIND A "PATTERN" AS REQUIRED UNDER THE SECOND SENTENCE OF ARTICLE 2.4.2

A. The U.S. Methodologies Fail to Assess Qualitative Aspects of Differing Export Prices

7. Turning to the first requirement for invoking the second sentence of Article 2.4.2, the methodologies adopted by the USDOC to identify targeted dumping by finding a "pattern" suffer from fundamental flaws. The second sentence requires an investigating authority to find a "pattern of export prices which differ significantly among different purchasers, regions or time periods". Since the words "pattern" and "significant" both have qualitative aspects,[10] a "pattern" of differing export prices must convey proper *meaning* which reflects the purpose of the analysis to be conducted under the second sentence of Article 2.4.2.

8. In this regard, the Appellate Body clarified that the role of the second sentence is to "capture pricing patterns constituting 'targeted dumping'"[11] and to "unmask" such targeted dumping.[12] It also explained that "there are three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods".[13] Because "dumping" by definition refers to sales made at lower (not to higher) prices, targeted dumping can be found when an investigating authority must show that export prices for certain purchasers, regions or time periods are significantly lower than those for other purchasers, regions or time periods , in a way that the former can be conceived as "targeted." In doing so, an investigating authority must qualitatively assess the significance of the observed deviation of a certain group from other groups of purchasers, regions or time periods with respect to the specific fact pattern. Such assessment is also required as a very basic rule of statistics.[14] Furthermore, in order to evaluate whether observed price differences are "significant", one needs to take into

[7] United States First Written Submission, para. 181.
[8] Appellate Body Report, *US – Softwood Lumber V (Art. 21. 5 – Canada)*, para. 99.
[9] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[10] Korea First Written Submission, paras. 131 and 134-135.
[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127; Appellate Body Report, *US – Zeroing (Japan)*, para. 133. See also the United States' First Written Submission, at para. 176.
[12] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[13] Appellate Body Report, *EC – Bed Linen*, para. 62.
[14] Lane, David et al., *Online Statistics Education: A Multimedia Course of Study*, (http://onlinestatbook.com/), pp. 11-12 and 648 (JPN-2); McFarland, Henry B., The U.S. Department of Commerce's Approach to Targeted Dumping: The Wrong Test and the Wrong Response (June 25, 2014). p. 6. (JPN-3)

account the characteristics of the relevant product and market, including the price variances of such a product in the market.

9. The USDOC's methodologies suffer from a common inconsistency with the second sentence of Article 2.4.2, as they adopt purely quantitative benchmarks that are mechanically applied in all cases. Under the *Nails* test, the USDOC identifies a "pattern" through a two-step analysis consisting of the "pattern test",[15] for which the USDOC bases its assessment solely on quantitative thresholds such as one standard deviation and 33% (of volume across all models) and the "gap test". Under the Differential Pricing Methodology, the USDOC employs the so-called Cohen's *d* test, for which it relies on purely quantitative and mechanical thresholds such as Cohen's *d* of plus or minus 0.8. There is no evidence that the USDOC assesses or interprets the meaning of the observed price variations or calculated statistics in a qualitative manner in order to determine whether certain purchasers, regions or time periods are "targeted".

10. The shortcoming of the USDOC's methodologies of disregarding qualitative aspects is aggravated with respect to the Differential Pricing Methodology. The Differential Pricing Methodology also includes within the identified "pattern" those export transaction groups with *higher* weighted average prices than the normal value. It is hardly understandable how the Differential Pricing Methodology identifies targeted "dumping" by using a "pattern" which in fact consists of a disorderly mixture of higher and lower prices.

B. The USDOC Fails to Take All Models into Account When Determining Whether Certain Purchasers (or Regions or Time Periods) Are "Targeted"

11. As the Appellate Body clarified, nothing in the text of the second sentence of Article 2.4.2 suggests that "models" or "types" of the same product under investigation can be considered as such categories.[16] The identification of a "pattern" pursuant to the second sentence cannot be completed at the level of certain price variations for individual models sold. Accordingly, in order to find that a certain purchaser, region or time period is "targeted", an investigating authority must show that export prices for the specific purchaser, region or time period are significantly lower across all models.

12. The USDOC's methodologies fail to take all models into account when identifying a "pattern" of targeted dumping. Under the *Nails* test, the USDOC considers that the "pattern test" is satisfied if the weighted average prices for *certain* models are below the "one standard deviation" standard and the aggregated transaction volume for such models exceeds 33% of the entire volume sold to that purchaser (or region or time period) across all models. Under the Differential Pricing Methodology, the USDOC splits export transactions for particular purchaser, region and time period by different models, and aggregates those model-specific transaction groups that passed the Cohen's *d* threshold of plus or minus 0.8.[17]

C. The Differential Pricing Methodology Aggregates Unrelated Variations Across Different Purchasers, Regions and Time Periods

13. As explained by Korea, under the Differential Pricing Methodology, the USDOC aggregates unrelated price variations within the category of purchasers (or regions or time periods) in order to identify a "pattern".[18] In other words, it combines price irregularities "across" different purchasers (or regions or time periods), instead of examining the difference "among" these purchasers (or regions, or time periods). The USDOC also aggregates unrelated price variations across the *distinct categories* of purchasers, regions and time periods.[19] Such an aggregation turns the "or" in "different purchasers, regions or time periods" into an "and" without any legal basis. Thereby, the USDOC fails to properly identify a "pattern" of export prices which differ significantly "*among* different purchasers, regions *or* time periods" as required by the second sentence of Article 2.4.2.

[15] Korea's First Written Submission, at para. 105.
[16] Appellate Body Report, *EC – Bed Linen*, para. 62.
[17] Korea's First Written Submission, at paras. 204-208.
[18] Korea's First Written Submission, at paras. 222-226.
[19] Korea's First Written Submission, at paras. 227-233.

IV. THE USDOC FAILS TO PROVIDE AN ADEQUATE "EXPLANATION" AS REQUIRED UNDER THE SECOND SENTENCE OF ARTICLE 2.4.2

14. As Korea argues, the terms "explanation" and "why" require an investigating authority to provide clear and detailed reasons for or the purpose of the inability or impossibility to appropriately take into account a pattern of significantly different export prices by the use of a W-W or T-T comparison.[20] Moreover, under the principle of effective treaty interpretation, the "explanation" clause must be interpreted in such a manner that it has a role separate and distinct from that of the "pattern" clause.

15. The United States seems to argue that the explanation requirement is fulfilled as soon as an investigating authority finds a difference between the margin of dumping calculated using the W-T comparison methodology and that calculated using the W-W comparison methodology.[21] This interpretative approach is circular; since the United States employs zeroing when using the asymmetrical comparison methodology exceptionally provided for in the second sentence of Article 2.4.2. As a consequence, the two calculation methodologies automatically yield different results.

16. In order to understand the reason behind the explanation requirement, one needs to bear in mind that an exporter generally does not sell its product at a uniform price. Export prices usually vary because each export price is determined based on various factors, including demand levels and scales of transactions that may vary among different purchasers, regions and time periods, as well as behavior of consumers and other market participants. Given that it is perfectly normal to observe certain differences in export prices of a product in a given market, such variations are expected to be captured and appropriately considered by the methodologies pursuant to the first sentence, which the Members agreed shall "normally" be used. As such, an "explanation" has to be provided at least as to why observed variations in export prices are not a mere reflection of factors that normally exist in a given market or otherwise does not allow to establish an appropriate margin of dumping under the first sentence so as to properly counteract dumping causing injury.

V. THE APPLICATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2 SHOULD BE LIMITED TO THOSE TRANSACTIONS THAT CONSTITUTE A "PATTERN"

17. Under the *Nails II* test, the USDOC uses the W-T comparison methodology and uses zeroing for all sales. [22] The same approach is employed under the Differential Pricing Methodology if certain conditions are met[23] yet this expansive use of the W-T comparison methodology is contradicted by the second sentence of Article 2.4.2. As explained by the Appellate Body, "[t]he emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions, or time periods."" [24] As such, the phrase "individual export transactions" in that sentence should be read "as referring to the transactions that fall within the relevant pricing pattern."[25]

VI. CONCLUSION

18. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

[20] Korea's First Written Submission, at para. 156.
[21] United States First Written Submission, paras. 127-129.
[22] Korea's First Written Submission, at para. 108.
[23] Korea's First Written Submission, at paras. 198-200.
[24] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.
[25] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.

ANNEX D-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

Madam Chair, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel. In this oral statement, I will therefore briefly set out Norway's view on one of the legal issues raised: the use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology referred to in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*[1].

2. However, before I turn to this issue, Norway would like to underline that the resort to this methodology is indeed an exception, to be applied only in very limited situations where the normal methodologies for calculating dumping margins are not appropriate. The criteria stated in the second sentence of Article 2.4.2 must be fulfilled, and the methodology must comply with Article 2.4. As elaborated in more detail by Korea and a number of third parties, the United States' methodology disregards all the criteria for the application of Article 2.4.2.

3. I now turn to the issue of zeroing. In line with the Appellate Body's consistent rulings in numerous previous cases, Norway holds that the use of all forms of zeroing, in all forms of proceedings under the *Anti-Dumping Agreement* is prohibited. This applies regardless of the comparison methodology employed to calculate the dumping margin, including the third comparison methodology of the second sentence of Article 2.4.2.

4. The Appellate Body has repeatedly found that the practice of zeroing is inconsistent with the *Anti-Dumping Agreement* in the context of both the "weighted-average-to-weighted-average" methodology and the "transaction-to-transaction" methodology. It has furthermore come to the same conclusion in terms of the third comparison methodology in the context of administrative reviews. As Norway will show, it is clear from the principles and interpretations laid down by the Appellate Body, that zeroing is also prohibited in terms of the third comparison methodology in the context of initial investigations.

5. Based on Article 2.1 of the *Anti-Dumping Agreement*, and Article VI:1 of the *GATT 1994*[2], the Appellate Body has repeatedly found that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[3] Furthermore, the Appellate Body has underlined that the concepts of "dumping" and "margin of dumping" are exporter-specific,[4] and that "a single margin of dumping is to be established for each individual exporter or producer investigated".[5] The Appellate Body has further clarified that these two terms must have "the same meaning in all provisions of the *Agreement* and for all types off anti-dumping proceedings".[6] Norway points to the wording of Article 2.4.2, which explicitly refers to the "margins of dumping" and the comparison methodology used to determine the existence of these. Norway agrees with Korea that the cohesive interpretation of these terms by the Appellate Body precludes an interpretation of "dumping" and "margins of dumping" to the effect that these may be considered on a transaction-specific basis, including under the second sentence of Article 2.4.2.[7]

6. Norway would furthermore like to highlight that the Appellate Body has found that Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement* require aggregation of <u>all</u> results of intermediate comparisons when calculating the dumping margin. In *US – Softwood Lumber V*, the

[1] *The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*
[2] *The General Agreement on Tariffs and Trade 1994*.
[3] Appellate Body Report, *US – Zeroing (EC)*, para 126, Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93.
[4] Appellate Body Report, *US – Stainless Steel (Mexico*), paras. 89-90, Appellate Body Report, *US – Zeroing (EC)*, para. 128.
[5] Appellate Body Report, *US – Continued Zeroing*, para. 283.
[6] Appellate Body Report, *US – Zeroing (Japan),* para. 109.
[7] First Written Submission of Korea, para. 70.

Appellate Body ruled that the individual comparisons only represent "intermediate values" that the investigating authority had to aggregate in order to arrive at the margin of dumping for the product as a whole. The investigating authority furthermore "necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[8] Disregarding or artificially reducing to zero the results of intermediate comparisons, through the application of zeroing, is thus at odds with this and inconsistent with Article 2.4.2.

7. In this regard, Norway would like to underline that the Appellate Body has confirmed this interpretation, both in the context of the "transaction-to-transaction" methodology[9], as well as in the context of the "weighted-average-to-transaction" methodology in administrative reviews[10]. The Appellate Body has thus found that a comparison between normal value and the prices of individual export transactions does not detract from its coherent conclusion on this matter.

8. Norway struggles to see that there is anything in the wording of the second sentence of Article 2.4.2 that would allow a different interpretation in this regard. Furthermore, the object and purpose of the provision is to address dumping targeted at particular purchasers, region or time periods. These dumping situations reflects a pricing strategy where the exporter dumps prices on specific purchasers, regions or time periods, while retaining higher prices for other sales. The very nature of targeted dumping thus necessitates a reference to the overall pricing behavior of the exporter, in order to identify this type of dumping. It necessarily follows that dumping cannot take place at the level of each individual transaction.[11]

9. Norway notes that the United States claims that the negotiation history of the *Anti-Dumping Agreement* confirms that zeroing should be permissible under the second sentence of Article 2.4.2.[12] As Norway understands it, the gist of the argument seems to be that communications of two delegations and minutes of a negotiating meeting can be read as proof that the asymmetrical comparisons, that is comparisons between individual export transactions and weighted average normal value in anti-dumping investigations, and zeroing, were viewed as one and the same thing. Norway strongly disagrees with this assumption. In our opinion, the material only shows that some Members were concerned about the use of zeroing in "weighted-average-to-transaction" comparisons. This is a far cry from deducting a permission of applying zeroing when using said comparison methodology. Furthermore, we note that the United States previously has described the negotiating history of Article 2.4.2 in quite a different way. In *US – Softwood Lumber V*, the United States argued that there were two practices employed by Members to establish "margins of dumping" at the time of the Uruguay Round negotiations that were relevant for the interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical" comparisons, while the second practice was zeroing. The United States asserted that, because the negotiators were able to agree only on the issue of "asymmetry", it would be reasonable to expect that, absent modified text in the *Anti-Dumping Agreement* addressing zeroing, that practice would continue to be consistent with the *Anti-Dumping Agreement*.[13] In this case, the United States clearly saw these two practices as two separate issues.[14] The Appellate Body did not agree with the United States in that proceeding. Similarly, the material at hand does not in any way prove that the negotiators intended to allow zeroing when applying the third comparison methodology.

10. Moreover, the use of zeroing when applying this third comparison methodology is inconsistent with the obligation of Article 2.4 of the *Anti-Dumping Agreement* to make a "fair comparison" between the export price and the normal value. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness or lack of bias".[15] The Appellate Body has found that zeroing tends to inflate the margins calculated, and that it can, in some instances, turn a negative margin of dumping into a positive margin of dumping.[16] The Appellate

[8] Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[9] Appellate Body Report, *US – Softwood Lumber V (Art 21.5 – Canada)*, paras. 85-124.
[10] Appellate Body Report, *US – Stainless Steel (Mexico),* paras. 102-104.
[11] As held by the Appellate Body in *US – Stainless Steel (Mexico)*, para. 98*:* "A proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transaction over a period of time."
[12] First Written Submission of the United States, paras. 242-250.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 107.
[14] Appellate Body Report, *US – Softwood Lumber V,* para. 108.
[15] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 138.
[16] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.

Body has thus emphasized that there is an "inherent bias" in zeroing,[17] and that "this way of calculating cannot be described as impartial, even-handed or unbiased."[18] As with the other two comparison methodologies, 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 *Anti-Dumping Agreement*.

11. In conclusion, Norway holds that "dumping" and "margins of dumping" cannot occur at the level of individual transactions. This is in line with consistent findings of the Appellate Body, which has emphasized that the concepts have the same meaning throughout the *Anti-Dumping Agreement*. 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. Furthermore, zeroing cannot be said to be impartial, even-handed or unbiased. The use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology is hence inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

Madam Chair, Members of the Panel,

12. This concludes Norway's statement. I thank you for your attention.

[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[18] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142.

ANNEX D-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

Madam Chair, distinguished Members of the Panel,

1. Thailand appreciates the opportunity to present its view to the Panel in this dispute.

2. In Thailand's view, the use of zeroing is not permitted when applying a comparison methodology of weighted average-to-transaction (W-T) under the second sentence of Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

3. In previous disputes, the Appellate Body has held that whenever an investigating authority uses intermediate comparisons as a step to determine the overall dumping margin for the product, the investigating authority may not, in aggregating the results of those intermediate comparisons, "zero" the results of some of those comparisons.

4. Although the Appellate Body has not yet considered the use of zeroing in the W-T methodology in cases of "targeted dumping" under the second sentence of Article 2.4.2, Thailand submits that the Anti-Dumping Agreement does not permit the use of zeroing in such case. We recall that the first sentence of Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal price", which, in Thailand's view, must apply to Article 2.4 as a whole, including both the first and second sentences of Article 2.4.2. Allowing the use of zeroing in the W-T methodology under targeted dumping while prohibiting it in all other instances would render the previous interpretations of "fair comparison" with regard to zeroing meaningless.

5. The use of zeroing under any of the methodologies used to determine dumping and margins of dumping cannot be considered "fair" under Article 2.4 of the Anti-Dumping Agreement. In Thailand's view, therefore, the use of zeroing when applying the W-T methodology under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, is inconsistent with the Anti-Dumping Agreement.

6. Thailand submits that the use of the W-T methodology provided for under Article 2.4.2, second sentence, is permitted only in exceptional circumstances, in which two requirements are satisfied: "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods", and "an explanation is provided as to why such differences cannot [apply] the use of a weighted average-to-weighted average or transaction-to-transaction comparison." In this dispute, Thailand will not address the issue of how investigating authorities may identify in a WTO-consistent manner when these two exceptional circumstances exist. We simply request the Panel to reach conclusions on these issues that take into account the interests of both exporting Members and importing Members. We may address these issues in further detail in upcoming disputes in which these issues arise.

7. In conclusion, Thailand respectfully requests the Panel to find that the use of zeroing in the W-T comparison methodology in circumstances of "targeted dumping" under the second sentence of Article 2.4.2 is inconsistent with the Anti-Dumping Agreement.

Madam Chair, distinguished Members of the Panel, thank you for your kind attention.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. INTRODUCTION

Mr. Chairman, Distinguished Members of the Panel

1. The Republic of Turkey (hereinafter referred to as Turkey) would like to thank the Panel for the opportunity to share her viewpoint as a Third Party in the current proceedings. Turkey makes this oral submission due to her systemic interest in the correct and coherent interpretation of the Agreement on Implementation of Article VI of GATT 1994 (hereinafter referred to as ADA or Anti-Dumping Agreement).

2. In this context, Turkey has decided not to elaborate on the specific facts presented by the Parties and rather focus on the right legal interpretation of the second sentence of Article 2.4.2 of ADA.

II. INTERPRETATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2

3. Turkey understands that the dispute on the legal boundaries of the second sentence of Article 2.4.2 concentrates on two primary questions: a) What is the legal content of the conditions allowing the investigating authority to use of weighted average normal value - individual export prices comparison (hereinafter referred to as W-T comparison)? b) Does the W-T comparison, *per se*, necessarily lead to zeroing?

4. As regards the first question, Article 2.4.2 stipulates one substantive and one procedural condition. Article 2.4.2 reads as follows:

> 2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions *if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods*, and *if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison*. (emphasis added)

5. In Turkey's understanding, the article, on its face, envisages two conditions[1] rather than three as asserted by the Republic of Korea (hereinafter referred to as Korea). The investigating authority has to a reach a conclusion that a pattern of export prices displaying a significant difference among purchasers, regions or time periods is present. In Turkey's view, every component used in this sub-sentence is legally, logically and grammatically linked to each other. The word "pattern", for instance, cannot be read individually without considering the fact that the "pattern" is established by export prices which significantly differ in terms of purchaser, region or time. In that context, the words reflect the rationale of the drafters if they are construed together.

6. Concerning the substantive condition, Korea underlines that a "pattern", under Article 2.4.2, reflects an aggregated pricing behavior of the exporter which defines the totality of export sales and not individual transactions[2]. The U.S. interprets the word "pattern" in a more contextual manner and underlines that a "pattern" shows a regular and intelligible form or sequence of export prices which significantly differ among purchasers, regions and time periods[3]. In Turkey's view, the

[1] United States' first written submission, para. 52; footnote 74.
[2] Korea's first written submission, para. 86.
[3] United States' first written submission, para. 55.

assessment whether a "pattern" exists requires the evaluation whether single transactions repeat themselves consistently during the investigation period and such repetition form a structure that significantly differ among purchasers, regions and time periods. As a matter of fact, such an evaluation puts weight equally on the transactions itself and the export sales as a whole to pinpoint whether the repeating lines in export sales form a grouping or differing structure. We understand that this form or sequence should be observable and identifiable[4].

7. As explicitly stipulated in the provision, such a pattern should not only differ among purchasers, regions and time periods but that difference must be significant in scale. We are in the same line with the case law that "*significant*" has a meaning of "*notable, important or consequential*"[5]. In light of this definition the investigating authority should have enough discretion to decide what constitutes a notable, important or consequential difference by considering the merits of the investigation and peculiarities of individual export transactions.

8. Turkey does not support the legal interpretation that a "*pattern of significant difference*" should be necessarily an outcome of a specific intent to apply "*targeted dumping*" and that usual commercial practices are perfectly plausible if the differing export prices display a pattern in line with the expected results of these practices[6]. Neither from the reading of Article 2.4.2 nor from the examination of case law it is possible to conclude that the "*usual commercial*" practices are defenses to permit the act of targeted dumping[7].

9. The plain reading of the Article 2.4.2 shows that the W-T comparison acts as an exception and that the investigating authority can resort to the methodology only under certain conditions[8]. As an expected result of the due process requirement, diversion from the general rule requires an explanation on why normal methodologies, stipulated in the first sentence of Article 2.4.2, cannot be used appropriately. Turkey understands that this explanation should be in such a context that it should not deprive the interested parties from using their right of presenting evidences they consider relevant in respect of the question. Thus, the base of the test controlling the adequacy of the explanation should be Article 6.1 of the Anti-Dumping Agreement.

10. Concerning the second question, Turkey prefers not to present any comment on the specifics of the U.S. methodology and on mathematical equivalence argument at this stage of the proceedings.

11. Nevertheless, Turkey highlights her previously underscored viewpoint that the second sentence of Article 2.4.2 operates as an exception to the first sentence part of the Article and that the rules and procedures to be followed differ in terms of legal obligations and burden of explanation.

12. Turkey understands that the W-T comparison methodology was designed to address a specific case, namely targeted dumping. In this framework, it should be assessed carefully whether applying the legal discipline that was devised to mark the boundaries of the normal comparison methodologies of the first sentence of Article 2.4.2 can really fit the exceptional structure of the comparison methodology stipulated in the second half of the Article. As a matter of legal interpretation, Turkey would like to share her view that the application of the legal discipline envisaged for the first two methodologies shown in Article 2.4.2 may erode the effectiveness of the results expected from the W-T comparison methodology which is exceptional in nature and asymmetric in terms of comparison structure.

III. CONCLUSION

13. Mr. Chairman, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of Anti-Dumping Agreement.

[4] United States' first written submission, para. 73.

[5] *US – Large Civil Aircraft* (Second Complaint) (AB), para. 1272 (citing US-Upland Cotton (AB), para. 426).

[6] Korea's first written submission, para. 142

[7] United States' first written submission, para. 86.

[8] *U.S. – Softwood Lumber VI,* Article 21.5 (Panel), para. 5.33.

14. We thank you for your kind attention and remain at your disposal for any question you may have.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF VIET NAM

Madam Chair, distinguished Members of the Panel.

1. Viet Nam appreciates this opportunity to present its views as a third party in this dispute.

2. Viet Nam believes that this dispute is of great systemic importance for the disciplines under the *Agreement on Implementation of Article VI of the GATT 1994* ("Anti-Dumping Agreement") as well as the *General Agreement on Tariffs and Trade 1994* ("GATT 1994). The issues raised in this dispute related to the application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement have, in fact, been raised by Viet Nam in the context of administrative proceedings being conducted against imports from Viet Nam by the U.S. Department of Commerce (USDOC).

3. In this third party oral statement, Viet Nam submits that: (i) the use of "zeroing" by the USDOC under the W-T comparison methodology is "as such" inconsistent with several provisions of the Anti-Dumping Agreement and the GATT 1994; and (ii) the panel should, interpret the conditions for applying the second sentences of Article 2.4.2 of the Anti-Dumping Agreement consistently with the object and purpose of Article 2.4.2 and, in particular, its status as an exception to the preferred rules for the comparison of normal value and export price. This is essential for ensuring that recourse to the so-called third methodology remains an exception to the use of the two "normal" comparison methodologies under the first sentence of Article 2.4.2. This is what the drafters of the Anti-dumping Agreement intended by making the second sentence of Article 2.4.2 an exception.

I. General observations

4. As a general point, Viet Nam wishes to express its concern about the recent proliferation of investigations by the United States Department of Commerce (USDOC) in which the USDOC has used the third comparison methodology. This surge has largely coincided with the United States' decision to cease zeroing under the other two comparison methodologies. This gives cause for great concern. USDOC has found targeted dumping to exist in recent years with increasing frequency. Moreover, under the new "differential pricing" methodology which has replaced the targeted dumping methodology, USDOC now examines *automatically* – without a precipitating request by the applicant – whether the third methodology can be applied. All this undermines the exceptional nature of the second sentence of Article 2.4.2. Furthermore, by applying zeroing when using the third comparison methodology USDOC has created a back-door through which zeroing is re-introduced into common anti-dumping practice, to be used at will by investigating authorities.

5. It is essential that the conditions under which the third methodology may be used be interpreted in a manner that preserves their object and purpose as an exception, as confirmed by the Appellate Body. In contrast to the object and purpose of the second sentence of Article 2.4.2, the United States would have the panel read the conditions for application of the exception as being little more than mere formalities which find prices to differ significantly without reference to significance as a concept based on common sense, statistics, or the object and purpose of the Anti-Dumping Agreement itself. This approach is simply not consistent with how Article 2.4.2 is drafted or with the object and purpose of the provision within the broader context of the object and purpose of the Agreement.

II. "Zeroing" is just as prohibited under the average-to-transaction comparison methodology as it is prohibited under the average-to-average and transaction-to-transaction methodologies

6. Viet Nam disagrees with the United States' reading of the second sentence of Article 2.4.2 as permitting recourse to the "zeroing" methodology. Korea has put forward a convincing set of arguments in this regard.[1] For instance, the United States' reading of Article 2.4.2 presumes that

[1] Korea's First Written Submission, Section IV.

dumping can be found at the level of individual transactions. However, the Appellate Body has consistently ruled that "dumping" can only be determined for the product as a whole, and not for individual transactions.[2]

7. The fact that the second sentence of Article 2.4.2 is an exception[3] does not speak to the issue of zeroing. The second sentence is an exception to the "normally"[4] applicable comparison methodologies. It is exceptional not because it permits zeroing; rather, it is exceptional because it is asymmetrical – that is, what is compared on one side of the comparison (a weighted average) is different from what is on the other side of the comparison (individual transactions).

8. Viet Nam is also not convinced by the United States' mathematical equivalence argument.[5] The United States' numerical example appears to be somewhat simplistic and basic. Moreover, it would appear to rely on certain assumptions which are questionable under the second sentence of Article 2.4.2. For instance, the example appears to assume that an investigating authority may apply the third methodology to all export transactions, rather than only to transactions within the pattern. However, that is one of the many open questions that Korea has raised[6] and that Viet Nam hopes the panel will address. The United States has not demonstrated whether mathematical equivalence would hold in the absence of that assumption.

9. Moreover, as the Appellate Body has found, even if two methodologies were to yield the same mathematical result *in some cases*, this would not deprive the second sentence of Article 2.4.2 of its useful effect.[7] Rather, mathematical equivalence presupposes that the same result would obtain *in all cases*. The United States has not discharged this burden of proof on this point.

10. Hence, in the light of the text of Article 2.4.2 and the existing extensive case law, Viet Nam considers that the United States' recourse to zeroing under the second sentence of Article 2.4.2 is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.2 and 9.3 of the Anti-Dumping Agreement as well as with Articles VI:1 and VI:2 of the GATT 1994.

III. The United States does not comply with the conditions that govern recourse to the third methodology

11. Viet Nam is concerned about the United States' reading of the various conditions in Article 2.4.2, second sentence, that govern recourse to the exceptional third methodology. These conditions include, among other things, the existence of a "pattern" of prices that "differ significantly among different purchasers, regions or time periods", as well as a meaningful explanation why the two "normally" used comparison methodologies are insufficient to capture such differences.

12. Article 2.4.2 second sentence must be interpreted in a manner that preserves the useful effect of these conditions. These conditions must not be converted into mere formalities that are easily satisfied by an investigating authority in many cases. However, that appears to be precisely what the United States would have the panel do.

13. Both the United States "*Nails II*" and "differential pricing" methodologies would appear to establish an excessively low threshold for the phrases "pattern" and "differ significantly". Korea's first written submission highlights in detail numerous problematic aspects in this regard. Viet Nam did not see an adequate response to these arguments in the United States' submission.

14. For instance, under the "*Nails II*" approach, the United States uses one standard deviation as one of the criteria. Whatever the discretion of an investigating authority, this would appear to be far too low a threshold. Viet Nam would urge the panel to engage in a thorough statistical and quantitative analysis of this point. The "differential pricing" methodology appears even more problematic in this regard, since the United States appears to use only a 0.8 of one standard

[2] See for instance, Appellate Body Report, *US – Continued Zeroing*, para. 283.
[3] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[4] Article 2.4.2 of the *Anti-dumping Agreement*.
[5] United States' First Written Submission, Sections IV.B.5.c and IV.B.5.d.
[6] Korea's First Written Submission, Section V.C.3.
[7] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

deviation. This lowers the bar even further. It cannot be that numerical thresholds are set so low that they would potentially be satisfied in the vast majority of anti-dumping investigations.

15. These concerns are compounded by several other factors. For instance, USDOC uses *average* export prices per comparison point (e.g. per purchaser), rather than the *actual* prices of individual export transactions. Doing so affects the calculation of the standard deviation and in many cases will make it more likely that a given purchaser, region or time-period will fall below the cut-off points and will be deemed to form a "pattern". Moreover, the use of such computed averages – which are different from the prices of actual export transactions – appears inconsistent with the term "export prices" in Article 2.4.2. Another example is what Korea has identified as the "vertical", "horizontal" and "cross-category" variation practice.[8] Viet Nam shares these concerns expressed by Korea.

16. These aspects of the United States' methodology inappropriately create the possibility that random, relatively minor and commercially entirely commonplace price fluctuations will be characterized as a "pattern" of prices that "differ significantly". This makes it unduly easy to apply the third methodology. This cannot have been the intention of the drafters of the Anti-dumping Agreement or they would not have classified the third methodology as an exception.

17. Also, USDOC considers it entirely irrelevant that lower prices may reflect standard commercial practices, for instance, routine seasonal fluctuations or lower prices to large-volume customers. In Viet Nam's view, contrary to the United States' arguments, such considerations are highly relevant for an effective interpretation of the term "pattern", both in its ordinary meaning and in the context at hand. Beyond all technicalities of the second sentence of Article 2.4.2, it cannot be that the Anti-dumping Agreement entitles WTO Members to burden exporters with higher anti-dumping duties simply because they follow standard business practices. Viet Nam agrees with Korea's arguments on this point.[9]

18. Finally, Viet Nam is concerned that the United States' practice reduces to an empty formality the requirement to provide an "explanation" as to why the two "normally" applicable methodologies cannot be used. First, the United States fails to provide any explanation with respect to the T-T methodology, contrary to the plain meaning of Article 2.4.2. Second, the explanation that the W-W methodology "conceals" certain price differences is, as Korea correctly argues, merely a description of what any averaging process entails by its very essence. Finally, saying that the W-T methodology with zeroing yields a higher margin than the W-W methodology without zeroing is not an explanation why price differences "cannot be taken into account appropriately" by the W-W methodology. When zeroing is applied the margins of dumping will always be higher than if zeroing is not applied because of the absence of any offset for the margin by which export prices exceed normal value. Recourse to the third methodology cannot be driven, or justified, by the fact that the application of zeroing will always result in the highest possible dumping margin. Nothing in Article 2.4.2 supports such an interpretation when choosing among the possible methodologies for determining the margins of dumping.

IV. The third methodology, to the extent it may be applied, can only be applied to the transactions constituting the identified pattern

19. Finally, Viet Nam agrees with Korea that, assuming the third methodology can be used, it can only be applied to the transactions found to "differ significantly", that is, within the pattern. The two "normal[]" methodologies should be applied to transactions outside the pattern.

V. Conclusion

20. Madam Chair, distinguished Members of the Panel,

21. This is the first time that a panel will rule on the consistency of a Member's actions with the second sentence of Article 2.4.2. Your ruling will set an important precedent for the interpretation and the application of this provision. Viet Nam recognizes that, like many provisions under the Anti-dumping Agreement, Article 2.4.2 second sentence leaves a margin of discretion to the

[8] See Korea's First Written Submission, paras. 217-233.
[9] Korea's First Written Submission, paras. 142-144.

investigating authorities in how to operationalize its various conditions. However, this discretion cannot entail recourse to zeroing, nor can it justify reducing the conditions in Article 2.4.2 to formalities or thresholds that can easily be satisfied potentially in any investigation.

22. For the reasons explained above, Viet Nam would like to urge the panel to rule that the United States' "*Nails II*" methodology (as such and as applied in the *Washers* investigation) and the "differential pricing" methodology (as such); as well as other aspects of the United States' approach to the third methodology, are inconsistent with Articles 2.1 2.4, 2.4.2, 9.2 and 9.3 of the *Anti-dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994.

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WORLD TRADE ORGANIZATION

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UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS464/R.

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WORKING PROCEDURES OF THE PANEL

ANNEX A-1

UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA
(DS464)

WORKING PROCEDURES OF THE PANEL (AS AMENDED)

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the date of a request from a Member, or the date the written submission in question is submitted to the Panel, whichever is later, unless a different deadline is established by the panel upon written request of a party showing good cause.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members who have notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all the members of its own delegation and shall ensure that each member of its own delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event, no later than in its first written submission to the Panel. If Korea requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Korea shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal and

answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comments, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of it into a WTO working language. The Panel may grant reasonable extensions of time for the translation of such exhibit upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Korea could be numbered KOR-1, KOR-2, etc. If the last exhibit in connection with the first submission was numbered KOR-5, the first exhibit of the next submission thus would be numbered KOR-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including in writing prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Korea to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Korea presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Korea. If the United States chooses not to avail itself of that right, the Panel shall invite Korea to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement, and should make available the final version of its closing statement if that statement was prepared in writing prior to being presented at the meeting, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than in responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each executive summary submitted by each party of opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages each. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft

Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA (DS464)

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously treated by the U.S. Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute, entitled Large Residential Washers from the Republic of Korea (A-580-868 and C-580-869). However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in one or both of the investigations at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Korea and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. 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.

4. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorization letter referred to in paragraph 2. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in paragraph 2 to grant such authorization. If an entity refuses to grant the authorization referred to in paragraph 2, a party may bring the situation to the attention of the Panel.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used 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.

6. The party submitting BCI 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 follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement

will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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ANNEX B

ARGUMENTS OF KOREA

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. This dispute concerns the protectionist and unlawful conduct of the USDOC in its final anti-dumping and countervailing duty determinations in the proceedings entitled *Large Residential Washers from Korea* (*Washers*) and in other measures of general and prospective application by which the USDOC applies anti-dumping duties to imported products. The *Washers* anti-dumping measure at issue in this dispute is one of many so-called "targeted dumping" determinations that the USDOC has issued in recent years. The sudden and dramatic increase in the USDOC's resort to the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is designed to circumvent the recommendations and rulings of the DSB prohibiting the use of "zeroing" in the calculation of dumping margins. The USDOC also misinterpreted and misapplied the relevant provisions of the SCM Agreement in its simultaneous countervailing duty investigation.

II. STANDARD OF REVIEW

2. This Panel is required to apply the standard of review set forth in Article 11 of the DSU. In conducting its assessment, the Panel must interpret the relevant provisions of the GATT 1994, the Anti-Dumping Agreement, and the SCM Agreement in accordance with the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and determine whether the USDOC's actions are consistent with the relevant provisions of the covered agreements. The Panel is also required to review the factual components of the USDOC's determination. In doing so, the Panel must conduct a "critical and searching" analysis and an "in depth" examination of the USDOC's determination.

III. THE EVOLUTION OF THE USDOC'S INTERPRETATION AND APPLICATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

3. The most significant aspect of the evolution of the USDOC's approach to the interpretation and application of the second sentence is the inextricable linkage between the USDOC's approach to "targeted dumping" and the history of "zeroing" in WTO dispute settlement. When the United States first implemented Article 2.4.2 in U.S. law following the completion of the Uruguay Round Agreements, it adopted an approach to "targeted dumping" and the interpretation of Article 2.4.2 that in important respects was faithful to that provision. However, after the Appellate Body's successive rulings that the USDOC's use of zeroing was WTO inconsistent, the United States radically changed its approach to "targeted dumping". This change was an effort to avoid the effect of the Appellate Body's zeroing jurisprudence.

IV. THE UNITED STATES ACTED INCONSISTENTLY WITH ARTICLES 2.4 AND 2.4.2 OF THE ANTI-DUMPING AGREEMENT BOTH "AS SUCH" AND "AS APPLIED" IN THE *WASHERS* INVESTIGATION BY APPLYING "ZEROING" IN W-T COMPARISONS

A. Introduction

4. By disregarding the results of intermediate W-T price comparisons when calculating the aggregated margin of dumping for the product as a whole and for the exporter, the USDOC runs afoul of the basic principles of the Anti-Dumping Agreement and of the GATT 1994, such as the definitions of "dumping", "margin of dumping", "product", and "injury", as interpreted in numerous panel and Appellate Body reports. These decisions dispositively hold that zeroing is not permitted in the context of any anti-dumping proceeding, regardless of the particular price comparison methodology that is applied to calculate the margin of dumping for the product as a whole and for each exporter. This is because the Appellate Body has conclusively interpreted the concept of "dumping", which by virtue of Article 2.1 applies with the same meaning to the entire Anti-Dumping Agreement, as a product-wide and exporter-specific concept. The Appellate Body has found ample contextual support for this interpretation in Articles 2.4, 2.4.2, 3.1, 5.8, 6.10, 9.3

and 9.5 of the Anti-Dumping Agreement, and has categorically rejected the contrary interpretation that dumping could ever occur at the transaction-specific level.

B. The Concepts of "Dumping" and "Margins of Dumping" Are Product-Wide and Exporter-Specific, and Apply Consistently throughout the Entire Anti-Dumping Agreement

5. The USDOC considers that recourse to the W-T comparison methodology provided for under the second sentence of Article 2.4.2 somehow permits the inference that dumping may occur at the transaction-specific level. This untenable position allows the USDOC to disregard non-dumped transactions when aggregating intermediate comparison results for the purposes of calculating the weighted average margin of dumping for each product and exporter. The transaction-specific construct applied by the United States when margins of dumping are calculated with recourse to the W-T comparison methodology finds no basis in the Anti-Dumping Agreement, as interpreted in previous panel and Appellate Body reports. The Appellate Body has specifically addressed – and categorically rejected on numerous occasions – the argument that the concepts of "dumping" and "margin of dumping" could possibly occur at the transaction-specific level. The Appellate Body has conclusively ruled that the terms "dumping" and "margins of dumping" are exporter-specific and product-wide concepts, and they must be interpreted in a consistent and coherent fashion throughout the entire Anti-Dumping Agreement.

C. Articles 2.4.2 and 2.4 Require Aggregation of All Results of Intermediate Comparisons when Calculating the Margin of Dumping

6. While it is permissible to undertake multiple comparisons between normal value and export price at an intermediate stage, the Appellate Body has found that Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement require that investigating authorities aggregate the results of all such intermediate comparisons when calculating the product-wide and exporter-specific margins of dumping, regardless of the comparison methodology that is being applied. Thus, the use of zeroing in W-T comparisons under the second sentence of Article 2.4.2 is inconsistent with the requirement that the results of all intermediate comparisons be aggregated when the investigating authority establishes the margin of dumping for the product as a whole and for each exporter. It is also inconsistent with the "fair comparison" requirement of Article 2.4, because it artificially inflates the margins of dumping.

D. The Appellate Body Has Rejected the USDOC's Contention that Zeroing is Permissible under the W-T Comparison Methodology

7. The Appellate Body has consistently rejected the USDOC's position that dumping may somehow occur at the transaction-specific level whenever the comparison methodology at issue calls for a comparison between normal value and the prices of individual export transactions in *US – Softwood Lumber V (Art. 21.5 – Canada)*, *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)* and *US – Continued Zeroing*. The Appellate Body conclusively found that the application of zeroing under the W-T comparison methodology in administrative reviews was inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because it led to the assessment of duties in excess of the amount of the anti-dumping margin for the product as a whole.

E. Nothing in the Text of the Second Sentence of Article 2.4.2 Suggests that Dumping Is a Transaction-Specific Concept

8. The second sentence of Article 2.4.2 allows investigating authorities to compare "a normal value established on a weighted-average basis" to "prices of individual export transactions" when three cumulative conditions are met. First, the investigating authority must identify "a pattern of export prices". Second, the investigating authority must identify a pattern of export prices that "differs significantly among purchasers, regions or time periods". Third, the investigating authority must provide an "explanation … as to why differences in export prices cannot be taken into account appropriately" by the two symmetrical comparison methodologies that an investigating authority must "normally" apply under the first sentence of Article 2.4.2 (the W-W and T-T comparison methodologies). These textual elements suggest that, just like elsewhere in the Anti-Dumping Agreement, a margin of dumping cannot be established at the transaction-specific

level, and the results of intermediate comparisons may not be disregarded when establishing the margin of dumping.

F. The Use of Zeroing in W-T Comparisons Is "As Such" Inconsistent with Articles 2.4 and 2.4.2, Second Sentence, of the Anti-Dumping Agreement

1. The Use of Zeroing in W-T Comparisons under the Second Sentence of Article 2.4.2 Is a Measure Challengeable "As Such"

9. The USDOC's use of zeroing in the W-T comparison methodology under the second sentence of Article 2.4.2 is attributable to the United States; it has the precise content as evidenced in numerous original investigations and administrative reviews by the USDOC; and finally, the USDOC has consistently and systematically applied zeroing whenever calculating margins of dumping with recourse to the methodology provided for under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

2. The Use of Zeroing in W-T Comparisons Is "As Such" Inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement

10. The use of zeroing invariably results in the USDOC disregarding or artificially reducing to zero the results of W-T comparisons when aggregating those results for the purposes of calculating the margin of dumping for the product as a whole and for each individual exporter or foreign producer. For this reason, it is "as such" inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, and as a consequence is also "as such" inconsistent with Articles 2.1 of the Anti-Dumping Agreement, and Article VI:1 of the GATT 1994.

11. Moreover, Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to be "impartial, unbiased, and even-handed" when comparing normal value and export price. The use of the zeroing methodology invariably leads to the results of intermediate W-T comparisons being disregarded or artificially reduced to zero, thus increasing the resulting margins of dumping and making an affirmative dumping determination more likely. For this reason, just like in the context of any other anti-dumping proceeding, the use of zeroing is "as such" inconsistent with Article 2.4 of the Anti-Dumping Agreement.

12. The USDOC also systematically applies the zeroing methodology when calculating margins of dumping for the product and exporter in the context of administrative reviews, where those administrative reviews entail the use of the W-T comparison methodology under the second sentence of Article 2.4.2. To that extent, the USDOC systematically levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement. For this reason, the use of zeroing in administrative reviews is "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

G. The Application of the Zeroing Methodology in the Original *Washers* Determination and in Subsequent Connected Stages of *Washers* Is Inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement

13. The USDOC's use of zeroing in its final anti-dumping duty determination in the *Washers* investigation resulted in the USDOC disregarding or artificially reducing to zero the results of W-T comparisons undertaken at the intermediate stage when establishing the margin of dumping applicable for the product under consideration for each investigated exporter. The USDOC's final anti-dumping duty determination in Washers is inconsistent "as applied" with Articles 2.4 and 2.4.2, second sentence, of the Anti-Dumping Agreement. As a consequence, the application of the zeroing methodology in *Washers* is also inconsistent "as applied" with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

14. Korea also challenges the USDOC's use of zeroing in subsequent connected stages of the Washers proceedings, as ongoing conduct. Any such use of zeroing by the USDOC will be inconsistent with Article 2.4, Article 2.4.2, Article 2.1, and Article 9.3 of the Anti-Dumping Agreement, as well as Articles VI:1 and VI:2 of the GATT 1994.

V. THE USDOC'S METHODOLOGIES FOR INVOKING THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT ARE INCONSISTENT WITH THE OBLIGATIONS SET FORTH IN THAT PROVISION, BOTH "AS APPLIED" IN THE *WASHERS* INVESTIGATION AND AS "ONGOING CONDUCT" OR "AS SUCH" IN RESPECT OF THE CURRENT "DIFFERENTIAL PRICING" METHODOLOGY

A. Overview of the Obligations for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement

15. A normal value calculated on a weighted average basis may be compared to prices of individual export transactions if the investigating authority find that there are "export prices which differ significantly", and that those differing export prices constitute "a pattern", and explain why applying either one of the comparison methodologies set forth in the general rule would not permit such differences to be "taken into account appropriately". The text and context of Article 2.4.2 make clear that if all three of these conditions are satisfied in a given case, the exception is to be applied only to those transactions that have met the criteria for application of the W-T comparison methodology.

B. The USDOC's Methodology for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement in the *Washers* Investigation Failed to Comply with the Requirements of that Provision

1. The USDOC Acted Inconsistently With the Second Sentence of Article 2.4.2 in the *Washers* Investigation by Relying Solely on Quantitative Criteria to Invoke the Exception to Article 2.4.2

16. As the term, "a pattern", is used in the second sentence of Article 2.4.2, the significantly differing prices found to exist in sales to a purchaser, or in a given region or time period must not be the result of some random or exogenous cause, but rather in fact must reflect what reasonably can be inferred to be targeting conduct. This conclusion is reinforced by the requirement in Article 2.4.2 that the prices differ not only by customer, region or time period, but also that they differ "significantly". Outside the context of Article 2.4, it can be seen that when the Anti-Dumping Agreement uses the word "significant" or "significantly", it does so with the intent of conveying a meaning that is qualitative as well as, or instead of, quantitative.

17. Contrary to the ordinary meaning of the terms "pattern" and "significantly", and contrary to its own analysis in its initial implementation of the second sentence of Article 2.4.2, in the "targeted dumping" analysis applied in *Washers*, the USDOC applied its so-called "pattern test" and "gap test" as purely quantitative tests. The USDOC applied these tests mechanically, and then it analysed only the quantitative differences among those average prices; the USDOC never examined the reasons for the alleged "pattern" of "significant" price differences that it found to exist.

2. The USDOC Acted Inconsistently With the Second Sentence of Article 2.4.2 in the *Washers* Investigation by Failing to Provide an Adequate Explanation

18. It is important to note the high standard for justifying the use of a W-T comparison methodology: the second sentence requires a determination that the W-W and T-T comparison methodologies *cannot* take into account appropriately the relevant pattern of significantly different prices. In other words, the W-T comparison methodology is not permitted if there is any way in which the W-W or T-T comparison methodology can produce a dumping margin calculation in which the pattern of significantly differing prices to the purchaser (or region, or time period) in question can be taken into account appropriately.

19. In *Washers*, the USDOC made no pretence of meeting this explicit requirement of the second sentence of Article 2.4.2. After finding the existence of "targeting" through a mechanical application of its "pattern test" and "gap test", the USDOC compared the respondents' dumping margins using the W-W comparison methodology (without any zeroing) and the W-T comparison methodology (with zeroing). Because this comparison yielded what the USDOC considered to be a "material difference" or a "meaningful difference", it concluded that it must apply the

W-T comparison methodology to all sales for both respondents. These "explanations" are facially inadequate to meet the high standard that the second sentence of Article 2.4.2 imposes. Indeed, the USDOC's statements are wholly conclusory and provide no explanation at all.

3. The USDOC Acted Inconsistently with Article 2.4.2 in the *Washers* Investigation by Applying the W-T Comparison Methodology to All of the Respondents' Sales

20. The structure and language of Article 2.4.2 confirm that the limited exception set forth in the second sentence only authorizes the application of the W-T comparison methodology to those transactions determined to have met the criteria for invocation of the exception, and not to all export transactions.

21. By using the mandatory term "shall", the general rule articulated in the first sentence of Article 2.4.2 reflects a clear and strong preference for the use of either the W-W or T-T comparison methodologies in every anti-dumping investigation. In contrast, by using the term "may", the exception set forth in the second sentence of Article 2.4.2 is never mandatory. Rather, it merely provides investigating authorities with the discretion to apply the W-T comparison methodology, assuming all three conditions for invoking it have been established.

22. It naturally follows from this structure that the exception in Article 2.4.2 should be limited in application to those transactions that have justified its use, while the remainder of the export transactions at issue, which have not met those conditions, should be subject to one of the two symmetrical methodologies that otherwise would apply to all export transactions under the general rule established by the first sentence of Article 2.4.2. Indeed, a contrary interpretation would be tantamount to granting investigating authorities unbridled discretion that could lead to the exception swallowing the rule.

C. The Repetition of These Same Three Errors in Subsequent Connected Stages of the *Washers* Investigation Is Ongoing Conduct that Is Inconsistent with Article 2.4.2 of the Anti-Dumping Agreement

23. The USDOC continues to commit the same three errors identified above in the application of its so-called "differential pricing" methodology. The Appellate Body has established that Members may challenge, as ongoing conduct, the repetition of the same WTO-inconsistent behaviour in successive determinations by which duties are calculated and maintained over time. Although the original anti-dumping determination in the Washers investigation was based on the USDOC's application of its *Nails II* test, the USDOC's application of its differential pricing methodology in subsequent connected stages of the Washers proceedings will result in a repetition of the same three errors. Accordingly, Korea challenges as ongoing conduct the repetition of the same three errors described above in subsequent connected stages of the *Washers* proceedings. Any such repetition of these errors by the USDOC will be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement for the same reasons as set forth above.

D. The Differential Pricing Methodology Is Inconsistent, As Such, with the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement

1. The Differential Pricing Methodology Is a Rule or Norm of General and Prospective Application

24. The differential pricing methodology is not only a measure challengeable in WTO dispute settlement "as applied" or as "ongoing conduct", but also a measure that can be challenged "as such", because the differential pricing methodology is a rule or norm of general and prospective application. The differential pricing methodology is expressed in several determinations in written form. Furthermore, the USDOC made public the SAS Code for the differential pricing methodology and even requested public comments on it. These developments in written form clearly show that the differential pricing methodology is a rule or norm of general and prospective application. Even if these developments are considered not to be expressed in the form of a written document, the differential pricing methodology is a rule or norm of general and prospective application that can be challenged "as such".

2. The Differential Pricing Methodology Enshrines the Same Unlawful Interpretations of Article 2.4.2 as the USDOC Applied in the *Washers* Investigation

25. The differential pricing methodology relies solely on quantitative criteria to determine whether there exists a pattern of export prices which differ significantly by purchaser, region or time period. By refusing even to consider respondents' proffered reasons for the observed price differences, and by relying exclusively on a mathematical analysis, the USDOC policy of invoking the second sentence of Article 2.4.2 under the differential pricing methodology without properly determining whether the mathematical differences in prices constitute a "pattern" of prices that differ "significantly" is inconsistent "as such" with Article 2.4.2 of the Anti-Dumping Agreement.

26. The USDOC employs the differential pricing methodology without providing an adequate explanation. As was true in *Washers*, the "explanation" that the USDOC provides under the differential pricing methodology as to why the pattern of significant price differences "cannot be taken into account appropriately" by the use of either the W-W or T-T comparison methodologies is facially inadequate. Under the differential pricing methodology, if a sufficient number of sales pass the numerical thresholds including the "Cohen's *d* test" and "ratio test", the USDOC concludes without any further analysis or explanation that the W-W comparison methodology cannot take into account the observed pattern of significantly different prices whenever the respondent's dumping margin using the W-W comparison methodology (without zeroing) and the W-T comparison methodology (with zeroing) yields what the USDOC considers to be a "meaningful difference".

27. The differential pricing methodology, like the methodology applied in *Washers*, also leads the USDOC to apply the exceptional W-T comparison methodology to sales that do not meet the criteria for invoking the exception. Unlike the *Nails II* test applied in *Washers*, however, which had no threshold, the USDOC now applies the exception to all U.S. sales in any instance where more than 66 percent of the U.S. sales have been found to constitute a pattern of prices that differ significantly by purchaser, region or time period under the Cohen's *d* test.

3. The Differential Pricing Methodology Does Not Identify "a Pattern of Export Prices Which Differ Significantly Among Different Purchasers, Regions or Time Periods"

28. The differential pricing methodology does nothing more than measure the amount of price variation that can be found within an exporter's sales. An amount of price variation, however measured, does not serve to reveal "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The differential pricing methodology does not identify patterns of significant price differences that might exist among different purchasers, regions or time periods. In fact, notwithstanding its name, the differential pricing methodology bears essentially no relationship to any concept of "patterns" of export prices which "differ" among "different" purchasers, regions, or time periods. Instead, it aggregates random, unrelated price differences of every possible type and combination, and simply asserts that the accumulated price variation constitutes a "pattern".

29. For example, the ordinary meaning of the second sentence indicates that a "pattern of prices which differ significantly" may arise among different purchasers, among different regions, or among different time periods. It may not arise among *combinations* of purchasers, regions or time periods. Such "cross-category" combinations bear no relationship whatsoever to the requirement of a "pattern" of export prices which "differ significantly" among "different" purchasers, regions or time periods.

4. The "Systemic Disregarding" in the Differential Pricing Methodology Is Inconsistent with the Anti-Dumping Agreement

30. The use of "systemic disregarding" in the result of the W-W comparison, where the USDOC "set total dumping margin to zero" in the W-W comparison subset if the absolute value of the sum of the negative dumping margin is larger than the sum of the positive dumping margin, is also inconsistent with the Anti-Dumping Agreement and the GATT 1994. As opposed to the "fair comparison" obligation under Article 2.4 of Anti-Dumping Agreement, this "systemic disregarding",

similar to the original zeroing, unlawfully inflates the dumping margin and makes a positive determination more likely, by ignoring the negative dumping margins. This "systemic disregarding" method also contravenes the "product as a whole" concept of dumping margins. Furthermore, this unreasonable inflation through the "systemic disregarding" runs afoul of the object and purpose of the second sentence of Article 2.4.2.

VI. THE USDOC'S FINAL SUBSIDY DETERMINATION FOR SAMSUNG IS INCONSISTENT WITH THE SCM AGREEMENT AND WITH ARTICLE VI:3 OF THE GATT 1994

31. As with its erroneous determination in the parallel anti-dumping investigation of *Washers,* the USDOC also misinterpreted and misapplied the relevant provisions of the SCM Agreement. The USDOC not only misunderstood the Korean Government's legitimate policy tools, but also misconstrued the relevant provisions of SCM Agreement. Overall, the USDOC disregarded relevant factors that are essential to determine the existence of a countervailable subsidy, as well as the proper calculation of countervailing duty margins.

A. The USDOC's Finding that Samsung Received a "Disproportionately Large Amount" of the Total Benefit that the Government of Korea Provided under RSTA Article 10(1)(3) Is Inconsistent with Articles 1.2 and 2.1(c) of the SCM Agreement

32. RSTA Article 10(1)(3) provides that a Korean company can earn – and Samsung received – a tax credit equal to 40 percent of the amount by which its R&D expenditures during the tax year exceeded the average of its R&D expenditures in the four previous years. While Samsung claimed on its 2011 tax return a larger amount of the tax credit than the average amount claimed by other Korean companies, the amount of the credit that Samsung earned for that year was automatically determined by using one of the two statutory formulas available to all Korean companies to determine their Article 10(1)(3) tax credits.

33. Nonetheless, the USDOC found that the tax credit that Samsung claimed on its 2011 tax return under RSTA Article 10(1)(3) was specific to Samsung. In this process, the USDOC relied exclusively on the third of four factors that Article 2.1(c) enumerates as possible bases for a finding of *de facto* specificity – namely, "the granting of disproportionately large amounts of subsidy to certain enterprises." This determination was based solely on the fact that the tax credit claimed by Samsung on its 2011 tax return constituted a larger percentage of the total RSTA Article 10(1)(3) credit than the average credit claimed by each other Korean company.

34. As was made clear by the Appellate Body in previous disputes, Article 2.1(c) requires an inquiry as to "whether a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure." Here, the USDOC made no such inquiry into whether the amount of tax credits received by Samsung differed from the allocation "that would be expected to result if the subsidy were administered in accordance with the conditions for eligibility for that subsidy."

35. Indeed, there was never any issue as to whether "the conditions for eligibility" under RSTA Article 10(1)(3) were properly applied to Samsung. To the contrary, the record shows – and the USDOC has never contested – that Samsung calculated the amount of its tax credit for tax year 2010 in the manner required by the methodology and criteria of RSTA Article 10(1)(3).

36. The USDOC had no evidence of a difference between the tax year 2010 credit amount that Samsung calculated and the amount that "would be [calculated] if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b)." This constitutes a clear violation of the United States' obligations under the SCM Agreement.

37. The evidence on the record shows that Samsung received a "proportionate" amount of the tax credit because it determined the amount of the credit that it earned using the same calculation formula available to all other Korean companies. The fact that its credit, in an absolute sense, was larger in amount than the average credit amount received by all other Korean companies did not

render it disproportionate in light of the much larger investments that it made that generated its credit.

38. The USDOC's determination is further invalidated by the USDOC's failure to address the two mandatory factors in the third sentence of Article 2.1(c).

B. The USDOC's Finding that Samsung Failed To "Tie" the Tax Credits that It Received under RSTA Articles 10(1)(3) and 26 to Subject and Non-Subject Merchandise Is Inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement

39. Despite the requirement of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement that countervailing duties be limited to the amount of subsidies provided on the production and sale of LRW, the USDOC improperly attributed a significant portion of the tax credits that Samsung received on products other than LRW to LRW. The proper calculation of Samsung's subsidy margins for both the Article 10(1)(3) and Article 26 tax credits should have used Samsung's tax credit received on digital appliances, including LRW, for the numerator and Samsung's sales of digital appliances, including LRW, as the denominator, in order to calculate the margin for the product under investigation.

40. The USDOC, however, calculated Samsung's subsidy margin based on the company's sales of all products and on tax credits bestowed on all of Samsung's products. The USDOC's margin calculation, therefore, relied overwhelmingly on credits earned by Samsung for eligible expenditures that benefitted the production and sale of products other than digital appliances, including LRW. The result was a dramatic inflation of the subsidy margins.

41. The USDOC's stated reason for refusing to receive, let alone examine or verify, Samsung's data and documentation showing that only a tiny portion of its total Article 10(1)(3) and Article 26 tax credits were earned and claimed on the production of digital appliances, including LRW, was its rule that it would allocate a subsidy to one or more specific products only upon a showing that the subsidy was "tied" to the production or sale of such products. The USDOC's use of a "tying" requirement is simply impermissible where, as here, data and documentation are submitted to demonstrate that the subsidy in fact benefited the production or sale of a particular product or category of products.

42. The evidence on the record shows that the USDOC had at its disposal information that would have enabled it to determine the amount of tax credit that benefited the production and sale of the merchandise subject to the investigation. Its refusal to consider that information, and to use it to calculate the proper numerator and denominator in determining Samsung's subsidy margin, constitutes a clear violation of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

C. The USDOC's Finding that the Tax Credits that Samsung Received Under RSTA Article 10(1)(3) Benefited Only the Products that It Produced and Sold in Korea Is Inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement

43. In its final determination in the *Washers* investigation, the USDOC, reversed its previous rulings and determined for the first time that the alleged subsidy benefitted only Samsung's domestic production. This reasoning of the USDOC, however, simply misconstrues the nature of the Article 10(1)(3) tax credits.

44. The core issue is whether the benefit of in-Korea R&D activity accrues to the company's worldwide production and sales. In the case of R&D activity, the resulting benefit is not limited to the location where the R&D is conducted. Rather, the results of R&D will normally benefit all operations of the company, wherever located, as Samsung demonstrated to the USDOC. The USDOC's reference to an absence of any "application and/or approval documents" does not fit the facts of the Article 10(1)(3) process.

45. The USDOC's limitation of the denominator to Korean sales was impermissible because: (a) it was based on a presumption not authorized by the SCM Agreement; (b) the USDOC failed to

make an objective assessment of this issue based on positive evidence; (c) the reasons given by the USDOC are demonstrably inaccurate and thus fail the requirement of an adequate explanation of its determination; and (d) to the extent that the USDOC relied on its presumption, that presumption was fully rebutted by Samsung, both by showing that the results of its R&D (which gave rise to the tax credit) in fact benefited its worldwide sales and production and by showing that the USDOC had previously analysed this identical issue on two separate occasions and had determined on each occasion that the Article 10(1)(3) tax credits benefitted Samsung's worldwide sales and production.

46. The determination of the USDOC on this issue, therefore, constitutes a clear violation of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

D. The Tax Credits that Samsung Received Under RSTA Article 26 Do Not Constitute Specific Subsidies within the Meaning of Article 2 of the SCM Agreement

47. The USDOC's determination that the tax credits were specific to a geographical region is erroneous and inconsistent with the United States' obligations under Article 2 of the SCM Agreement. In all respects, RSTA Article 26 is a legitimate policy tool pursued by the Korean government, as essentially a zoning measure, to address the particular social problems associated with the overconcentration of growth in the Seoul metropolitan area. RSTA Article 26 does not in any way attempt to distort trade.

48. The RSTA Article 26 eligibility criteria are fully consistent with the principles of non-specificity in Article 2.1(b) of the SCM Agreement. The eligibility criteria are neutral, and do not favour some enterprises over others. The criteria are clearly spelled out and are objective. The amount of the subsidy is also objectively calculated. Eligibility is automatic, and there is strict adherence to the eligibility criteria. As the operation of RSTA Article 26 fully meets the requirements of Article 2.1(b) of the SCM Agreement, the tax credits are not specific.

49. Furthermore, the tax credits provided in Article 26 are not "limited to certain enterprises located within a designated geographical region", either by the terms of Article 26, or in its application. Rather, the credits are generally available to any enterprise that meets the qualifications of that Article, without regard to where the enterprise is located. An enterprise located anywhere in Korea, including within the "overcrowding control region" of the Seoul Metropolitan Area, is entitled to the tax credit for any qualifying investment made by that enterprise anywhere else in Korea.

50. Even if the USDOC had determined that RSTA Article 26 imposes limitations on eligibility based on the enterprise's location in a designated geographical region, the determination of regional specificity in this case fails under Article 2.2.The RSTA Article 26 tax credits are generally available to all enterprises in that geographical region and, therefore, are not limited to "certain enterprises". It is particularly inappropriate to define a "designated geographical region" that constitutes 98% of a Member's total territory. This constitutes no identifiable demarcation between the "designated geographical region" and the broader jurisdiction of the granting authority.

51. Therefore, the tax credits provided under Article 26 are not specific under the principles of Articles 2.1(a) and 2.1(b) of the SCM Agreement and do not constitute subsidies limited to certain enterprises located within a designated geographical region within the meaning of Article 2.2 of the SCM Agreement. The USDOC determination to the contrary constitutes violation of these provisions of the SCM Agreement.

E. The Imposition and Maintenance of Countervailing Duties on Imports of Washers Produced by Samsung Are Inconsistent With Articles 10 and 32.1 of the SCM Agreement

52. The USDOC's imposition of countervailing duties on Samsung is also inconsistent with Article 10 of the SCM Agreement. Moreover, the imposition of countervailing duties on Samsung also violates Article 32.1 of the SCM Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF KOREA

I. USDOC'S WTO INCONSISTENT "ZEROING" METHODOLOGY

A. Past Appellate Body Reports Apply Equally In This Case

1. Korea submits that the nine prior AB reports addressing the USDOC's zeroing methodology, properly understood, are largely dispositive of the question of whether zeroing is permitted in any context of any anti-dumping proceeding, regardless of the particular price comparison methodology. Although the Appellate Body may not have ruled on the specific scenario of the application of the second sentence yet, the logic of the prior AB rulings – that "dumping" margins must reflect the product as a whole, and must reflect all of the exporter's prices whether or not they are below normal value – applies with equal force under the second sentence. Indeed, the Appellate Body has also explicitly rejected the contention that zeroing is permissible under the W-T comparison methodology.

2. The USDOC's zeroing methodology has nothing to do with choosing a comparison methodology; rather, the USDOC's zeroing methodology is employed as the very last step of calculating the overall dumping margin. The second sentence says nothing about calculating the ultimate dumping margin, and therefore cannot justify the zeroing methodology.

3. Although the United States argues that the second sentence is an exception, this provision's character as an exception does not justify the use of zeroing. There is simply no authority in the Anti-Dumping Agreement or the AB rulings to support the U.S. argument that an "exception" allows the use of zeroing. The second sentence allows the use of the W-T comparison method, and says nothing about zeroing. Everything about the second sentence – indeed, everything about Article 2.4 as a whole, including Article 2.4.2 – deals exclusively with the intermediate comparison stage of calculating a dumping margin.

B. There Is No "Mathematical Equivalence"

4. The Appellate Body has already rejected the mathematical equivalence argument *twice*, for the reason of the logical flaw in the U.S. argument – the reliance on assumptions that create the equivalent results. If one simply changes those assumptions made by the United States, the equivalence collapses and the two comparison methods yield different results. The U.S. assertion that the W-W and W-T comparison methods will always yield identical results is therefore simply not factually correct.

5. In further support of these prior AB findings, Korea has provided an expert affidavit by Professor Thomas J. Prusa, provided as exhibit KOR-93. His affidavit explains why the alleged mathematical equivalence is completely a construct of the narrow U.S. view about how to calculate dumping margins under the exceptional method. Importantly, Professor Prusa *also* specifically disproves the U.S. argument that mathematical equivalence can be seen in the specific facts of the *Washers* original investigation. Korea has therefore established conclusively that, as a factual matter, there is no mathematical equivalence.

6. Korea has also demonstrated how and why the U.S. legal argument to justify zeroing fails. The U.S. legal argument of the need to "unmask" rests on several false premises. First, the U.S. argument implicitly assumes the second sentence is about obtaining higher dumping margins. That assumption is simply wrong. The zeroing methodology as employed by the USDOC does not contribute to "unmasking" targeted dumping, because zeroing is not used to determine whether there is a "pattern of prices which differ significantly." Next, the U.S. argument assumes that without zeroing, the W-T comparison has no purpose. Again, this assumption is simply wrong because there is no mathematical equivalence and because the USDOC assumes the only purpose of a W-T comparison is to focus on how the "individual export transactions" are aggregated into a single dumping margin. To the contrary, there are other reasons the authority would use the

W-T comparison to allow more careful consideration of the export prices that differ significantly. Once the authority is considering individual export transactions, a different form of weighted average normal value might well make sense. For example, the authority might switch from an annual average normal value to a monthly average normal value.

7. Finally, the U.S. argument that Article 2.4.2 requires an investigating authority to adopt identical basis for calculating normal value between W-W and W-T is simply wrong. Article 2.4.2 does not tie the hands of the investigating authority in the manner suggested by the United States. There are legitimate reasons why an investigating authority might wish to change its approach to normal value.

8. As importantly, the Appellate Body has effectively already rejected the U.S. argument that the W-W and the W-T comparison methodology have to utilize the exact same normal value. Indeed, when offered the explicit chance to rule that the calculation of normal value was required to be the same under W-W and W-T (when applying the second sentence), the Appellate Body declined to do so in two different cases.

C. There Is No Need To Turn To Negotiating History

9. The U.S. argument that the negotiating history supports the use of zeroing when implementing the second sentence should also be rejected. First, because the terms of Article 2.4.2 are unambiguous, resort to negotiating history is not needed. Second, although the United States asserts that this provision is a "compromise," the United States has not provided any evidence that the second sentence was adopted as a compromise. Indeed, the real compromise was to put the term "fair comparison" into the Anti-Dumping Agreement, not "zeroing." If the drafters of the Anti-Dumping Agreement had intended to allow the use of zeroing in the second sentence, they would have included the term in the text or more clearly expressed this wish. The U.S. FWS suggests that, during the negotiations, Japan supported the concept of zeroing when implementing the second sentence. Japan flatly rejects the notion that Japan supported the use of zeroing in the implementation of the second sentence. The same can be said of Hong Kong's position.

II. USDOC'S WTO-INCONSISTENT USE OF ARTICLE 2.4.2

A. The United States Has Misinterpreted The Pattern Clause

10. The text requires the analysis to be based on the actual "export prices" themselves. It is the "export prices" that must "differ significantly," not the averages of those export prices. There is no textual basis to disregard certain differences as "meaningless," while focusing on other differences as somehow being "meaningful." The U.S. approach creates bias in the conclusions being drawn by understating the variance.

11. The text also requires the analysis to consider the export prices "among different purchasers, regions or time periods." These three categories are each analytically distinct, and are separated by the disjunctive "or." Moreover, the purpose of these categories is not simply to accumulate differences into an undifferentiated group, but rather to identify price differences within each category that might constitute a "pattern" of such differences within that category. That "dumping" requires consideration of the product as a whole does not mean that price differences can be combined into an undifferentiated group.

12. Pursuant to the second sentence, the process to determine whether the price differences really are "significant" and actually constitute a "pattern" should be both qualitative and quantitative. The USDOC never actually tests any aspect of the prices other than their magnitude – whether they are "large" price differences, rather than whether the differences are meaningful or notable price differences. Prices do not differ "significantly" if the differences are simply the natural and completely expected reactions to normal commercial considerations. Korea is not arguing that the authority must consider the exporter's subjective intent. Rather, the issue is whether price differences are "significant" in the specific context of a particular industry and particular market situations.

13. The text also requires that the export prices that differ significantly within each category must collectively constitute "a pattern." The frequency of export prices that "differ" is the starting point but not the ending point of a proper analysis of "pattern." There have to be enough prices that "differ significantly" to reasonably preclude the possibility of random price differences. In this regard, the factual context, such as normal commercial conditions, does matter. A better description of what the USDOC does is to test for the number of prices that differ. Another problem is the U.S. argument that both higher and lower prices can be part of the "pattern." The United States allows a "pattern" to be any collection of differing prices that exceeds some minimal threshold based on the number of transactions.

1. Inconsistencies in the *Washers* original investigation

14. There are several problems in the *Washers* original investigation. First, the USDOC calculated standard deviations based on average export prices, not the actual "export prices" themselves. Second, the USDOC improperly found the export prices to "differ significantly" by using the average prices, which necessarily made the standard deviations smaller, arbitrarily increasing the possibility of finding a pattern. Third, the USDOC made no effort to consider the reasons for price differences, instead dismissing such arguments. Fourth, the USDOC improperly found the "pattern" to include all sales, and applied the exceptional method even to non-patterned sales.

15. To document these errors in more detail, Korea has provided an expert affidavit by Professor Prusa explaining and confirming these problems. First, the affidavit stresses that the *Nails* test is "biased towards finding evidence of targeted dumping." Second, the affidavit documents the effect of this bias. If the biased approach was corrected in the *Washers* original investigation, the USDOC could not have found the "pattern" because about 98% of the export sales had prices that did not differ significantly.

16. In addition, there is no evidence that the USDOC actually tested for a "sufficient volume" in any of its calculations in the *Washers* original investigation. The USDOC never explicitly found or explained why it deemed so few export sales to be "sufficient volume."

2. Inconsistencies in the differential pricing methodology

17. The differential pricing methodology is also inconsistent with the second sentence. First, the USDOC improperly ignores the necessary distinctions among the groups, combining them all into an undifferentiated group. Second, the USDOC improperly finds the export prices to "differ significantly," making no effort at all to consider the reasons for price differences, instead dismissing such arguments out of hand. Third, the USDOC improperly finds the "pattern" to include all sales whenever more than 66% of the transactions pass the threshold test, and therefore applies the exceptional method to all sales in that situation. Finally, the USDOC finds prices to "differ significantly" relying on a misuse of the Cohen's *d* test, without reflecting the actual distribution in the prices – that Professor Cohen himself and other scholars have warned against.

18. To be clear, although the USDOC is trying to create the illusion of statistical validity, the Cohen's *d* test simply measures and standardizes the size of a difference between two mean values. The Cohen's *d* test is not a measurement of significance. Professor Cohen himself and a generation of scholars have stressed the importance of context and avoiding "mindless rigidity" in using the Cohen's *d* test. The United States has extensively studied the market for large residential washers. There is nothing "significant" in this market – nothing that is meaningful or noteworthy – about prices that vary over time, across customers, and across regions in this particular industry. Nor is there anything significant about prices being lower during a well-known holiday season sale period.

B. The United States Has Misinterpreted the Explanation Clause

19. Merely showing the difference of the results between W-W (without zeroing) and W-T (with zeroing) does not meet the textual obligation of "explanation." The investigating authority must provide the specific reason and "explain" why it must resort to the exceptional comparison method, and why it was not possible at all to account for these differences using the normal comparison methods. The use or non-use of zeroing cannot constitute a permissible "explanation"

because even a comparison between W-W with zeroing and W-W without zeroing will produce different results, even if the sales in both groups were the same.

20. The text also specifies that the authority "cannot" use the normal comparison methods. That using the normal comparison method might be more burdensome does not matter; rather, it must not be possible to use the normal comparison methods. The authority must explain why the normal methods are not sufficient to allow "appropriate" use of those methods.

21. The term "appropriate" requires the explanation to address why in a particular case the particular price differences are such that they cannot "be taken into account appropriately" through this normal comparison method. This phrase also requires some qualitative assessment of the objective circumstances of a particular product and industry. The text of the second sentence adds the term "appropriately" because even after all the adjustments for price comparability have been made, there still might be circumstances where price differences can be taken into account "appropriately" without the need to resort to the exceptional W-T comparison method.

22. The United States also ignores the express obligation to provide an "explanation" with reference to both of the normal comparison methods. The last part of the second sentence explicitly references the use of either W-W or T-T comparisons, requiring the authority to address both methods.

1. Inconsistencies in the *Washers* original investigation

23. The United States has confirmed that its "explanation" in the *Washers* original investigation consisted entirely of its findings that the overall dumping margins differed between W-W without zeroing and W-T with zeroing. There are two problems. First, the USDOC made no effort to explain why any differences could not be taken into account "appropriately.. Rather, the USDOC assumed without any explanation that if there was a difference in the overall margin, then the difference necessarily could not be taken into account. Second, the United States also argues that the "differences resulted in a change from a determination of no dumping to an affirmative determination of dumping." These differences are really just the difference between a margin based on zeroing and a margin not based on zeroing.

2. Inconsistencies in the differential pricing methodology

24. Under its differential pricing methodology, the USDOC continues to look exclusively to the differences in the margin and considers no other factors. The USDOC applies the same 25% threshold in every case regardless of the facts and regardless of how small the change in the margin might be. Even tiny shifts in the margin will be considered meaningful if they are larger than this fixed 25% threshold. Again, the USDOC continues to ignore the requirement to address the T-T comparison method in its explanations.

C. The United States Has Misinterpreted The Scope of The Exception

25. The United States incorrectly argues that no matter how few transactions meet the conditions, the exception can apply to all transactions. First, it ignores the logical relationship between a basic rule and an exception. Second, it ignores the textual reference to "such differences." Third, the Appellate Body in *US-Zeroing (Japan)* definitely stated that the phrase "individual export transactions" refers "to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited." The U.S. interpretation ignores this key finding.

1. Inconsistencies in the *Washers* original investigation

26. There is no dispute that the USDOC applied the W-T comparison method with zeroing to all of the sales by both of the Korean respondents, despite the fact that in the final determination in the *Washers* original investigation, the USDOC confirmed that the vast majority of the transactions – more than 90% – were found not to be "targeted."

2. Inconsistencies in the differential pricing methodology

27. Under the differential pricing methodology, the USDOC also does not properly limit the application of the W-T comparison method to those transactions found to meet the conditions. In the differential pricing methodology, if more than 66% of the sales pass the Cohen's *d* test, then the USDOC subjects all sales to the W-T comparison method with zeroing. This feature is part of the measure – the differential pricing test – that is used consistently in every USDOC original investigation and administrative review.

D. The United States Improperly Engages In Systemic Disregarding

28. Under the differential pricing methodology, the USDOC often creates subsets, applying a W-W comparison without zeroing to one subset and a W-T comparison with zeroing to the other subset. The USDOC sets any such negative margins in the W-W subset equal to zero, and ignores them when determining the overall margin of dumping. This systemic disregarding necessarily inflates the overall dumping margin, contrary to the concepts of "product as a whole." This systemic disregarding of negative margins is essentially a new form of WTO-inconsistent zeroing. The generic SAS code for differential pricing shows this methodology. And, the SAS code used in the preliminary determination in the *Washers* administrative review confirms the use of this generic SAS code.

E. Korea Has Properly Challenged The Differential Pricing Methodology

29. "As Such": Korea has summarized the substantial amount of evidence already provided to this Panel to demonstrate both (1) the precise content and (2) the general and prospective application of the differential pricing methodology. The evidence of the measure's general and prospective application thus occurred between March 2013 and December 2013, and then continued throughout all of 2014 and into early 2015. The evidence continues to accumulate to this day. Nothing in the Appellate Body decisions indicates that this Panel must ignore evidence of continuing application of a measure during the pendency of a dispute. If this Panel accepts the U.S. logic that since a measure might change it cannot be challenged, the Panel would make virtually it impossible to challenge any WTO-inconsistent measure "as such" or more generally. Such an approach would limit panels to the past application of a measure, and preclude any challenge to the ongoing measure. It makes no sense to open such a "back door" to allow WTO-inconsistent measure to escape meaningful review that might prevent the occurrence of future disputes.

30. The United States confuses the key distinction between applying the same differential pricing methodology in every instance, and what remedy is applied in each particular case given the results of the application of the methodology. The best analogy is the WTO dispute over zeroing. The fact that zeroing does not always show up in the results does not mean there is no zeroing methodology that may be challenged "as such." To the contrary, zeroing was challenged and found to be inconsistent "as such" with the Anti-Dumping Agreement. The same logic applies here.

31. "Ongoing Conduct": Korea raised an "ongoing conduct" claim because Korea knew that the differential pricing methodology would be applied to the Korean exporters in the first administrative review of the anti-dumping order. Precisely as Korea anticipated, the USDOC applied the differential pricing methodology in exactly the same manner in the preliminary determination recently announced in the *Washers* administrative review in March 2015. Korea is not seeking to challenge the differential pricing methodology as a future measure that has not yet occurred. Rather, this challenge is to the well-defined and consistently applied differential pricing methodology that already exists.

32. "As Applied": Korea's point about the preliminary determination in the *Washers* administrative review being subject to challenge "as applied" simply notes that the differential pricing methodology has in fact been applied yet again. First, the application occurred in the context of the very anti-dumping order that is the subject to this dispute. Although the USDOC has not yet published its final determination, that final determination will occur during the pendency of this dispute, before the Panel has to issue any findings. Second, the differential pricing methodology was very much subject to the consultations. The United States does not claim that

the differential pricing methodology applied in the preliminary determination in the *Washers* administrative review was in any way different. Third, although it is true that the differential pricing methodology does not *yet* have the same long, drawn-out history that the zeroing methodology has had in the WTO, as the United States notes in its argument, it is precisely these long, drawn-out disputes that Korea seeks to avoid. It would be contrary to Article 3.3 of the DSU and the principle of the "prompt settlement" of disputes to avoid the issue now.

III. THE USDOC'S CVD DETERMINATION IS INCONSISTENT WITH THE GATT 1994 AND THE SCM AGREEMENT

A. The USDOC's "Disproportionately Large Amount" Analysis Is Inconsistent With Article 2.1(c) of the SCM Agreement

33. The USDOC's continuing reliance upon the fact that Samsung received 24% of the total tax credit amounts to the mere conclusion that it received both a "large" amount and a "large proportion" of the total amount. The United States contends that the mere size of Samsung's credit compared to the size of the credit received by other companies speaks for itself because the size is "significant." However, size alone cannot be the measure of disproportionality, especially where the benefit is directly proportionate to the amount of the eligible investment.

34. The United States refuses to say what a "proportionate" amount would have been or what would have been expected under all the circumstances, which is a strong indication of the fundamental infirmity in its position. The United States also fails to explain why the USDOC would have expected the tax credits to be distributed "more evenly across the program's 11,764 recipients." In this regard, it wrongly equates an expected distribution with a more level distribution among all recipients.

35. In *U.S. – Large Civil Aircraft (2nd complaint)*, the United States contended that it was not possible to determine whether a subsidy was larger than it should be without first determining the relationship of the relative size of the subsidy compared to the total subsidy awarded to other recipients, i.e., the "first ratio," to some other measure of relative importance or significance. This relational concept requires use of a "second ratio." The United States stated that, "the numerator of the second ratio must consist of some information about Boeing, such as its size as measured by annual revenue, while the denominator must consist of comparable information about the group of recipients of the alleged subsidy as a whole."

36. The United States in *EC and certain member States – Large Civil Aircraft* continued to maintain its position that disproportionality could only be measured by use of a second ratio. The Appellate Body agreed with the United States that disproportionality could only be evaluated using a second ratio. Although, the Appellate Body rejected the second ratio that the United States proposed, the Appellate Body insisted on the need for an appropriate ratio before it could find that a subsidy was not disproportionately large. However, the USDOC failed to provide in the *Washers* case the type of evidence that both the Appellate Body and a Panel have found is essential in order to evaluate the issue of disproportionality.

37. The United States next contends that Korea has incorrectly asserted that RSTA Article 10(1)(3) provides tax credit benefits pursuant to a common formula. However, the United States impermissibly conflates the formula that a company uses to calculate the tax credit that it earns in a particular year with the amount that a company may claim on its tax return. The latter amount may be affected by tax planning considerations, including the effects of carry forward provisions and minimum tax requirements. However, these unrelated tax law provisions do not affect the amount of the Article 10(1)(3) tax credit that a company earns in a particular year, which is calculated using a formula that is common to all taxpayers. Moreover, there is no evidence that Korea designed or enacted this program to benefit large companies generally or Samsung specifically. Rather, Article 10(1)(3) benefits every company in the same way that invests in R&D activities, regardless of its size.

38. A WTO Panel found that the requirement in the final sentence of Article 2.1(c) is not dependent upon whether an interested party raised the relevance of the two factors - "length of time" and "diversification." Moreover, there is no question that Samsung raised the "length of

time" and "diversification" issues, but the USDOC failed to respond to them in its I&D Memorandum or in any other document, as required by WTO jurisprudence.

39. The United States' reliance on the findings in its redetermination upon remand from the U.S. Court of International Trade must also fail because, inter alia, the amount that a particular company claims on its tax return as a credit under Article 10(1)(3) is, in significant part, a function of tax planning. In fact, the percentage amount of the tax reduction that Samsung derived from Article 10(1)(3) is integrally related to the amount of tax credits that it earned and claimed on a wide variety of unrelated programs.

B. The USDOC Was Able To Tie Samsung's Tax Credits To Washer Production

40. The fatal flaw in the USDOC's calculation of the countervailing duties attributable to the tax credit benefits that Samsung received under Article 10(1)(3) and Article 26 is that it calculated the tax credit benefit that Samsung received on all of the products that it produced, not just the large residential washers that it produced, and then allocated a pro rata portion of that benefit to washers. As a result, the USDOC violated Article VI:3 and Article 19.4 by not calculating the tax credit that Samsung earned that was attributable solely to the washers that it produced in its Digital Appliance Division. Had the USDOC complied with its WTO obligations, it would have determined that the tax credits that Samsung received on its production of washers provided a *de minimis* benefit of less than 1% *ad valorem*.

41. Thus, the USDOC made no effort "to ascertain the precise amount of subsidy attributable to the imported products under investigation" as required by the Appellate Body. Nor did it "take all necessary steps to ensure" that the countervailing duty did not exceed the amount of the benefit that the tax credit conferred on Samsung's washers. Nor did it "actively seek out pertinent information."

42. The USDOC instead chose to remain passive based on an irrebuttable presumption that the tax credits could not be tied to a particular product category unless the intended uses of the tax credits "were known to the subsidy giver (in this case, the GOK) and so acknowledged prior to or concurrent with the bestowal of the subsidy." Under Korea's tax credit laws, it was impossible for Samsung to satisfy this requirement, which made the USDOC's presumption irrebuttable. This is because the government of Korea chose not to require taxpayers to identify in their tax returns the amount of any particular expenditure that pertained to any particular product. However, the Appellate Body in *US – Countervailing Measures on Certain EC Products* has stated that an irrebuttable presumption may not be used in an investigation.

43. The very same types of records that the USDOC relied upon in the *Refrigerators* and *Washers* anti-dumping investigations formed the basis for Samsung's calculation of the eligible expenditures that entitled it to claim tax credits under Articles 10(1)(1), 10(1)(2) and 10(1)(3). It is clear from these records that Samsung could tie its eligible expenditures directly to the Digital Appliance Division.

44. Even if the USDOC's requirement does not constitute an impermissible and irrebuttable presumption, ample evidence shows the WTO-inconsistency of the USDOC's refusal to allow Samsung to demonstrate that it could tie its Article 10(1)(3) and Article 26 tax credits to the eligible expenditures made by its Digital Appliance Division. First, on the date that Samsung filed its tax return for tax year 2010, Korea's National Tax Service had the legal ability to know exactly which tax credits were earned on those investments made by Samsung's Digital Appliance Division. There is no dispute that Samsung maintained these records, which the USDOC refused to examine when Samsung presented them at the verification of its questionnaire responses. There is also no dispute that the Korean tax authorities could have examined these records at any time, either before or after Samsung filed its tax return. Second, the United States cannot articulate what purpose would have been served by requiring Samsung to submit these records to the Korean tax authorities, or a summary of them, at the same time as it filed its tax return. Third, when Samsung did submit evidence of its "tying" of expenditures under Articles 10(1)(1) and 10(1)(2), which showed that the expenditures were made on R&D activities other than those related to washers, the USDOC refused to examine that evidence.

45. The United States nevertheless asserts that the SCM Agreement does not require it to "trace which portions of the total subsidies were related to underlying expenditures in Samsung's Digital Appliance business unit." However, the USDOC's analysts in fact had traced R&D expenditures on digital appliance products to the books and records of the Digital Appliance Division on two separate occasions. Accordingly, all of these circumstances meant that the USDOC could not ignore the evidence Samsung provided and offered to provide, which allowed the tying that Article VI:3 and Article 19.4 require.

C. The Calculation of the Denominator Should Include The Sales Value Of Global Production, Not Just Production In Korea

46. In its countervailing duty investigation in the *Refrigerators* case, the USDOC used Samsung's global sales value, not the value of its sales within Korea, in order to calculate the *ad valorem* benefit of the Article 10(1)(3) tax credit. In contrast, in the *Washers* investigation, the USDOC reversed its position and found, without any factual basis, that the very same types of R&D investments and resulting tax credits benefited only Samsung's local production and sales.

47. The United States' claim that "Korea offers no evidence of these supposed overseas effects" is contradicted by the USDOC's own findings in the *Refrigerators* subsidy investigation, where the USDOC found that R&D activities had effects on overseas production both with respect to R&D tax credit programs and R&D grant programs. The United States should not be allowed to escape the consequences of its own inconsistent findings.

48. The United States contends that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "do not require Members to take into account products manufactured outside the territory of a subsidizing Member when calculating subsidy rates." This assertion is simply wrong because it violates the matching principle and, for this reason, the United States is unable to identify any investigation or administrative review in which the USDOC has held that the benefits of a countervailable subsidy may never benefit overseas production. Moreover, if the United States' position were correct, then the denominator that it would use to calculate the subsidy margin for any particular program could never be a company's worldwide sales of its global production. However, as noted above, in the *Refrigerators* subsidy investigation, the USDOC used Samsung's global sales, not its local sales, on numerous occasions.

49. The United States argued in its FWS that it would have been too burdensome for the USDOC to trace the effects of R&D subsidies. This argument is contradicted by the USDOC's use in the *Refrigerators* subsidy investigation of the global sales denominator, as well as by the USDOC's findings in both the *Washers* and *Refrigerators* anti-dumping investigations that the R&D activities that Samsung conducted in Korea benefited worldwide production and sales.

D. The Tax Credits That Samsung Received Under RSTA Article 26 Do Not Constitute Specific Subsidies Within The Meaning Of Article 2.2 Of The SCM Agreement

1. It is without dispute that RSTA Article 26 does not impose limitations on the location of the enterprises receiving the subsidies

50. RSTA Article 26 subsidies are available to enterprises located anywhere in Korea. The provisions of Article 26 and the Enforcement Decree do not specify, either *de jure* or *de facto*, any limitations on the location of the enterprises receiving the subsidy. The enterprises earning the tax credits may be located anywhere in Korea.

2. The United States seeks to improperly expand the scope of Article 2.2 of the SCM Agreement

51. Article 2.2 of the SCM Agreement is not intended to be a broad "catch all," as the United States would have it, but rather, is narrowly concerned with geographical limitations on the location of the enterprises that are eligible to receive the subsidy. Other types of limitations are addressed by Article 2.1, which covers a different range of circumstances that could lead to a finding of specificity. Article 2.2 is very precise in defining the type of limitations that it addresses. Unlike Article 2.1 which broadly addresses limitations on the enterprises receiving the subsidy,

Article 2.2 is specifically and exclusively concerned with limitations on the location of the enterprises. Article 2.2 is further narrowed by specifying that the limitations must be related to the geographical location of the enterprises.

52. The Appellate Body interpreted the term "enterprise" to mean "[a] business firm, a company." The United States appears to rely on the compound term, "certain enterprises," and the definition of this term provided in the chapeau of Article 2.1. However, the fact that the drafters expressly referred to aggregate forms of enterprises in the definition of "certain enterprises" but did not refer to sub-divisions of such enterprises, strongly suggests that they did not intend the term to be expansive, as argued by the United States. In addition, Article 6.1(c) indicates that the term "enterprise" refers to a business organization that maintains its own accounting and reports its own operating profits and losses. Such description would not be fitting for facilities or investments. Moreover, paragraph (e) of the Illustrative List of Export Subsidies refers to the "exemption, remission or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises." The use of the term "enterprise" in this context also denotes an operating business organization. Indeed, this paragraph indicates that an enterprise is an entity capable of directly paying taxes and social welfare charges.

53. Importantly, the SCM Agreement draws an express distinction between "enterprises" and "facilities." Article 8.2(c) is specifically addressed to "assistance to promote adaptation of existing facilities to new environmental requirements." The drafters, therefore, used the term "facilities" when they intended to refer to particular operations or manufacturing plants that belonged to an enterprise. Article XVII of the GATT 1994 also uses the term "enterprise" to refer to the broader business organizations maintained or established by States. The reference is to the overall business organization and not to particular operations or investments of such enterprise.

3. The United States fails to demonstrate that RSTA Article 26 "designates" a geographical region where enterprises receiving the subsidy must be located

54. RSTA Article 26 does not designate or affirmatively identify a geographical region within the jurisdiction of the granting authority. To the extent that Article 26 designates any geographical region, it designated the region where investments will not be granted a subsidy.

55. Even if it were possible to designate the geographical region by implication -- a conclusion that is difficult to reconcile with the ordinary meaning of "designate" -- no such geographical region is designated by Article 26. The area outside the overcrowding control region of the Seoul Metropolitan Area constitutes 98% of Korea's land mass. The area essentially overlaps with the jurisdiction of the granting authority. It has no physical or natural features, or character, that distinguishes it as a "geographical region."

56. Korea is not putting forward a "size" defense as the United States inaccurately describes it. Rather, Korea's point is that, where there is no identifiable demarcation between the area in which a subsidy may be used and the broader jurisdiction of the granting authority, and where the degree of overlap between the two is almost total, there is effectively no limitation as to the geographical location of the enterprises.

4. The United States does not adequately respond to the policy concerns raised by Korea

57. Under the U.S. interpretation, subsidies provided for any investment made anywhere in the vast majority of a country's territory would be considered to be regionally specific. The U.S. position is too extreme, runs completely counter to the concept of "specificity," and yields outcomes that could not have been intended by the drafters of the SCM Agreement.

58. RSTA Article 26 is essentially a zoning regulation, and any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy. The U.S. approach to Article 2.2 would constrain WTO Members from pursuing policies to relieve over-congestion and income disparity in large urban areas, a problem that is common to most developing, and some developed, countries. Such limitations could not have been

intended by the drafters and would have a "chilling effect" on what are sensible and increasingly necessary policies given the growing number of megacities.

59. The circumvention concerns raised by the United States are also unjustified. Where a program allows investments essentially throughout the complete jurisdiction of the granting authority, there is effectively no limitation on the recipients of the subsidy. A further safeguard against circumvention is that eligibility under such programs would have to be subject to objective criteria, like RSTA Article 26. Any express limitations that do not meet the requirements of Article 2.1(b) of the SCM Agreement could give rise to a finding of *de jure* specificity under Article 2.1(a). Similarly, any indication that a program is *de facto* specific could be examined under Article 2.1(c). Accordingly, the circumvention concerns alluded to by the United States do not arise.

5. The U.S. position is internally inconsistent

60. The United States has argued that Article 2.2 does not require that the subsidy be limited to a subset of enterprises located with the designated geographical area. In its FWS, the United States simply chose to ignore the term "certain" from Article 2.2, as well as the definition of "certain enterprises" in the chapeau of Article 2.1, and instead argued that the subsidy that is available to all enterprises within a designated geographical region is nonetheless specific.

61. Yet, in responding to the Panel's questions, the United States relies heavily on "certain enterprises" in Article 2.1 and applies it to Article 2.2. The chapeau of Article 2.1 defines the term "certain enterprises" as "an enterprise or industry or group of enterprises or industries." As defined in Article 2.1, the term "certain enterprises" necessarily refers to a subset of enterprises. Otherwise, subsidies provided to all enterprises would be specific under Article 2.1(a).

62. Thus, if the United States relies on the definition of "certain enterprises" in Article 2.1 to interpret Article 2.2, then it must accept the full implications that flow from the application of that definition. In particular, the United States must accept that transposing the definition of "certain enterprises" from Article 2.1 to Article 2.2 necessarily means that only subsidies that are limited to a subset of enterprises located within a designated geographical region are specific for purposes of Article 2.2.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

1. The U.S. Department of Commerce ("DOC") has been using its new targeted dumping methodologies to circumvent WTO rulings that prohibit the zeroing methodology for all purposes. The DOC also applied the SCM Agreement arbitrarily and misunderstood the Korean government's legitimate policy tools.

2. The issues of zeroing and targeted dumping are closely related, but distinct issues. The U.S. has tried to blur these two issues, by arguing that since the second sentence of Article 2.4.2 of the Anti-Dumping Agreement ("the second sentence") is an exception, the use of zeroing is somehow the inevitable and exclusive remedy for targeted dumping. The U.S. has basically two arguments. First, the Appellate Body ("AB") has never before ruled on the application of W-T pursuant to the second sentence. Second, because of mathematical equivalence, the second sentence must allow zeroing.

3. Although the AB may not have ruled on this specific scenario yet, the logic of prior AB rulings – that "dumping margins" must reflect the product as a whole, and must reflect all of the exporter's prices, both dumped and non-dumped, applies with equal force to the second sentence. The use of zeroing in the context of targeted dumping ignores the same basic principles the AB has repeatedly applied to find zeroing WTO-inconsistent in all other contexts. The U.S. has provided no explanation of how the need to "unmask" allegedly targeted dumping in any way changes these basic principles.

4. The basic mechanism of zeroing is the same in all three comparison methods – W-W, T-T, and W-T – and thus, zeroing under all three of these comparison methods has been found to be WTO-inconsistent. There is no basis in the text of Article 2.4 or the AB interpretation of that provision to support the "exception" argument by the U.S. government.

5. The U.S. argues that W-T is an exception to W-W and T-T, and therefore, by logical extension, W-T should "lead to results that are systemically different." This argument seriously misconstrues the AB's findings. The AB has never said that the results of the symmetrical comparison methods (W-W and T-T) and the unsymmetrical comparison method (W-T) have to be different. Rather, the AB was merely addressing the logic of certain interpretative arguments made by the parties in those earlier disputes.

6. The U.S. further argues that without systemically different results, the second sentence cannot unmask targeted dumping and would thus be inutile. W-T is a different method, but that does not mean the outcome must be different. The outcome may or may not be different, depending on the facts and assumptions used. Also, the fact that W-T is a different method does not mean that the method necessarily needs to include the use of zeroing. The comparison methods employed in both T-T and W-T are basically identical in the sense that individual export prices are compared in both methods. Thus, if the use of zeroing is prohibited in the T-T comparison method that focuses on individual export prices, the use of zeroing in the W-T comparison method that also focuses on individual export prices must be prohibited as well.

7. Although the U.S. devotes much of its argument to mathematical equivalence, this argument has repeatedly been rejected by the AB. The U.S. makes specific assumptions that yield equivalence. But if one simply changes those assumptions, the equivalence collapses and the two comparison methods yield different results. Korea provides two expert opinions and actual examples from the *Washers* investigation that support the AB's findings.

8. Professor Thomas J. Prusa explains why the alleged mathematical equivalence is based wholly on assumptions the U.S. makes about how to apply the second sentence. He then gives several examples of alternative methods that do not yield equivalent AD margins. He also disproves the U.S. argument of equivalence in the specific facts of the *Washers* investigation. Professor Prusa and Ms. Anya Naschak show, using actual *Washers* price data, that once U.S. assumptions on calculating margins under different scenarios are changed, the equivalence disappears. The results confirm that under the same set of assumptions that the DOC consistently

uses in its standard administrative review methodology, the margins in the *Washers* investigations were different under the two comparison methods.

9. Even if the two comparison methods led to the same margin, the second sentence still does not become inutile. The exception in the second sentence allowing use of the "prices of individual export transactions" can also be given meaning through more detailed adjustments to ensure price comparability pursuant to the overarching obligation of "fair comparison" under Article 2.4.

10. The U.S. argues that the past AB decisions do not apply to this dispute, mainly because the DOC had never applied W-T in the context of the second sentence. But these prior AB findings in no way depend on the DOC having actually applied the second sentence. Again, the AB stated that the principles that "dumping margins" must reflect the product as a whole and must reflect all of the exporter's prices apply with equal force to the entire Anti-Dumping Agreement.

11. With respect to targeted dumping issue, Article 2.4.2, the second sentence requires three conditions. First, the investigating authority must find a "pattern" based on actual export prices that differ "significantly," not just a finding that export prices differ in some way that does not amount to a "pattern" and is not "significant." Second, the investigating authority must provide an "explanation" of why the W-T method is necessary, not just a statement that the result is different. Third, the investigating authority must limit the W-T comparison method to those sales that have actually met the conditions for invoking this exceptional method. The DOC violated all of these conditions in both its old *Nails* test and the current differential pricing test.

12. Both the *Nails* and differential pricing tests apply a purely mechanical and unfair methodology, contrary to the correct interpretation of the terms "pattern" and "significant." Such mechanical and overbroad tests are clearly inconsistent with the second sentence as well as Article 2.4.

13. Prices may "differ" but these differences do not constitute a "pattern" and do not differ "significantly" if the differences simply reflect normal commercial considerations such as price fluctuations of raw materials. The proper inquiry therefore must involve both qualitative and quantitative aspects, unlike the fixed quantitative methodology that is employed by the U.S. in its *Nails* and differential pricing tests. For example, in its *Nails* test, the DOC compressed the actual prices into a handful of average prices, and then ignored the actual export prices themselves. By doing so, the DOC found a pattern that did not exist at all because it was not reflective of actual prices. To explain this error, Korea submitted a second affidavit by Professor Prusa.

14. The U.S. claims that it does consider qualitative aspects. In reality, however, the U.S. attempts to identify small differences in prices as being "significant" without providing any meaningful reasons to support its claim. Contrary to U.S. arguments, Korea is not suggesting that the investigating authority must consider the exporter's subjective intent in setting prices. The issue under the second sentence is the pattern of prices that differ significantly and what those differences mean. If the prices differ for normal commercial reasons, then those prices do not constitute a "pattern" of prices that "differ significantly" within the meaning of the second sentence.

15. The DOC did not and still does not provide any meaningful explanation pursuant to the second sentence. The main U.S. argument is that the DOC has fulfilled the obligation of explanation by simply comparing the result of the W-T comparison method with zeroing and the result of the W-W method without zeroing. However, selective application of the zeroing methodology does not fulfill the obligation of "explanation." The investigating authority must provide the specific reason why it must resort to the "exception," as well as why it was not possible at all to account for these differences using the normal comparison methods. Korea emphasizes that the DOC has made no effort whatsoever to explain why the use of a T-T comparison cannot appropriately take into account such price differences.

16. There is no textual basis for the DOC to punitively apply the W-T comparison with zeroing to all of the transactions, whether or not they met the conditions under the second sentence. To defend its flawed interpretation of the term "pattern," the U.S. twists the issue by saying that a "pattern" necessarily involves all of the transactions, including those with higher prices and lower prices. In *Washers*, the DOC found about 90% of the sales by the Korean exporters not to satisfy the criteria for imposing the W-T comparison, but still imposed both the W-T comparison and the zeroing remedy to all the sales. However, the AB in *US-Zeroing (Japan)* clearly stated that it read "the phrase 'individual export transactions' in that sentence as referring to the transactions that fall within the relevant pricing pattern."

17. The differential pricing test artificially raised the possibility of finding a pattern by combining the purchasers, place, and time periods. This approach violates the plain language of the second sentence, which explicitly sets the categories with the conjunction "or": the pattern must exist for either purchasers, or for regions, or for time periods. Contrary to what the second sentence instructs, the DOC accumulates price differences from each category even when individually they would not meet the second sentence. The DOC then aggregates all three categories to create the appearance of meeting the second sentence criteria even when, in fact, they have not been met.

18. Furthermore, the DOC has invented a new type of zeroing when using the W-W comparison, which Korea refers to as "Systemic Disregarding." In the differential pricing test, the DOC disregards the negative margin of the W-W comparison and assigns a zero instead, when transactions fall between 33% and 66%. The negative margin comes from transactions not meeting the criteria of the second sentence.

19. The differential pricing test is a mandatory measure that is inconsistent "as such" with the second sentence. Korea showed how this measure meets each of the three elements identified by the AB. To further prove its claim, Korea provides an expert opinion by Ms. Anya Naschak, a former DOC official, on the nature and application of the new differential pricing test that confirms its precise content and consistent application in every case since its adoption. It specifically addresses and debunks the U.S. argument that the SAS code for the test may change from case to case.

20. Moreover, Korea has presented more than just a string of cases that coincidentally repeat the same actions. Korea is providing Exhibit KOR-95 showing all DOC decisions after the adoption of the new differential pricing test in March 2013. There were 138 proceedings where DOC had any need to test U.S. prices and thus had any reason to apply the test. Of those 138 proceedings, the DOC applied the test in all 138 proceedings – in 100 percent of those instances.

21. The U.S. confuses the distinction between, first, applying the same differential pricing test in every instance and, second, what remedy is applied in each particular case given the results of the application of the test. What remedy is applied may vary from case to case, but the test itself is identical in every case and is applied without exception or variation when the DOC determines that there are prices to be tested.

22. The differential pricing test also constitutes ongoing conduct that should be reviewed by this Panel. Korea's panel request specifically identified this test as one of the measures subject to the dispute, and also specifically included among its claims a challenge to the "ongoing practice" concerning targeted dumping and differential pricing.

23. Turning to the subsidy claims, Korea submits that the DOC's finding that Samsung received a "disproportionately large" amount of the total benefit under RSTA Article 10(1)(3) is inconsistent with Articles 1.2 and 2.1(c) of the SCM Agreement. While Samsung claimed on its 2011 tax return a larger amount of the tax credit than the average amount claimed by other Korean companies, the amount of the credit that Samsung received was solely determined based on the statutory formula. The U.S. approach replaces Article 2.1(c)'s "disproportionality" analysis with an absolute size analysis. However, the subsidy was proportionate to the amount of its investment. Any other company that made a similar sized investment would have received the same tax credit benefit. Therefore, the subsidy cannot be disproportionate.

24. Moreover, as was made clear by the AB in *US – Large Civil Aircraft*, an investigating authority conducting a "disproportionately large amount" analysis under Article 2.1(c) must compare the *actual* allocation of the subsidy to what would otherwise be *expected* if the statutory scheme were to be followed as it is stipulated. In its investigation, the DOC failed to conduct the inquiry that the AB has required. The test articulated by the AB in *US – Large Civil Aircraft* requires the investigating authority to compare the allocation against a second ratio reflecting the expected distribution of the subsidy as determined by the conditions of eligibility. The U.S. strongly contended in that case that a second ratio was required, but here the U.S. has abandoned the very test that it sought in *Large Civil Aircraft*. Furthermore, the DOC also failed to conduct the economic diversification and duration of the program analyses that are mandatory under Article 2.1(c).

25. Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement both require that countervailing duties be limited to offsetting the amount of subsidies *provided to the product subject to investigation*. The DOC simply disregarded this clear requirement. As a result, the DOC improperly attributed to washers a portion of the tax credits that Samsung received which were attributable to investments benefiting the production of *products other than* washers.

26. An accurate calculation of Samsung's subsidy margin for both the Article 10(1)(3) and Article 26 tax credits should have used Samsung's tax credit received on its Digital Appliance investments, including its large residential washers ("LRW") investments, in the numerator and Samsung's sales of Digital Appliances, including LRW, in the denominator, in order to calculate the *ad valorem* margin for the product under investigation. Because all of the information was readily available during the investigation, an accurate calculation would have been easy and simple. The DOC, however, refused to examine the detailed documentation of all of Samsung's R&D expenses and facilities investments. Instead, it calculated Samsung's *ad valorem* subsidy margin using the tax credits bestowed on *all* of Samsung's products in the numerator and its sales of *all* products in the denominator. The DOC's final margin calculation, therefore, assigned to subject merchandise a substantial amount of the tax credits earned by Samsung for eligible expenditures that benefitted the production and sale of products *other than* digital appliances.

27. The DOC's stated reason for refusing to receive, let alone examine or verify, Samsung's data and documentation was that it would allocate a subsidy to one or more specific products only upon a showing that the subsidy was "tied" to the production or sale of such products. Korea finds it ironic that the U.S. takes the position that it must be able to tie a subsidy to a particular product while at the same time it refuses to examine evidence that such tying can be made.

28. The DOC's finding that the Article 10(1)(3) tax credits benefited only the products that Samsung produced and sold in Korea is also inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. It is common sense that the results of R&D will normally benefit all operations of a company, wherever located, as Samsung demonstrated to the DOC. Before the *Washers* Final Determination, the DOC had determined that the R&D activities which rise to the Article 10(1)(3) tax credits benefited Samsung's worldwide sales and production. The DOC then changed its position with no supporting rationale.

29. Where, as here, it is determined that a subsidy is granted to a manufacturer to develop a particular product, the numerator in a countervailing duty investigation of that product would be the full amount of the subsidy. To calculate the *ad valorem* margin, that numerator would be divided by the total value of the recipient's sales of that product, regardless of where the product was produced or manufactured, and regardless of where the product was sold (the denominator). If the denominator were to consist only of some subset of the company's total sales of that product, the use of such a smaller denominator, relating to a different universe of sales than the universe included in the numerator, would artificially inflate the subsidy margin.

30. As regards regional specificity, the tax credits that Samsung received under RSTA Article 26 do not constitute specific subsidies within the meaning of Article 2.2 of the SCM Agreement. By the plain language of Article 2.2, in order for a subsidy to be specific, access to the subsidy must be "limited." In addition, this limitation must concern the location of the enterprises that are eligible to receive the subsidy, and the location must be a geographical region that is designated. RSTA Article 26 does not meet any of these requirements. RSTA Article 26 does not impose any type of limitation. It offers tax benefits to "domestic corporation[s]" across numerous industries. All such Korean enterprises have access to RSTA Article 26 subsidies, and these enterprises may be located anywhere in Korea's territory, and would still be eligible to receive RSTA Article 26 subsidies.

31. The accompanying Enforcement Decree identifies the "investments" that are eligible for the tax benefits as "business assets" that are located outside of the "overcrowding control region." Thus, to the extent that RSTA Article 26 incorporates a limitation, it is on the *investments* that give rise to the tax credits, not the location of the *enterprise* that benefits from the subsidy.

32. Korea further notes that Article 2.2 refers to "a designated geographical region within the jurisdiction of the granting authority." A "geographical region" is a subpart or subdivision of a larger, territorial unit. In considering the relevant "geographical region," one must take care to ensure that the subdivision at issue does not encompass the broader territorial unit of which it is a part. While there is necessarily overlap between the two, there will be a point in which the two may be so co-extensive that one can no longer reasonably refer to them as two units. It is also important to note that the "geographical region" under Article 2.2 must be a "designated" region. Designation is an act of identification by the granting authority. And it is done affirmatively, not by implication or suggestion.

33. The territory outside the overcrowding control region of the Seoul Metropolitan Area cannot constitute a "designated geographical region within the jurisdiction of the granting authority" because it constitutes 98 percent of Korean total landmass. Not only is this not a limitation pursuant to Article 2.2 of the SCM Agreement, but there is also no identifiable demarcation

between this geographical region and the broader jurisdiction of the granting authority. The degree of overlap is almost total and, thus, there is effectively no distinction between the area in which qualifying investments may be made and the jurisdiction of the granting authority of the tax credit program. RSTA Article 26 is essentially a zoning regulation, and any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy.

34. Korea further notes that Article 2.2 states that a subsidy must be "limited to certain enterprises" to be specific. While the U.S. suggests that the interpretative issues surrounding the term "certain enterprises" have been definitively resolved, the fact is that previous disputes have been determined under completely different sets of facts and the AB has not yet examined the type of issue Korea raises.

35. Finally, Korea submits that the imposition and maintenance of countervailing duties on imports of washers produced by Samsung are inconsistent with Articles 10 and 32.1 of the SCM Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE CLOSING ORAL STATEMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

Madame Chair and Distinguished Members of the Panel,

1. We would like to thank the Panel for a productive two days of meetings. We hope our answers today have helped clarify the issues and we look forward to your further questions. In closing, we would like to highlight a few key points.

2. On the issue of zeroing, we note the U.S. still has not addressed the overarching principles of the AB jurisprudence on zeroing. Instead, the U.S. focuses on drawing what it calls "logic extensions" from certain isolated statements. But in doing so, the U.S. argument ignores the important overarching principles the AB has applied. That is precisely why so many third parties agree with Korea that the logic of prior AB rulings condemning zeroing in all other contexts also applies to condemn zeroing in the context of the second sentence.

3. We also note that the U.S. has not and cannot prove mathematical equivalence. The U.S. agrees mathematical equivalence is "critical," and that the U.S. must show that it applies "in all cases." What these admissions mean is that when mathematical equivalence fails, the entire U.S. interpretative argument also fails. The AB has already found repeatedly that equivalence depends on the assumptions made. The U.S. has tried to defend those assumptions, but the U.S. arguments are based entirely on arguments about what an authority might reasonably choose. But those choices by the authority are not required by the text of Article 2.4.2. The authority could – consistently with Article 2.4.2 – make other choices and that is the point. The U.S. cannot show that Article 2.4.2 explicitly precludes these other choices, and so any equivalence based on those choices must fail. Korea has shown just that point, both in general and in the context of the *Washers* investigation.

4. Based on these arguments, we believe that the Panel must conclude that the DOC's use of zeroing is inconsistent with the Anti-dumping Agreement. The Panel should also conclude that the DOC's interpretation and application of the second sentence, apart from zeroing is also, inconsistent with the Anti-dumping Agreement.

5. The one point on which all parties agrees is that this case represents the very first time a WTO panel will render a decision concerning the actual application of the second sentence. It is for this reason that Korea urges the Panel to reach a clear decision on this issue, and when doing so to base its analysis on the actual text of the second sentence. Korea is forced to reiterate this obvious legal point because the U.S. interpretation ignores key terms of the second sentence.

6. Take the term "significantly." The U.S. adopts a purely quantitative interpretation. Indeed, under the U.S. approach as long as a particular category of prices is more than some portion of a standard deviation from the average selling price, the second sentence has been met. However, the actual meaning of the word "significantly" in all three languages makes clear that the analysis require more than application of a numerical criterion. Context is absolutely required. Prices in the fourth quarter of the year may actually be more than one standard deviation below those of earlier in the year, but such difference is not significant for the purposes of the second sentence if prices for the raw materials used to produce the merchandise decreased by an even greater amount. In its opening statement the U.S. stated emphatically that the reason for the difference in prices does not matter. Such an interpretation of the second sentence is contrary to the very meaning of "significantly" and therefore cannot be sustained.

7. Turning now to the subsidies issues, we can confidently state that the oral remarks of the U.S. yesterday failed to undermine any of Korea's claims.

8. On the issue of whether Samsung received a disproportionately large amount of the Article 10(1)(3) subsidy, the U.S. incorrectly continues to rely solely on the fact that Samsung

received a much larger amount of the subsidy than any other Korean company. This is the "size defense" of the U.S., not Korea. The problem with this defense is that the U.S. is forced to ignore the position it took in *US – Large Civil Aircraft* where the U.S. stated the following:

> the fact that a company receives more of the subsidy because it engages in more eligible activity cannot amount to a finding that this company has received disproportionately large amounts of subsidy.[1]

9. In the *Large Civil Aircraft* case, Boeing and Spirit had received over 60 percent of the total industrial revenue bond subsidy awarded to all recipients. Yet, the U.S. contended that this was not a disproportionately large amount. The AB agreed, stating that the issue of disproportionality could only be evaluated by comparing the relative size of the subsidy to a "second ratio". This is what the AB meant when it said that the issue of disproportionality is a "relational" concept. In other words, the relative size of a subsidy must be related to something else before one can decide if the subsidy is proportionate or disproportionate.

10. Yet, in its oral statement yesterday, the U.S. failed to acknowledge that the AB endorsed the original U.S. interpretation of Article 2.1(c). Instead, the U.S. has been compelled to ignore that interpretation. The Panel should recognize that the AB's ruling is dispositive. For this reason, the Panel should find that the DOC's finding of disproportionality lacked the type of evidentiary support that the AB has required. No amount of stacked up automobiles can overcome this fatal flaw.

11. On the tying issue, the U.S. ignores two critical points. First, it ignores the AB's holding that an investigating authority has an affirmative obligation to ascertain the precise amount of the subsidy on the investigated product.[2] Second, the U.S. ignores the fact that Samsung maintained and presented to the DOC records that showed the precise amount of R&D expenditures on digital appliances, including washers. All expenses are aggregated at the Digital Appliance level, but Samsung's R&D expenses are first collected on a project-specific basis.

12. The 200 pages of documentation that Samsung presented, but that the DOC's analysts refused to examine, listed every single R&D project conducted by the Digital Appliance division. Had the DOC's analysts examined those records, they would have easily been able to determine that none of the projects pertained to products produced outside the Digital Appliance Division. This was not a difficult task, despite the U.S. contention to the contrary, which it fails to support with any evidence. Rather, it is the type of task that the DOC routinely performs.

13. But, by failing to examine Samsung's detailed records, the U.S. violated the AB's requirement that an investigating authority can impose countervailing duties on only those subsidies that benefit the product under investigation. As noted by the Panel in *China – Broiler Products*, an investigating authority "must actively seek out pertinent information and may not remain passive in the face of possible shortcomings in the evidence submitted."[3]

14. On the denominator issue, the U.S. position defies logic and common sense. When Samsung conducts R&D in Korea, it does not limit the results of the R&D to its Korean production facilities. No rational company would ever restrict the benefits of its efforts to its local facilities when it produces the very same products in overseas facilities. Equally important, the DOC itself stated in the antidumping case on refrigerators that Samsung made in Mexico that:

> As the Department explained in the Preliminary Determination, the R&D expenses incurred by SEC {in Korea} benefitted Samsung's production {in Mexico} of the merchandise under consideration.

15. In light of the DOC's direct acknowledgement that Digital Appliance division R&D expenses incurred in Korea benefit digital appliance production in Mexico, the U.S. had no factual basis in the *Washers* case for claiming that such benefits should not be allocated to both domestic and overseas sales. The DOC's own finding that the R&D projects that Samsung conducted in Korea benefited its overseas production flatly contradicts the position that it has taken in this dispute.

[1] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 185.
[2] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139.
[3] Panel Report, *China – Broiler Products*, para. 7.261.

16. Finally, Korea has argued that RSTA Article 26 benefits do not meet the regional specificity standard in Article 2.2 because the benefits are not limited "by reason of the geographical location of the beneficiaries."[4] The U.S. has conceded that the eligibility requirements for Article 26 concern the use of the investment and are not tied to the location of the enterprises receiving the benefits.

17. The U.S. incorrectly attempts to portray Korea's claim as involving issues that have already been resolved. However, Article 26 could not be more different from the measure that was found to be regionally specific in *US – Antidumping and Countervailing Duties (China)*. In that case, eligibility was limited to enterprises located within a small industrial park. Article 26 does not have any limitations on the location of the enterprises receiving the subsidy.

18. Even if one considers the limitations on the use of the investment, the contrast could not be sharper. Contrary to what the U.S. suggests, Article 26 does not designate or even identify "any … tract of land". Article 26 simply excludes investments in a minuscule area representing no more than 2% of Korea's total land mass. Any notion that the area excluded should be treated the same way as the area designated for eligibility is simply wrong.

19. The legal theory put forward by the U.S. is too extreme. Under that theory, should the U.S. provide subsidies to enterprises making investments anywhere in its territory, but for Washington, D.C., the subsidies would be considered to be specific under Article 2.2. Korea does not believe that this is the outcome intended under Article 2.2. Article 2.2 does not constrain WTO Members from pursuing policies to relieve over-congestion and income disparity in large urban areas, a problem that is common to most developing, and some developed, countries.

20. That completes Korea's statement, and we thank the Panel for its attention.

[4] Appellate Body Report, *U.S. – Anti-Dumping and Countervailing Duties (China)*, para. 413.

ANNEX B-5

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF KOREA AT THE SECOND SUBSTANTIVE MEETING

I. ANTI-DUMPING ISSUES

A. The U.S. Has Improperly Reintroduced WTO-Inconsistent Zeroing

1. The Appellate Body has repeatedly condemned zeroing in W-W, T-T *and specifically* W-T comparisons as contrary to Articles 2.4, 2.4.2, 9.3 and 11.3 of the AD Agreement. There is nothing in the language of the second sentence that suggests that zeroing should be allowed in that context, when the Appellate Body has found zeroing to violate the AD Agreement under all three comparison methodologies.

2. Korea agrees that the second sentence is an exception to the first sentence of Article 2.4.2. But that exception, by its terms, has to do only with comparison methodologies – that is, the W-T comparison methodology is an exception to the "normal" methodologies of W-W and T-T comparisons.

3. The U.S. tries to stress the "limited nature" of prior Appellate Body decisions, and constructs "logical extensions" from some specific bits of language in those decisions. But under repeated Appellate Body decisions, any finding of "dumping" must be based on the product as a whole for an exporter, and cannot be based on price differences at the level of intermediate comparisons. That is why zeroing is not allowed under any comparison method – including W-T comparisons – because zeroing takes a price difference at the intermediate level out of the context of the product as a whole. That a specific price might be lower than some threshold is not "dumping" and zeroing cannot make it into dumping. The U.S. never explains why or how the application of the W-T methodology in the context of the second sentence overcomes these general principles for finding zeroing to be WTO-inconsistent.

4. Even assuming that the purpose of the second sentence is to "unmask" lower export prices charged to certain purchasers or in certain regions or during certain time periods, the second sentence explicitly does so by the W-T comparison method. The "unmasking" is to be achieved by the second sentence undertaking a more detailed examination of individual export prices.

5. The application of W-T without zeroing *does not always produce the same result* as W-W comparisons without zeroing. The Appellate Body has made this point twice, and the U.S. efforts to distinguish these cases fail. Korea noted that specifically in the case of *Washers*, a different result would be produced if different, namely, monthly, normal values had been used in the W-T comparisons. We also noted that changing other assumptions, such as using individual transaction adjustments rather than average adjustments, can also produce different results. Finally, Korea reinforced these Appellate Body findings with an expert affidavit by a noted scholar of anti-dumping measures. Moreover, we note that the U.S. argument about mathematical equivalence ignores T-T comparisons, which would not be equivalent in virtually all cases.

6. There is nothing in the language of the second sentence of Article 2.4.2 that remotely suggests that, as an exception, the provision should lead to "systemically" different results. The U.S. essentially extrapolates from a single statement from one Appellate Body decision (in *Softwood Lumber V*) to infer a meaning that is not in the Appellate Body's statement itself.

7. The U.S. seems to argue that even if the use of the W-T methodology in the second sentence of Article 2.4.2 *can* produce different results, if it does not do so "systemically" then it is rendered *inutile*. To be *inutile*, a provision must always and everywhere have the same effect as some other provision. By conceding that there are some cases in which a W-T methodology can produce a different result from a W-W methodology without zeroing, the U.S. effectively admits that the second sentence cannot be *inutile*.

8. The purpose of the second sentence of Article 2.4.2 is not to create larger dumping margins, but to examine a pattern of differing prices individually, so as to determine whether those

individual transactions are further below normal value than the average taken as a whole. The U.S. discussed the margin results from the preliminary determination in the *Washers* administrative review. Under certain assumptions there may be equivalent results, but that does not establish that equivalence always occurs. That is why the second sentence is not *inutile*, even without zeroing.

9. Negotiating history is recognized as a very limited tool for interpreting the provisions of a treaty, and thus, it *cannot* be used to contradict the plain meaning of a provision or to supply a meaning that is not even implicit in the treaty's terms. The negotiating history cited by the U.S. does not present a clear statement of the intent of the negotiating parties. What Hong Kong and Japan meant by their statements is far from clear and is not evidence that there was agreement by all members.

10. The language of the second sentence of Article 2.4.2 is clear on its face. It establishes an alternative methodology, namely, W-T, for examining "dumping" where a pattern of significantly differing prices exists. The Appellate Body has repeatedly held, however, that the W-T methodology does not permit zeroing because it is contrary to the requirement that "dumping" be found for the product as a whole. The ambiguous, limited negotiating history cannot be used to permit a methodology that is contrary to the very definition of dumping as set forth in the AD Agreement.

B. The Second Sentence Can Be Invoked Only When Certain Conditions Have Been Met

11. In the *Washers* case – even using the biased *Nails* test – only about 13 percent of the export prices were found to differ at all. An even fewer two percent of export prices would have differed under an unbiased test based on actual export prices. So few export sales and so little explanation does not properly establish a "pattern" of prices that "differ significantly".

12. The U.S. argues that the second sentence does not require the focus to be on individual prices. This approach is not difficult to administer, since the DOC currently uses Korea's approach in its differential pricing test. There is nothing "logical" about using average prices that obscure rather than reveal any "pattern". The U.S. tries to dismiss Professor Prusa's affidavit, but this affidavit is in fact credible "evidence" on which the Panel can rely. The U.S. has provided no other reason to reject this expert statement. Moreover, the U.S. has provided no alternative expert statement. Korea is very confident that any WTO statistician would quickly and easily validate Professor Prusa's basic points and his reliability as an expert on this issue. If the authority chooses to use a standard deviation, it must do so in a manner that makes sense. Ignoring the individual prices and calculating the standard deviation based on average prices makes no sense, as Professor Prusa's expert affidavit explains at some length.

13. Moreover, the *Nails* test addresses only the size of the price differences and disregards the reasons for the price differences. An authority cannot find differences to be "significant" based solely on quantitative criteria with no consideration at all of the qualitative factual context – the reasons why prices might be differing.

14. In the *Washers* case, the DOC relied exclusively on the difference in the results between W-W and W-T, and provided no other explanation as to why the W-W comparison would not work. The DOC did not even use the word "appropriately" in its determination, let alone explain why the W-W method could not be used – other than to say the margins were different. And the DOC failed to consider the T-T comparison method at all. The failure to do so ignores the express requirement of the second sentence. The proper reading of the second sentence is that both options must be considered and included as part of the explanation.

15. The U.S. approach renders the "explanation" requirement meaningless. The requirement is not whether W-W and W-T yield different results. The requirement is to "explain" why the W-W method "cannot" take differences into account appropriately. The authority must have some reason other than the effect of zeroing to show that the W-W or T-T comparison cannot address the pattern of prices that differ significantly. It would be circular to allow zeroing itself to justify the use of zeroing.

16. The DOC's application of the exception to be overbroad, since it applies the exception to all transactions and not just to those transactions found to meet the requirements of the exception. Having found alleged targeting for about 10% of the sales, the DOC applied the exceptional

W-T comparison method to all sales, including the almost 90% of the transactions not found to be targeted in any way. The U.S. arguments continue to ignore the text of the second sentence and clear Appellate Body guidance.

C. The Differential Pricing Methodology Is A Measure

17. The U.S. seems to believe that by changing certain aspects of its policy every few years, the U.S. can forever evade any meaningful WTO review. The Appellate Body, however, has recently confirmed that the scope of measures that can be challenged is "broad," and rejected artificial limitations on the scope of challengeable measures.

18. The differential pricing methodology can be challenged "as such". Korea has demonstrated the precise content and general and prospective application of the differential pricing policy. Korea has documented the existence of this measure extensively, providing the standard SAS code that the DOC applies to every case without change, citing hundreds of cases that applied the new policy, and confirming these facts with the DOC's own description of its new policy and with expert testimony. The U.S., on the other hand, has provided no contrary evidence.

19. The differential pricing should be reviewed as "ongoing conduct" precisely because the differential pricing methodology had been adopted, was being applied by the DOC in every case, and Korea knew that this methodology would be applied to any Korean exporters participating in the administrative review process.

20. Korea challenges the differential pricing methodology that has now been applied in the first administrative review "as applied". That methodology existed at the time of the panel request, and has been exhaustively documented.

D. The Differential Pricing Methodology Also Ignores the Key Conditions for Invoking the Exceptional Comparison Method Under the Second Sentence

21. Under the differential pricing methodology, the DOC continues the key WTO inconsistencies from the *Nails* test. The DOC does not properly find a "pattern" of "significant" price differences, relies exclusively on a difference in the size of the dumping margins, and applies the remedy too broadly.

22. The DOC has made the pattern test even worse: nowcollecting random price differences and then deeming them to be a "pattern" without indicating a pattern of what. Differences by purchaser, by region, by time period are accumulated into an undifferentiated mass.

E. It Is Also WTO-Inconsistent To Disregard the Negative Margins When Combining the Separate Results

23. "Systemic disregarding" is a particularly egregious violation. Indeed, the preliminary determination in the *Washers* administrative review provides the most extreme example. For the product as a whole, LG would have had no dumping margin, even when using W-T comparisons and even with the application of zeroing for the W-T comparisons. Yet by ignoring the negative margin for those products subject to the W-W comparisons – setting that potential offset to zero – the DOC has created a "dumping margin" that should not exist.

II. SUBSIDY ISSUES

A. Samsung Did Not Receive a Disproportionately Large Amount of Tax Credit

24. Samsung received a large amount of the total tax credit. The credit that Samsung received was proportionate to the amount of the investment that it made in eligible R&D activities. That is how the tax credit program works; meaning that the more a company spends, the larger the credit that it receives.

25. The U.S. denies that Samsung earned a proportionately large credit, but if it is going to take that position, then it must at least be able to explain the conceptual difference between a proportionately large tax credit amount and a disproportionately large tax credit amount.

26. In both *US – Large Civil Aircraft* and *EC – Large Civil Aircraft*, the U.S. stated that an absolute precondition under Article 2.1(c) to finding that a company had received a disproportionately large amount of a subsidy was the use of a second ratio that would allow the

investigating authority to determine whether a seemingly large subsidy amount was in fact disproportionate to what would be expected. The Appellate Body agreed that disproportionality could not be evaluated without the calculation of two ratios.

27. The Appellate Body found that the first ratio only provides a basis to investigate further the issue of disproportionality so long as the amount of a company's benefit has been calculated in accordance with the conditions of eligibility, which is indisputably the case for Samsung. In the *Washers* case, the DOC relied solely on its first ratio calculation, and the U.S. continues to maintain that position here.

28. The U.S. also contends that the large amount of the subsidy that Samsung received "deviated from what would be expected." Yet, the U.S. continues to be unable to articulate what should have been expected, and the record contains no evidence as to what would be expected other than what Samsung actually received.

B. The DOC Failed to Consider Evidence that Tied Samsung's Investments

29. The fundamental principle that underlies Korea's position is that an investigating authority may only countervail the benefits that a government confers on the merchandise that is the subject of an investigation.

30. Samsung's Digital Appliance Division regards the investments that it makes as equally benefitting all of the products that it produces, and the DOC agreed that the proper way to attribute R&D costs to washers is to treat the Digital Appliance Division's R&D costs as benefitting washers and all other products within the Digital Appliance Division on a *pro rata* basis.

31. Samsung made a *prima facie* showing of its tying ability, which then triggered the DOC's obligation to examine the accuracy of the representations that Samsung made.

32. Nevertheless, the DOC chose to invoke an irrebuttable, and therefore impermissible, presumption that, in order to tie a subsidy to a particular product, the "intended use" of the subsidy must be known to the subsidy giver and "so acknowledged prior to or concurrent with the bestowal of the subsidy."

33. However, the supporting examples of prior knowledge that the DOC provided in its Issues and Decision Memorandum pertained solely to grants and loans, not tax credits. Unlike grants and loans, prior knowledge cannot exist in a tax credit situation where the subsidy giver decides to bestow the benefit automatically when the tax return is filed. In addition, the requirement that Korean taxpayers maintain the tying information, which is available at all times both before and after the tax return is filed, is a completely suitable alternative to the DOC's filing requirement. By focusing solely on what Korea's National Tax Service might constructively, not actually, have known on the date of bestowal, the U.S. impermissibly seeks to avoid its obligation to examine the evidence that supported the tying claim.

C. The Correct Denominator Should Be Samsung's Worldwide Production

34. The R&D activities in which a company engages benefit the production of the merchandise to which the activities apply, no matter where that production occurs. It would be illogical for a company to confine the results and benefits of its R&D activities to its Korean facility and withhold those same benefits from its other facilities around the world.

35. The U.S., in a publicly released Issues and Decision Memorandum in the *Refrigerators* antidumping investigation, stated that Samsung's "Digital Appliance business' related R&D activities benefitted all of its subsidiaries that also produced and sold its digital appliance products." This statement constitutes a conclusive and unqualified statement by the U.S. government that the R&D activities that Samsung conducted in Korea benefited its production in all of its worldwide facilities.

36. The U.S. speculates about a difficult, if not impossible, "tracing exercise" as a practical bar to the use of a worldwide sales denominator. Yet, the DOC did in fact conduct this tracing by concluding that R&D benefits, as it found in the *Refrigerators* antidumping case as well, extended to all production facilities around the world.

D. The Article 26 Tax Credit Is Not a Regionally Specific Subsidy

37. The existence of limitations on the location of the enterprises eligible to receive the subsidy is a necessary element of a finding under Article 2.2. Article 26 imposes no such limitations. The affirmative identification of a geographically distinct area where the enterprises eligible to receive the subsidies must be located is another necessary element, which again is not met by Article 26.

38. Where there is no identifiable demarcation between the area in which a subsidy may be used and the broader jurisdiction of the granting authority, and the degree of overlap between the two is almost total, there is no "designation" of a geographical region and there is effectively no limitation as to the geographical location of the enterprises.

39. The term "enterprises" refers to a business firm or company, and not to its facilities. Where the drafters intended to refer to facilities, they did so explicitly, as they did in Article 8.2(c).

40. If an "enterprise" exists everywhere that a recipient has facilities, investments, or local production, then any Korean company that has a sales office or a bank account in Seoul is an enterprise "located" in Seoul and, thus, is ineligible for RSTA Article 26 credits. That is, of course, absurd. RSTA Article 26 does not deny subsidies to an enterprise on the basis of its location.

41. Any express limitations that do not meet the requirements of Article 2.1(b) of the SCM Agreement could give rise to a finding of *de jure* specificity under Article 2.1(a). Similarly, any indications that a program is *de facto* specific could be examined under Article 2.1(c). Thus, the circumvention concerns alluded to by the U.S. simply do not arise.

42. Any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy. A subsidy available for investments made anywhere in a country's territory, except for a national park, would be regionally specific according to the U.S.. Such an extreme outcome could never have been intended by the drafters of the SCM Agreement.

ANNEX B-6

CLOSING ORAL STATEMENT OF KOREA AT THE SECOND SUBSTANTIVE MEETING

1. Madame Chair, distinguished members of the Panel, members of the Secretariat, Korea would like to thank you for the time and attention that you are devoting to assisting the parties in resolving this dispute. Korea would also like to thank our colleagues on the U.S. delegation. We hope to continue working together to find a prompt resolution to this matter.

2. Korea believes that this meeting has been very helpful in clarifying the issues raised under the AD Agreement. Korea has raised issues under the SCM Agreement that are equally important and looks forward to the opportunity to further clarify the issues through the written questions.

3. In our concluding remarks, Korea would like to emphasize a couple of points. This dispute involves the proper interpretation of key treaty provisions. Korea believes that the U.S. interpretations of the AD and SCM Agreements are not permissible interpretations. If the DOC's determinations are to be permitted by the WTO, the seasonal Black Friday sales could be found to be a targeted dumping; a legitimate policy tool of preventing urban sprawl could be found to be a regionally-specific government subsidy. These kinds of WTO-inconsistent measures by a WTO Member are particularly problematic, because legitimate commercial practices are allowed to that Member's domestic industries, but not to foreign exporters, resulting in the distortion of international trade.

4. Concerning the antidumping issues, I recognize that there has already been a lot of discussion. However, I want to make a few additional observations.

5. In its Opening Statement the U.S. side spent quite a bit of time attempting to discredit the integrity of Professor Tom Prusa. This is not right. Professor Prusa is the Chairman of the Economics Department of a major U.S. university whose expertise is the economics of international trade regulation. Professor Prusa has repeatedly been invited by the WTO to speak at different conferences. Professor Prusa is truly an expert in these matters. Moreover, a very major conclusion that Professor Prusa offered to the Panel about DOC's antidumping practice was previously published by Professor Prusa long before he was asked to assist in this case. We are happy to debate with the U.S. side about the legal significance of the factual findings set forth in two Professor Prusa Affidavits offered to the Panel. However, we do not believe it is proper to cast aspersions on Professor Prusa's integrity.

6. In my view, the lasting image about antidumping issues over the last two days was the discussion yesterday afternoon about the *Nails* test. Notwithstanding that for virtually every other question, the U.S. side was ready with a quick reply, when asked to defend one aspect of the *Nails* test, the U.S. side was rendered utterly speechless. We agree that it is impossible to defend the validity of the Nails test under the AD Agreement.

7. Korea's last comment about antidumping issues concerns the increasing frequency of the DOC's application of the second sentence. As the U.S. side itself admitted, such change in the U.S. approach is a conspicuous attempt to circumvent the WTO rulings prohibiting the zeroing methodology. No other reason can sufficiently explain the change from the reasonable regulation promulgated in 1997 to the new methodologies applied by the DOC that automatically examine the existence of targeted dumping in all antidumping allegations made by the U.S. domestic industries, and do so in a biased way designed to find targeted dumping in a larger percentage of cases.

8. This is not right. And Korea is not the only WTO Member to be concerned. As evident by the number of third parties that are participating, Korea believes many other Members are also concerned with this Panel's decision. The mechanical and quantitative-only approach claimed by the U.S., if allowed to take hold, will initiate a new period of repeated WTO-litigation.

Korea believes there is a shared systemic concern to minimize the risk of further burdening the system with another decade of WTO litigation over zeroing.

9. With respect to the subsidy issues, Korea would make only the following brief points in order to demonstrate that the U.S. has failed to support any of the four determinations that Korea has challenged.

10. First, on the disproportionately large amount issue, the U.S. has once again demonstrated that it remains either unable or unwilling to describe what a proportionately large amount of the Article 10(1)(3) tax credit would have been for Samsung. It remains equally unable or unwilling to describe what amount of the tax credit should have been expected for Samsung. Also, it continues to misread the Appellate Body's decision in *US – Large Civil Aircraft*. If the U.S. reading is correct, then the Appellate Body would have stopped its analysis and found disproportionality once it found that Boeing had received 69% of the total Wichita, Kansas bond subsidy. The fact that it went much further by discussing the merits of the second ratios that the parties proposed necessarily means that much more is required under Article 2.1(c) than the mere 24% calculation that the DOC relied upon in Samsung's case.

11. Moreover, the U.S. has impermissibly attempted to shift the burden to Samsung to demonstrate what the second ratio should have been. However, the DOC had the burden to demonstrate disproportionality, which it failed to do. Moreover, the DOC never asked Samsung for any evidence concerning the second ratio, so Samsung cannot be criticized for failing to submit required evidence.

12. Second, on the tying issue, it is absolutely clear that Samsung has always had the ability to tie its tax credits to the products that its Digital Appliance Division produced. But, the DOC refused to examine the tying evidence that Samsung submitted even though, in the antidumping context, the DOC said that the Digital Appliance Division's R&D pertained equally to all digital appliance products. It is astonishing to Korea that the U.S. would now ignore its own directly relevant findings in a published, non-confidential document that remains a highly relevant administrative precedent, just like any other case precedent upon which a party is entitled to rely.

13. Third, on the denominator issue, the Opening Statement of the U.S. deliberately ignored the factual finding that the DOC itself made in its Issues and Decision Memorandum in *Refrigerators* antidumping case. The DOC said there that, "[Samsung's] Digital Appliance business' related activities benefitted all of its subsidiaries that also produced and sold it digital appliance products". The Panel should regard this statement as dispositive of the denominator issue because it compels the conclusion that R&D tax credits, just like the R&D activities that generate those credits, pertain to worldwide production, not just local production in Korea.

14. Finally, on the regional specificity issue, the U.S. alleges that Korea misconstrues the text of Article 2.2. However, the reality is the inverse and it is the DOC that has failed to adhere to the requirements expressly set out in Article 2.2. In its Opening Statement, the U.S. recognized that Article 2.2 expressly makes the existence of limitations on the location of the enterprises eligible to receive the subsidy a necessary condition for a finding of regional specificity. While the U.S. claimed in its Opening Statement that the DOC's finding met this requirement, the inescapable fact is that it did not.

15. Korea invites the Panel to review the DOC's finding on regional specificity in the Issues and Decision Memorandum. As the Panel will confirm, the DOC did not identify specific limitations imposed on the location of the enterprises receiving the RSTA Article 26 subsidies, much less make a finding that such limitations were a condition for Samsung to have received the tax credits. Thus, the DOC determination fails to meet the requirements of Article 2.2 even under the overly expansive interpretation of "enterprise" put forward by the U.S., which, in any case, finds no support in the SCM Agreement.

16. The U.S. has described Korea's interpretation of "enterprises" as "untenable".[1] Yet, the interpretation advocated by Korea closely matches the definition that the U.S. has consistently

[1] U.S. Opening Statement at the Second Panel Meeting, para. 56.

included in its free trade agreements, where "enterprise" has been defined as an "entity constituted or organized under applicable law…, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization". The U.S. has included this definition of the term "enterprises" in at least 12 free trade agreements, as indicated in Exhibit KOR-133. Thus, the interpretation of "enterprises" put forward by the U.S. in this case is not only contradicted by the text and context of Article 2.2, it is also contrary to U.S. practice.

17. The U.S. cites approvingly the Panel Report in *US – Upland Cotton* and that panel's conclusions that the assessment of specificity must be made on a case-by-case basis and that, at some point, "a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products."[2] Korea recalls that Article 26 tax credits were available to all enterprises wherever located making any investments throughout 98 percent of the Korean landmass. The facts of this case therefore clearly show that the tax credits provided under Article 26 were broadly available and did not benefit a particular limited group of producers of certain products. Consequently, Article 26 tax credits are not specific under the approach articulated by the *US – Upland Cotton* panel and endorsed by the U.S. in this dispute. This conclusion is entirely reasonable. By contrast, the interpretation of Article 2.2. put forward by the U.S. is extreme as illustrated by the examples that Korea has posited and that U.S. simply refuses to address.

18. In conclusion, Korea reiterates its appreciation to the Panel and the Secretariat and looks forward to your written questions. Korea would like to wish everyone a safe journey home.

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[2] Panel Report, *US – Cotton (Panel)*, para. 7.1142; U.S. First Written Submission, para. 375 and U.S. response to Panel Question 3.11, para. 155.

ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. This dispute presents novel questions of legal interpretation that have not previously been considered by the Appellate Body or any WTO panel. In its first written submission, Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from the customary rules of interpretation of public international law. The Panel should find that all of Korea's proposed interpretations of the covered agreements simply are not supported by the ordinary meaning of text of those agreements, in context, and in light of the object and purpose of the agreements. Accordingly, all of Korea's legal claims lack merit, and should be rejected.

II. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

2. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination." It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Accordingly, Korea, as the complaining party, must establish a *prima facie* case before the United States, as the defending party, has the burden of showing consistency with that provision.

III. KOREA'S CLAIMS UNDER THE AD AGREEMENT ARE WITHOUT MERIT

3. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement are questions of first impression for the Panel. Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." Through its "as applied" and "as such" challenges in this dispute, Korea seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement. The Panel should not countenance Korea's efforts in this regard.

Korea's "As Applied" Claims Related to the Washers Antidumping Investigation

4. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

5. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, *should* "lead to results that are systematically

different" from the two "normal" comparison methodologies when the conditions for its use have been met.

The "Pattern Clause"

6. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

7. Korea argues that, because of the qualitative connotations of the terms "pattern" and "significantly," the differences in export prices "must not be the result of some random, or exogenous cause, but in fact reflect what reasonably can be inferred to be targeting conduct." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. That latter question is not germane to an application of the "pattern clause." Additionally, Korea's reasoning is unsound. "'[L]ow' prices of sales," if they are below normal value, still constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. The "reason" for the low prices changes nothing.

8. Korea argues that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the washers antidumping investigation because it "evaluated whether the prerequisites for invoking [the alternative comparison methodology] had been met exclusively through the use of a computational analysis of the difference in exporters' prices." The USDOC was not obligated to examine *why* there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 of the AD Agreement by not doing so.

9. In the washers antidumping investigation, the USDOC applied a two-part test – the *Nails* test – to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed. In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by Samsung and LG. As reflected in the discussion in the final issues and decision memorandum, the USDOC undertook a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. In addition to explaining its analytical approach, the USDOC addressed numerous arguments raised by interested parties concerning the methodology applied in the examination of the existence of a pattern of export prices. Accordingly, the USDOC did not act inconsistently with the requirements of the "pattern clause" in Article 2.4.2.

The "Explanation Clause"

10. The second condition in the second sentence of Article 2.4.2, the "explanation clause," provides that an investigating authority may utilize the alternative comparison methodology only "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average and transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss the both the average-to-average and transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

11. In the washers antidumping investigation, the USDOC considered whether observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC evaluated the difference between what the weighted average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-

to-transaction comparison methodology. The USDOC concluded that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method. The USDOC provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Accordingly, the "explanation" that the USDOC provided in the washers antidumping investigation is not inconsistent with Article 2.4.2.

Application of the Average-to-Transaction Comparison Methodology to All Sales

12. Korea's claim that the USDOC acted inconsistently with Article 2.4.2 by "apply[ing] the [average-to-transaction] comparison methodology to all of LG's and Samsung's sales, not merely to those transactions which it found to constitute a pattern of export prices that differed among purchasers, regions and periods of time" lacks merit. When the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is constrained as Korea proposes. The Appellate Body did not definitively declare in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions.

13. Korea's proposed interpretation of Article 2.4.2 is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping." "Masked" or "targeted dumping" involves both sales below normal value, which are evidence of dumping, as well as sales above normal value, which may mask such dumping. "Targeted dumping" is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced sales, and by ensuring that the higher-priced sales do not offset dumping that properly should be evidenced by the lower-priced sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

Zeroing in Connection with the Average-to-Transaction Comparison Methodology

14. Korea's claims that the USDOC acted inconsistently with Articles 2.4.2 and 2.4 of the AD Agreement by using zeroing in connection with the average-to-transaction comparison methodology are without merit. Prior Appellate Body reports are not "dispositive of the question of whether zeroing is permitted." The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met.

15. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes. That the average-to-transaction comparison methodology is an exception to the comparison methodologies, and that it can be used to "unmask targeted dumping" is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law, in particular the "principle of effectiveness."

16. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results. This is true because, for both methodologies, all of the normal value and export price data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. Those

mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. Mathematical equivalence can be demonstrated using hypothetical examples, but the problem is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the washers antidumping investigation, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes, but the factual situations of those disputes can be distinguished from the factual situation here, and the Appellate Body's prior consideration of the argument neither supports nor compels rejection of the argument in this dispute.

17. The meaning of the second sentence of Article 2.4.2 can be confirmed through recourse to documents from the negotiating history of the AD Agreement, which reflect that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked and that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

18. Korea also claims that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4. Korea overstates the Appellate Body's findings in previous disputes related to zeroing and Article 2.4. The Appellate Body has not found that zeroing breaches Article 2.4 without having first found a breach of another provision. The Panel should recognize the limited nature and application of the Appellate Body's previous findings. Furthermore, there is no basis for finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is not "fair." It is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased.

Korea's "As Such" Claims Related to Zeroing

19. Korea's "as such" claims related to zeroing rely on the same arguments that Korea advances in support of its "as applied" claims. For the reasons given above, those arguments are without merit. Korea's claims under Articles 1, 2.1, and 9.3 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 are dependant upon or consequential of its claims under Article 2.4.2 and 2.4, and thus also should be rejected.

Korea's "As Such" Claims Related to the "Differential Pricing Methodology"

20. Korea seeks to "establish that the differential pricing methodology is a measure challengeable in WTO dispute settlement, 'as such'." Korea's effort fails. The evidence Korea adduces to support its claim is insufficient. Korea is inviting the Panel, contrary to the admonition of the Appellate Body, simply to divine the existence of a measure in the abstract on the basis of a string of cases, or repeated action. The Panel should decline Korea's invitation.

21. Assuming *arguendo* that the Panel accepts Korea's claim that the "differential pricing methodology" is a measure that exists and can be subject to an "as such" challenge, for Korea to succeed in its "as such" claim against the alleged "differential pricing methodology" measure, Korea must demonstrate that the "differential pricing methodology" necessarily causes a breach of Article 2.4.2 of the AD Agreement. Korea has failed to do so. Korea has provided no basis to conclude that a differential pricing analysis breaches Article 2.4.2 because it has turned an exception into a "rule," and Korea's contentions are belied by the facts. At the time Korea submitted its panel request, the USDOC had actually used the exceptional, average-to-transaction methodology only about 11 percent of the time as a result of the application of a differential pricing analysis.

22. Korea advances two groups of complaints about the "differential pricing methodology." First, Korea contends that the "differential pricing methodology" is inconsistent with Article 2.4.2 of the AD Agreement, "as such," for the same reasons that it argues that, in the washers antidumping

investigation, the USDOC acted inconsistently with Article 2.4.2, on an "as applied" basis. For the same reasons given above, Korea's arguments lack merit.

23. Second, Korea sets forth a number of criticisms that it argues are specific to the "differential pricing methodology." However, Korea has failed to present legal arguments and evidence sufficient to make a *prima facie* case of a breach of Article 2.4.2 of the AD Agreement. Korea premises its arguments exclusively on hypothetical scenarios. Korea makes no reference to any actual evidence. Accordingly, Korea has failed to adduce evidence sufficient to make out a *prima facie* case that the "differential pricing methodology" breaches Article 2.4.2 of the AD Agreement, "as such."

Korea's "Ongoing Conduct" Claims

24. Korea's "ongoing conduct" claims are without merit. The purported "ongoing conduct" "measure" cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU. Additionally, the facts in this dispute do not support the conclusion that the challenged practices "would likely continue to be applied in successive proceedings." Not even one administrative review of the washers antidumping order has been completed. Thus, it is impossible for Korea to establish the "string of determinations, made sequentially. . . over an extended period of time" that would be required to support its claims related to alleged "ongoing conduct," as that concept has been elaborated by the Appellate Body.

Korea's Claim under Article 1 of the AD Agreement

25. None of the antidumping measures challenged by Korea in this dispute is inconsistent with Article VI of the GATT 1994 or any provision of the AD Agreement. Accordingly, the Panel should deny Korea's request for a finding that the challenged U.S. measures are inconsistent with Article 1 of the AD Agreement.

IV. KOREA HAS FAILED TO ESTABLISH THAT THE USDOC'S COUNTERVAILING DUTY DETERMINATION WAS INCONSISTENT WITH THE SCM AGREEMENT OR GATT 1994

26. Korea asserts that the USDOC incorrectly found that subsidies under RSTA Article 10(1)(3) were *de facto* specific – despite overwhelming evidence that Samsung received disproportionately large amounts of these subsidies. Korea's second claim – i.e., that RSTA Article 26 subsidies are not specific – fares no better. This subsidy program falls squarely within Article 2.2 of the SCM Agreement, and is limited to a designated geographical region.

27. In addition, Korea challenges the method by which Samsung's subsidy rate was calculated. Korea attempts to introduce obligations into the SCM Agreement and GATT 1994 that are not set out in the text. There is nothing in these agreements that requires an investigating authority to treat subsidies as "tied" to a product, based on how a recipient chooses to "use" the benefit that it receives and any alleged effects of that use on a product. And the agreements do not require authorities to apply this use and effects inquiry to include offshore manufacturing.

RSTA Article 10(1)(3)

28. The USDOC's findings are fully consistent with the text of Article 2. Korea errs in asserting that the specificity determination is somehow at odds with the Appellate Body's approach in *US – Large Civil Aircraft*. Two companies received a substantial share of all benefits disbursed under a subsidy program. The absence of any restrictions on eligibility means that benefits would have been expected to be distributed more evenly across the program's 11,764 recipients. Thus, there was a significant disparity between the expected distribution of subsidy based on those conditions of eligibility and the actual distribution.

29. Equally groundless is Korea's assertion that the subsidies were "proportionate" because they were calculated using the same formula available to all Korean companies. Use of a common formula could indicate "objective criteria or conditions," but an indication of non-specificity under

Article 2.1(b) does not preclude a finding of *de facto* specificity. At most, the exercise of discretion would be relevant to a different analysis under Article 2.1(c).

30. Likewise, there is no merit to Korea's suggestion that the distribution of benefits reflects the fact that Samsung is a large company, and that any tax credit reflects a large company's research and human resources development activities. Korea's hypothesis is unsupported by evidence. The fact that a company is large does not mean that, where it receives a subsidy that is larger, in relative and absolute terms, than that received by other recipients, such a subsidy inherently cannot be found specific under Article 2.1(c). The USDOC found that to accept such an argument would "undermine the purpose" of the disproportionality inquiry.

31. Here, neither of the two factors identified in the third sentence of Article 2.1(c) has any bearing on the specificity inquiry. The considerable age of this subsidy program eliminates certain complications that can arise with new programs. And the USDOC was aware of the publicly known fact that Korea is one of the wealthiest and most diversified economies in the world – a fact that Korea neither raised nor contested.

32. The USDOC's remand redetermination supplements and reaffirms these findings. The USDOC drew upon newly-obtained information to address Samsung's argument that its share of the tax credits merely reflected the large size of the company. Even among other large companies, Samsung's use of the program was "overwhelming[ly] disproportionate."

RSTA Article 26

33. The USDOC's specificity determination is a straightforward application of Article 2.2 of the SCM Agreement. The RSTA Article 26 program is expressly limited to investments in facilities located in a designated region – i.e., the territory of Korea that falls outside the Seoul overcrowding area.

34. To evade these findings, Korea attempts to rely on legal theories that have been rejected by WTO panels. Korea asserts that RSTA Article 26 subsidies are available to all enterprises located *within the designated region*. The panel in *EC – Large Civil Aircraft* refused to accept this argument, which would require specificity "on a double basis" within Article 2.2. As the panel observed, this interpretation would render Articles 2.2 and 8.2(b) redundant. More recently, the panel in *US – Anti-dumping and Countervailing Measures (China)* rejected the "double basis" interpretation of Article 2.2.

35. Equally deficient is Korea's argument that a finding of non-specificity under Article 2.1(b) trumps a finding of regional specificity under Article 2.2. This interpretation has no grounding in the text of Article 2 and would make Article 8.2(b) redundant.

36. Korea attempts to re-characterize the RSTA Article 26 subsidies. But this program does not address the "use" of a subsidy, and instead ties eligibility to the geographic location of facilities. The fact that the restriction in RSTA Article 26 is addressed to the location of the facilities, as opposed to the head office of the recipient, is of no moment. Article 2.2 does not impose a "head office" test or similar restriction.

37. Likewise, Article 2.2 does not require that any geographic region be designated "explicitly," as Korea suggests. Nor is there any basis for Korea's apparent attempt to limit Article 2.2 to situations of *de jure* specificity. It is of no moment that the language of the relevant law designates a geographical region through language of inclusion or exclusion.

38. There is also no basis for Korea's assertion that larger regions (which are subject to "exclusions" such as the Seoul overcrowding area) should be exempted from the disciplines of Article 2.2. Article 2.2 does not depend on the relative proportion of land mass covered or excluded by a region. Although Korea suggests that large regions with "sensible exclusions" do not distort trade, the inquiry under Article 2.2 is not one of trade distortion; that comes into play in the context of a panel's adverse effects analysis or an investigating authority's injury analysis. To provide an exemption for geographically limited programs would invite circumvention of the subsidy disciplines of the SCM Agreement. And the alleged "exception" at issue here – the Seoul overcrowding region – is hardly a negligible exclusion that should be overlooked.

39. Korea falls back on "policy" arguments, but essentially concedes that RSTA Article 26 is a regional assistance program. The RSTA Article 26 program falls squarely within the regional specificity provisions of Article 2.2.

The Calculation of Samsung's Subsidy Rate

40. Korea challenges the method by which Samsung's countervailable subsidy rate was calculated. But its arguments are not well-founded in any specific obligation, and it points to no error in the calculation of that rate. Nor has any previous panel or Appellate Body report endorsed the interpretations put forward by Korea.

Korea Seeks to Create Rules that Are Not Set Out In the Agreements

41. Korea hinges its claims on finding specific obligations in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement on how a Member should allocate the numerator and denominator when calculating CVD ratios. Yet these provisions do not dictate precisely how the rate of subsidization is to be calculated.

42. In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts relating to the granting authority's bestowal of the subsidy are a key consideration. A Member may examine a subsidy and determine that it is appropriate to treat that subsidy as essentially "untied" for attribution purposes. Alternatively, a Member may examine a subsidy and determine that there is a product-specific "tie." The Member may allocate the subsidy entirely to that product and divide the benefit by only the sales of the product that it views as "tied" to that subsidy.

43. The use of both approaches is reflected in Annex IV of the SCM Agreement, which informs serious prejudice analysis. The Informal Group of Experts ("IGE") established by the Committee on Subsidies and Countervailing Measures developed recommendations to address when a subsidy is "tied" for purposes of paragraph 3. One acceptable method is to determine whether "the intended use of a subsidy is known to the giver, and so acknowledged, prior to or concurrent with the subsidy's bestowal." The IGE report also recommends that research and development subsidies presumptively be treated as untied. Other relevant context suggests the appropriateness of an approach that looks to the conditions of the granting of the subsidy.

Attribution of Subsidies On A "Tied" Basis

44. According to Korea, in apparently every case, a Member must analyze the actual use and effects of a subsidy in connection with a particular product, and apply a "tied" attribution methodology. But the terms of the SCM Agreement and the GATT 1994 do not impose a specific test for determining when a subsidy is "tied" to the production or sale of a particular product – either the approach employed by the USDOC or alternatives.

45. Korea's approach may yield results that are speculative and arbitrary. Adoption of Korea's use/effects approach could impose significant administrative burdens, and may be difficult or impossible to implement in a meaningful way.

46. Korea also relies on inapposite jurisprudence to support its position. Here, there are no allegations of pass-through or privatization, and it is undisputed that the RSTA subsidies at issue exist and benefit the products.

47. It was appropriate for the USDOC to employ an untied approach on the facts of this case. The design, structure, and operation of these RSTA programs do not suggest a product-specific tie. To the extent that the RSTA programs induce investment *ex ante* (i.e., by encouraging companies to invest in anticipation of receiving tax credits) they would not do so at the product level. Indeed, companies only receive credits for a percentage of their aggregate investment costs. The aggregate tax credits received by the company are more appropriately viewed as fungible, benefitting the entire company. Even if Samsung maintained underlying records to support the expenses it claimed in its return, in case the Korean authorities decided to conduct an audit, the Korean authorities did not receive or review these underlying documents in connection with the bestowal of the subsidies, and did not acknowledge any product-specific tie.

Sales of Products Manufactured Outside Korea

48. Equally, there is no basis for Korea's assertion that the USDOC was required to include in the denominator the sales value of products manufactured *outside Korea*. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require Members to take into account products manufactured outside the territory of the subsidizing Member when calculating subsidy rates. Members generally grant subsidies to generate benefits within their borders.

49. The USDOC explained that it was not appropriate to attribute subsidies to overseas production. There was no evidence that the granting Member intended to subsidize overseas production, and no connection between the structure and operation of the subsidy program and overseas production.

50. Korea asserts that the USDOC failed to "match" the elements in the numerator and denominator. This "matching" argument rests on a flawed premise – namely, that the inquiry hinges on the possible indirect effects of subsidies overseas. But even if an investigating authority were required to consider effects-based considerations for purposes of attribution, Korea offers no evidence of these supposed overseas effects.

51. Korea wrongly criticizes the USDOC for its alleged use of a presumption in favor of attributing subsidies to domestic sales. WTO panels and the Appellate Body have endorsed the use of presumptions where they are reasonable and rebuttable. Here, the USDOC will examine any relevant evidence and can draw the opposite conclusion. The record was devoid of evidence establishing that the grant of subsidy was intended to benefit overseas production.

52. Finally, Korea fails to account for the administrative burden associated with its overseas effects theory. Taken to its logical conclusion, Korea's theory would mean that Members would have to evaluate which sales of goods produced overseas were linked in some way to the subsidy, on a country-by-country basis, to determine the denominator in the subsidy ratio.

Korea's Claims Under Articles 10 and 32.1 of the SCM Agreement

53. Korea has failed to establish that the USDOC's specificity determinations and subsidy rate calculations are inconsistent with Article VI:3 of the GATT 1994 or Articles 1.2, 2 and 19.4 of the SCM Agreement. Accordingly, the USDOC's determination is not inconsistent with Articles 10 or 32.1 of the SCM Agreement.

V. CONCLUSION

54. For the foregoing reasons, the United States respectfully requests that the Panel reject Korea's claims.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. Korea continues to offer the Panel highly charged rhetoric rather than sound legal reasoning. Korea also continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law. The U.S. first written submission demonstrates why Korea's claims fail. Statements and written filings Korea has made since filing its first written submission have not improved Korea's case.

II. KOREA'S CLAIMS UNDER THE AD AGREEMENT ARE WITHOUT MERIT

2. The U.S. first written submission explains why the Panel should conclude that the measures challenged by Korea are not inconsistent with Article 2.4.2 of the AD Agreement or any other provisions of the covered agreements. Korea's legal arguments remain fatally flawed. The interpretations that the United States proposes are those that result from the proper application of the customary rules of interpretation of public international law. Korea's proposed interpretations, on the other hand, are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely.

3. While Korea and a number of the third parties attack the *Nails* test applied by the USDOC in the washers antidumping investigation, as well as the differential pricing analysis applied by the USDOC in the preliminary results of the first administrative review of the washers antidumping order, neither Korea nor any of those third parties describes how, in their view, an investigating authority *should* discern whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

Korea's Arguments Related to the "Pattern Clause" Are without Merit

4. When the USDOC undertook analyses pursuant to the "pattern clause" in the washers antidumping investigation, it took into account all of the "actual export prices" reported. Korea simply is incorrect when it suggests that the USDOC did not "evaluate actual export prices." Korea also is incorrect when it contends that the "pattern clause" requires investigating authorities to examine export prices on an individual basis. The text of the second sentence of Article 2.4.2 of the AD Agreement actually supports the opposite proposition.

5. Korea likewise is incorrect when it argues that the use of average prices rather than so-called "actual prices" "ignored basic principles of data analysis and common sense." The USDOC did not look to price variance (*i.e.*, as quantified by the standard deviation) at the transaction-specific level because the second sentence of Article 2.4.2 is concerned with export prices that "differ significantly *among* different purchasers, regions or time periods." Using weighted-average export sales prices allows the USDOC to disregard variations *within* a purchaser (or region or time period) and focus instead on uncovering a pattern of export prices which differ significantly *among* groups. Korea's proposed transaction-based variance calculation would not only be difficult to administer in most cases (if not impossible), but it also is at odds with the text of the second sentence of Article 2.4.2.

6. Korea objects to the USDOC's alleged "misuse of the standard deviation in the *Nails* test," and, in addition, Korea advances a numbers of statistics-based arguments. Korea's statistical arguments are without merit. The "pattern clause" does not require the use of any specific type of statistical analysis, and the USDOC has not misused standard deviations. Further, although the USDOC did, in a generic sense, analyze certain statistics, *i.e.*, weighted-average export prices, in the washers antidumping investigation, the "pattern clause" does not require the use of formal statistical techniques.

7. The premises of Korea's statistical arguments are flawed. As a legal matter, the term "significantly" in the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to utilize statistical analyses when examining export prices to determine whether there exists "a pattern of export prices that differ significantly among different purchasers, regions or time periods." The basic logical premise of Korea's arguments is equally flawed. Korea contends that the *Nails* test applied by the USDOC in the challenged antidumping investigation is not suitable to perform a particular type of statistical analysis. However, the *Nails* test does not involve the type of statistical analysis discussed by Korea. Korea's statistical criticism of the *Nails* test simply is inapposite. Korea seeks to replace the USDOC's balanced approach with one of the extremes noted by the USDOC in its determination, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is Korea's insistence on the use of a particular type of statistical analysis, which the AD Agreement does not require.

8. Korea's argument that the USDOC's examination of a "pattern" in the washers antidumping investigation is inconsistent with the "pattern clause" because the USDOC did not examine what Korea terms "qualitative aspects" continues to lack merit. In Korea's view, even after the investigating authority has found a pattern, the investigating authority must then conduct a second, independent investigation of what those differences mean and why they exist. Nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. Korea's proposed interpretation is untenable.

Korea's Arguments Related to the "Explanation Clause" Are without Merit

9. In its statements at the first panel meeting and in its responses to the Panel's questions, Korea offers the Panel no compelling reason to find that the USDOC's explanation in the washers antidumping investigation is inconsistent with the "explanation clause." It is not the case that the investigating authority must explain why it is not possible *at all* to take into account significantly differing export prices using one of the two normal comparison methodologies. Rather, the investigating authority must explain why the significant differences in export prices cannot be taken into account in a manner that is "proper," "fitting", or "suitable" using one of the normal comparison methodologies. Additionally, the term "appropriately" does not alter the meaning of the terms of the "pattern clause." Korea's proposed reading of the term "appropriately" simply is nonsensical.

10. Korea makes clear its view that "whatever their trends or variations" and "regardless of the size of the price differences," the normal comparison methodologies can take into account "appropriately" any "pattern of export prices which differ significantly among different purchasers, regions, or time periods." This plainly is yet another attempt by Korea to read the second sentence of Article 2.4.2 out of the AD Agreement entirely, using the term "appropriately" as leverage to do so. Korea's proposed interpretation is untenable.

11. Korea argues that "[t]he term 'appropriately' indicates that an adjustment of the W-W method might be sufficient to allow the W-W method to take differences into account with the W-W method, without the need to resort to the W-T comparison method." Korea offers no explanation, however, for why the presence of the term "appropriately" in the second sentence of Article 2.4.2 should be read as altering the application of the comparison methodologies set forth in the first sentence of Article 2.4.2.

12. Korea argues that the USDOC "does not make any effort to consider particular circumstances." Korea's contention is baseless. The USDOC, based on information provided by the respondents, determined what the margins of dumping would have been for LG and Samsung, both using the normal average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology. The USDOC compared the results and discerned that there was a "meaningful difference" in the margins of dumping calculated using the different methodologies. In this way, the USDOC explained why, within "the factual context of a particular case," *i.e.*, the washers antidumping investigation, the average-to-average comparison methodology could not take into account appropriately the pattern of export prices that differ significantly.

13. Korea continues to argue that "the authority must always consider the possibility of a [transaction-to-transaction] comparison." Nothing in the text of Article 2.4.2 supports Korea's proposed interpretation.

Application of the Average-to-Transaction Comparison Methodology to All Sales

14. Korea offers little new argumentation to support its claim that the United States has breached the second sentence of Article 2.4.2 as a result of the USDOC's application of the alternative average-to-transaction comparison methodology to all sales in the washers antidumping investigation. Korea appears to argue for the application of the alternative, average-to-transaction comparison methodology only to certain types or models of the product under investigation. However, applying the alternative, average-to-transaction comparison methodology on such a model-specific basis would appear to be directly contrary to what the Appellate Body said about the so-called "targeted dumping" provision in *EC – Bed Linen*.

Zeroing in Connection with the Average-to-Transaction Comparison Methodology

15. The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. The Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection. The Panel should recognize the limited nature and application of the Appellate Body's previous findings related to zeroing and the "fair comparison" language in Article 2.4 of the AD Agreement. The logical extension of the Appellate Body's reasoning that the alternative, average-to-transaction comparison methodology is an exception to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should *not* "lead to results that are systematically different" – is that the alternative comparison methodology *should* "lead to results that are systematically different," *when the conditions for its use have been met*.

16. When the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, those interpretations, on a basic level, are rooted in the text of Article 2.4.2 of the AD Agreement. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions." The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis." There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

17. The U.S. first written submission demonstrates "mathematical equivalence," using both hypothetical scenarios and the actual data from the washers antidumping investigation. It also is the case that the actual preliminary result in the first washers antidumping administrative review, if zeroing is prohibited under both methodologies, would be that the average-to-average and the alternative, mixed comparison methodologies would yield mathematically equivalent results. This is further evidence of the veracity of mathematical equivalence. Korea's arguments do not leave mathematical equivalence "broken."

Korea's Claims Regarding the "Differential Pricing Methodology" Are without Merit

18. Korea has given the Panel no reason to find that any so-called "differential pricing methodology" – or any measure in which the USDOC applied a differential pricing analysis – is inconsistent with Article 2.4.2. As we have demonstrated, no "differential pricing methodology" measure exists, and thus no such measure can be found inconsistent with Article 2.4.2, either "as such" or as "ongoing conduct." Additionally, we have shown that the preliminary results of the first administrative review of the washers antidumping order are not within the Panel's terms of reference, so those results, too, cannot be found inconsistent with Article 2.4.2, "as applied." Nevertheless, we address Korea's substantive arguments.

19. The differential pricing analysis the USDOC applied in the first administrative review sought to identify a "pattern," but did not require a "target." A "target" is just one example of a "pattern." While the second sentence of Article 2.4.2 has been described as a provision that addresses "targeting" or "targeted dumping," that is a shorthand reference to the terms of the second sentence of Article 2.4.2. The terms "targeting" and "targeted dumping" are not present in Article 2.4.2 or anywhere else in the AD Agreement.

20. Under the "targeted dumping" approach that the USDOC applied in the washers antidumping investigation, the "target" concept focused only on lower-priced export sales. However, Article 2.4.2 does not require this particular approach to a "pattern" analysis. The differential pricing analysis that the USDOC applied in the preliminary results of the first administrative review looked for export prices to a purchaser, region, or time period which are either significantly higher or significantly lower than the export prices to other purchasers, regions, or time periods. The conceptual framework of that analysis is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2, which calls upon the investigating authority to find "export prices which differ significantly," but which does not require a focus either on lower-priced or higher-priced export sales.

21. The legal premise of Korea's vertical variation argument is flawed. A "target" analysis is just one kind of analysis an investigating authority might undertake when searching for "a pattern of export prices which differ significantly among different purchasers, regions or time periods." Korea is incorrect when it suggests that the USDOC did not evaluate "*all* of the exporter's export prices for the product under investigation." In the preliminary results of the first administrative review, after making comparisons between different purchasers, regions or time periods on a model-specific basis, the USDOC aggregated the results of these model-specific comparisons to establish that 47.12 percent of LG's export sales passed the Cohen's *d* test and that this supported the conclusion that there existed conditions indicative of a pattern of export prices that differed significantly among different purchasers, regions, or time periods. Aggregating the results of the model-specific comparisons among different purchasers, regions, or time periods ensured that the "pattern" identified was for the product under investigation as a whole and was based on the exporter's overall pricing behavior in the U.S. market.

22. Korea contends that the USDOC's differential pricing analysis improperly combines price variation across different purchasers, regions and/or time periods to identify a pattern. However, there is no textual support in Article 2.4.2 for Korea's contention. To identify "a pattern" for the exporter and product as a whole, it may be appropriate for an investigating authority to consider all of that exporter's export prices to discern whether significant differences in the export prices are exhibited collectively among different purchasers, or different regions, or different time periods. In other words, the text of the "pattern clause" contemplates a holistic analysis of the exporter's pricing behavior for the product as a whole, or, in other words, the very "horizontal" analysis to which Korea objects.

23. Korea's argument related to so-called "cross-category" variation fails for the same reason that its "horizontal" variation argument fails. Nothing in the text of the "pattern clause" suggests that the significant export price differences among purchasers (or regions or time periods) cannot be cumulated with the significant differences in export prices among other categories (*i.e.*, purchasers, regions, or time periods) when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." The USDOC undertakes a similar process when measuring the amount of dumping. Specifically, the USDOC makes comparisons between normal values and export prices for comparable merchandise, and then aggregates those intermediate comparison results to determine the amount of dumping for that exporter and for the product as a whole. In this way, the use of the Cohen's *d* and ratio tests as part of the USDOC's differential pricing analysis is in accord with prior findings of the Appellate Body elaborating on the obligations set forth in Article 2.4.2.

24. Korea's "systemic disregarding" contention just amounts to another phrasing of Korea's argument that zeroing is always impermissible. However, zeroing is permissible – indeed, it is necessary – when applying the alternative comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. Additionally, because the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology to all sales is permissible, there is no basis for finding that what Korea calls "systemic disregarding" is impermissible. Nothing in the text of the second sentence of Article 2.4.2 supports

Korea's claim. When the results of the two comparison methodologies used in a mixed application are aggregated, it is necessary to ensure that the results of the average-to-transaction comparison methodology are not masked or offset by the results of the average-to-average comparison methodology, and the USDOC ensures that that does not happen by not offsetting a positive comparison result of the average-to-transaction comparison methodology with a negative comparison result of the average-to-average comparison methodology.

III. KOREA HAS FAILED TO DEMONSTRATE THAT THE USDOC'S COUNTERVAILING DUTY DETERMINATION IS INCONSISTENT WITH THE *SCM AGREEMENT* AND THE *GATT 1994*

25. Korea has failed to demonstrate that the USDOC's CVD determination is inconsistent with U.S. obligations under the GATT 1994 and SCM Agreement. Korea's first claim – *i.e.*, that RSTA Article 10(1)(3) subsidies are not *de facto* specific – is legally and factually untenable, and its second specificity claim is equally flawed.

26. Likewise, there is no merit to Korea's assertion that the USDOC should have calculated the subsidy ratios for RSTA Article 10(1)(3) and 26 subsidies using a novel variation of the "tied" approach to attribution. Korea's expense-driven theory has nothing to do with the *bestowal of subsidies*, and fails as a consequence. Korea's belated attempt to introduce materials from separate antidumping investigations cannot rescue this theory.

27. Equally without merit is Korea's assertion that the USDOC should have incorporated revenue from overseas manufacturing into the denominator of the subsidy ratio for RSTA Article 10(1)(3). Here, again, Korea relies on a theory that has no basis in the bestowal of subsidies.

The USDOC's Disproportionality Determination Is Consistent With Article 2.1(c) Of The SCM Agreement

28. Korea asserts that, in *US – Large Civil Aircraft*, the Appellate Body "endorsed" and "implicitly agreed with" the argument that a panel must base its determination on a "second ratio reflecting the expected distribution of the subsidy." Korea mischaracterizes the Appellate Body's findings.

29. The Appellate Body found that it would have expected a "wider distribution" of benefits, given open eligibility criteria and notwithstanding the fact that not every company would be in a position to take advantage of the program. Having found that there was "reason to believe that the IRB subsidies were granted in disproportionately large amounts," the Appellate Body turned to the explanations offered by the parties. The Appellate Body found that the European Communities' "second ratio" was not relevant, as it was not an explanation for the distribution. The Appellate Body also could not accept the United States' explanation based on qualifying investments. The Appellate Body considered the United States' final explanation, which was predicated on the significance of Boeing and Spirit to the Wichita economy, but rejected this defense. The Appellate Body did not "endorse" or even suggest that a disproportionality analysis must include a "second ratio."

30. Korea also continues to cling to arguments that the USDOC appropriately considered and rejected. Korea points to the fact that the "amount of the credit that Samsung received was solely determined based on the statutory formula," and argues that as a result its "subsidy is proportionate to the amount of its investment." This "common formula" argument reflects a misreading of Article 2.1. The disproportionality inquiry cannot be reduced to the question of whether subsidies are distributed automatically, without the exercise of discretion. Korea's position distorts the inquiry under Article 2.1(c) and would invite ready circumvention of subsidy disciplines. Here, as well, RSTA Article 10(1)(3) does not even contain a single "common formula."

31. Equally groundless is Korea's continued reliance on its "size defense." The fact that Samsung and LG are "large" companies does not explain the skewed distribution evident here. Nor can large size shield recipients from scrutiny under Article 2.1(c) of the SCM Agreement.

32. This was the extent of Samsung's "size defense" before the USDOC – *i.e.*, that, in general, "large" companies will "typically" invest more in research and human resources development than "smaller" companies. To the extent that Samsung was attempting to establish a "second ratio"

that would explain the disproportionate subsidy distribution found by the USDOC, it failed to do so. The USDOC also found that this theory was fundamentally at odds with the purpose of the disproportionality inquiry.

33. Here, again, the *US – Large Civil Aircraft* dispute is instructive. The fact that Boeing and Spirit were "large" companies with larger investments in commercial and industrial property than "smaller" companies was not found to explain the disparate distribution and could not avert a disproportionality finding. The Appellate Body did not accept a "size defense" in that case, and the Panel should not do so here. And even assuming some connection between size and R&D activity, this general correlation would not explain the *extent* of the disparity evident here.

34. Nor does the relative size of participants in the RSTA Article 10(1)(3) program explain this disparity. Korea has offered extra-record evidence on Samsung's size relative to the next largest company in Korea, but does not compare participants in the Article 10(1)(3) program. The only known RSTA 10(1)(3) participants for which there is information on the record regarding size are the two companies under investigation – Samsung and LG. Throughout the 2007-2009 period, Samsung and LG both received very large amounts of subsidy. But this information shows a disparity that cannot be explained by relative size. And the disparity in subsidy distribution cannot be explained by the amounts of eligible investments.

35. Other record evidence confirms that this pattern – *i.e.*, the concentration of subsidy benefits in a very small number of recipients – is long-standing. The distribution with respect to RSTA Article 10 is consistent with a broader pattern of concentration of tax benefits in the top "chaebol."

36. In its redetermination, the USDOC further confirmed that Samsung's status as a "large" company cannot explain the distribution of RSTA Article 10(1)(3) subsidies. Korea dismisses the USDOC's redetermination, apparently based on the assertion that the USDOC's findings did not constitute a "second ratio." But the Appellate Body did not require a "second ratio." Korea falls back on the argument that data in the redetermination, which is based on taxable income and tax savings, is "irrelevant," because it may reflect a company's tax planning strategy. But this does not render the data irrelevant, particularly at the level of an aggregate comparison between Samsung and the other 99 companies.

37. Finally, in its first written submission, the United States observed that Korea had failed to make a *prima facie* case with respect to the final sentence of Article 2.1(c) of the SCM Agreement. Korea has failed to cure the deficiencies in its case. Korea asserts that "there is no evidence" that the USDOC took into account the diversification of the Korean economy. To the extent that Korea is asserting that this factor must be addressed explicitly, Korea is incorrect. It is a "publicly-known fact" that Korea is one of the wealthiest, most diversified economies in the world. And because of limitations in the evidence that the GOK provided, the extent of diversification of the economy was not at issue.

The USDOC's Determination That RSTA Article 26 Subsidies Were Regionally Specific Was Consistent With Article 2.2 Of The SCM Agreement

38. Korea also failed to establish that the USDOC's specificity determination with respect to RSTA Article 26 subsidies is inconsistent with Article 2.2 of the SCM Agreement.

39. Korea offers a narrow, results-driven interpretation of the term "enterprise" in Article 2.2. Yet when the term "certain enterprises" is read in context with Article 2.2, it is clear that a firm, industry, or group thereof may be "located" in a variety of places, including the site of a head office, branch, manufacturing facility, or other asset or investment.

40. Korea casts a wide net, hoping to find support for its interpretation in other provisions of the SCM Agreement and the GATT 1994. This effort fails. The sharp distinction that Korea seeks to draw between "enterprise" and "facility" defies logic. It is unclear where an enterprise would be located, if not in facilities of some kind. Manufacturing and production does not occur in a vacuum, but instead is undertaken by enterprises in manufacturing facilities.

41. Korea asserts that the Article 26 program "does not impose any limitation on the location of the enterprise that receives the subsidy." But the geographic limitation in the RSTA Article 26

program is imposed with respect to the location of "facilities" in which investments are made. The fact that a company such as Samsung has multiple locations – that fall both within and without a designated region – is of no moment. And Korea's interpretation would create a major loophole in subsidy disciplines.

42. In addition, Korea continues to rely on failed legal theories that have no basis in the text of Article 2.2. Korea clings to its "double basis" theory, yet two panels that have addressed this theory rejected it. Korea also asserts that a geographic region under Article 2.2 must be designated "affirmatively, not by implication or suggestion." But Article 2.2 does not contain the word "explicit," and does not require that a region be "affirmatively" designated. Here, RSTA Article 26 incorporates an express geographic limitation.

43. Korea's continued reliance on its "large region" defense is equally without merit. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large. And it would be particularly inappropriate to overlook the geographic limitation imposed here.

44. Finally, Korea's resort to "policy" arguments also cannot avert a finding of specificity. In fact, these policy arguments confirm that the RSTA Article 26 program is regionally specific.

The USDOC Appropriately Treated RSTA Subsidies As "Untied" When Calculating Subsidy Ratios

45. Korea criticizes the USDOC's calculation of the subsidy ratios for RSTA Articles 10(1)(3) and 26. Yet Korea's claim is legally untenable. There can be no doubt that the R&D and facilities subsidies at issue are not "tied" to particular products.

46. Korea distances itself from its previous "retroactive use" theory, but fails to offer a coherent alternative. Korea's attribution theory hinges on *expenditures* that were incurred by the subsidy recipient. Although Korea grounds its theory in expenditures that it says "benefit" production, it uses this term in a way that has no basis in Article 1.1(b) of the SCM Agreement. To the extent that Korea is using the term "benefit" as a short-hand reference to the effect of an expenditure, this too would be inconsistent with the SCM Agreement. Treating expenses as synonymous with subsidies is also inappropriate here, given the structure, architecture, and design of the subsidies at issue.

47. Korea relies heavily on Samsung's internal expense records, which it argues allow Samsung to "'tie' the tax credits that it received to the washers that it produced in its Digital Appliance Division." Korea's focus on record-keeping is misplaced, however, as the attribution of subsidies is not a function of the effect of expenses, but rather the bestowal of the subsidies. So the internal records of these expenses would not provide a basis for calculating subsidy ratios.

48. The record-keeping requirements for RSTA Article 10(1)(3) also do not support Korea's view. Korea admitted that companies are not required to file a form or report as part of their tax return that shows how expenses eligible for Article 10(1)(3) tax credits are associated with particular merchandise. Korea points to Korea's Basic Act on National Taxes, which requires all taxpayers to "prepare and keep faithfully books and documentary evidence related to all transactions." But this is a cross-cutting requirement, applicable to all taxpayers in all contexts.

49. Moreover, Samsung did not submit any records – internal or otherwise – to the granting authority, the Government of Korea ("GOK"), that would have shown which expenses were allegedly spent in connection with a particular product. Korea has conceded that even the "detailed breakdown" of expenses that it touted in its first written submission was never presented to the GOK. Likewise, it is undisputed that the "200 page document" (which Korea says the USDOC should have reviewed) was never submitted to the GOK, and did not inform the bestowal of the subsidies. Korea asserts that such a product-specific breakdown would not be possible because of the way Samsung does business. But, if this is so, even Samsung is unable to provide what Korea argues is *required* to be analyzed under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

50. Finally, even if Samsung had submitted a product-by-product breakdown in its tax return to the GOK, this would not necessarily be a sufficient basis for finding that the RSTA Article 10(1)(3) and 26 subsidies were "tied" to particular products. There is no merit to Korea's assertion that the USDOC's treatment of subsidies under RSTA Articles 10(1)(1) and 10(1)(2) as "untied" was somehow "inconsistent" with its treatment of RSTA Article 10(1)(3) subsidies – which were also treated as untied. The USDOC found that there was no evidence in the tax returns themselves to indicate that RSTA Article 10(1)(1) and 10(1)(2) subsidies were tied to specific products.

51. Korea attempts to buttress its expense-driven tying theory by adducing materials from two separate antidumping investigations. Yet the verification reports and verification exhibits that Korea submitted from these proceedings were never a part of the washers CVD record. These materials are also irrelevant on their face, as they do not refer to or address the RSTA Article 10(1)(3) subsidy program. Moreover, Korea attempts to rely on these documents to support a legal theory the United States has previously explained is erroneous. Cost accounting principles used in antidumping proceedings are an inappropriate basis for attributing subsidies.

52. Finally, Korea offers a flawed and incomplete description of the USDOC's cost accounting in these AD investigations. Korea fails to mention that the USDOC presumptively follows the investigated company's books and records in carrying out this calculation. Korea likewise fails to mention that U.S. courts have imposed a substantial evidentiary hurdle and strict requirements for departing from an investigated company's books and records.

Korea's Overseas Effects Theory Is Groundless

53. Equally, there is no merit to Korea's argument that the USDOC should have incorporated overseas manufacturing into the denominator of the subsidy ratio for RSTA Article 10(1)(3). The obligations that Korea grounds its claim in – Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement – do not support its theory, and focus exclusively on domestic production. Nor do these provisions support an effects-based attribution theory.

54. In addition, Korea's approach is at odds with the facts here, which confirm that Korea bestowed RSTA Article 10(1)(3) subsidies on domestic production – not overseas manufacturing. Korea impugns the USDOC for alleged inconsistency in its approach. But the alleged "change in position" between the USDOC's preliminary and final determination reflected the correction of Samsung's misreported data.

55. Korea argues that "[i]t is common sense that the results of the R&D will normally benefit all operations of a company, wherever located." Korea fails to support this conclusory assertion with any evidence.

56. Korea further argues that, for the USDOC to attribute subsidies to domestic production, it must prove that the effects of R&D "were limited to washer production in Korea." Korea's approach would distort the provisions on which it grounds its claims. Korea also fails to address the troubling implications of its approach, which would inject an overseas dimension into subsidy attribution, with potentially far-reaching consequences.

57. Korea again takes refuge in antidumping proceedings. But these involved a different product and different jurisdiction, and have no bearing on the attribution of RSTA Article 10(1)(3) subsidies. In fact, Korea's reliance on a royalty payment made by Samsung undercuts its overseas attribution theory.

IV. CONCLUSION

58. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject Korea's claims.

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. This dispute places before the Panel a number of important questions concerning the proper interpretation and application of the AD Agreement, the SCM Agreement, and the GATT 1994. Resolving this dispute will require the Panel to discern the meaning of various provisions of these agreements through the application of the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU. Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from those rules.

I. KOREA'S CLAIMS UNDER THE AD AGREEMENT ARE WITHOUT MERIT

A. Zeroing Is Necessary for the Alternative, Average-to-Transaction Comparison Methodology To Have Any Effect

2. The Appellate Body has explicitly stated that it "has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2." Of course, the United States recognizes that a number of Appellate Body and panel reports include findings that bear on the interpretive questions before the Panel. None of those findings compels the Panel to find against the United States. On the contrary, when understood in the context in which they were made, the logical extension of the Appellate Body's zeroing findings is that zeroing is permissible – indeed, it is necessary – under the alternative, average-to-transaction comparison methodology.

3. The second sentence of Article 2.4.2 describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." The Appellate Body has found that Members must offset positive and negative comparison results when using the "normal" comparison methodologies, and must calculate an aggregate margin of dumping for an exporter for the product as a whole. However, in a situation where a pattern of significantly different export prices is observed among different purchasers, regions, or time periods, such offsetting may "mask" what has been referred to as "targeted" dumping. Unmasking such dumping requires not offsetting the lower-priced export sales with the higher-priced export sales; that is, it requires zeroing. The Appellate Body has further observed that the third methodology is an "exception" to the comparison methodologies that "normally" are to be used. As an exception, the third methodology, logically, *should* "lead to results that are *systematically* different" from the two "normal" comparison methodologies when the conditions for its use have been met.

4. The concept of mathematical equivalence is critical to the resolution of the interpretive questions before the Panel because, if a proposed interpretation of a provision of the AD Agreement would lead to the alternative comparison methodology set forth in the second sentence of Article 2.4.2 yielding, in all cases, results that are identical to the results of the average-to-average comparison methodology, then that proposed interpretation cannot be accepted. Such an interpretation would render the second sentence of Article 2.4.2 ineffective, which would be inconsistent with the customary rules of interpretation. That is precisely what would happen under Korea's proposed interpretations. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology will always yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all.

5. Japan, China, and Korea suggest that the Appellate Body has already rejected the mathematical equivalence argument in the past. The Appellate Body's prior consideration of the

mathematical equivalence argument neither supports nor compels rejection of the mathematical equivalence argument in this dispute.

6. Japan, China, and Korea further suggest that the mathematical equivalence argument must fail because it rests on particular "assumptions." With respect to export prices, limiting the application of the alternative, average-to-transaction methodology only to the "targeted" export sales raises at least two potential concerns. First, doing so in a way that would exclude entirely from the dumping calculation other "non-targeted" sales would result in the calculation of even higher dumping margins. Second, applying the alternative, average-to-transaction comparison methodology to the "targeted" sales while applying the "normal" average-to-average comparison methodology to the remaining sales, without zeroing, would also lead to a result that is mathematically equivalent to the application of the average-to-average comparison methodology to all export sales. The identification of this assumption is no answer to the mathematical equivalence argument.

7. Likewise, identifying an assumption about the calculation of normal value does not mean that the mathematical equivalence argument fails. There is no reason why a weighted average normal value would be calculated any differently when applying the average-to-average comparison methodology pursuant to the first sentence of Article 2.4.2 and when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2. Neither Japan nor China explains *why* manipulation or adjustment of the calculation of normal value, which is based on sales prices in the *home* market, would be appropriate to address a potential issue where there is a pattern of prices that differ significantly in the *export* market. The lower-price *export* sales are "masked" by other higher-price *export* sales. How would calculating *normal value* differently help "unmask targeted dumping"? Logically, using different normal values would not help "unmask targeted dumping" at all, and the identification of the normal value assumption is no response to the mathematical equivalence argument.

B. If Application of the Alternative, Average-to-Transaction Comparison Methodology Is Limited Only to Lower-Priced Sales, then the Exceptional Methodology Would Have No Effect

8. If zeroing is prohibited, then it does not matter whether the average-to-transaction comparison methodology is applied to all or just some export sales. If zeroing is prohibited, then, after the intermediate calculations are aggregated, the mathematical result will be the same as it would be if the "normal" average-to-average comparison methodology had been used. Assuming that zeroing is permissible, then it must also be permissible to apply the average-to-transaction comparison methodology not only to the export sales that are at significantly lower prices, but also to the higher-priced export sales that may "mask" the dumping evidenced by the lower-priced export sales.

C. The "Pattern Clause"

9. The conclusion that flows from an analysis in accordance with the customary rules of interpretation is that the "pattern clause" requires a finding of a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent among different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically. As we have demonstrated, that is precisely what the U.S. Department of Commerce ("Commerce") did in the washers antidumping investigation.

10. Korea urges that an analysis pursuant to the "pattern clause" must take into account the qualitative, in addition to the quantitative significance of any observed differences. Korea means that the differences in export prices must "reflect what reasonably can be inferred to be targeting conduct." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. The "reason" for the low prices changes nothing.

D. The "Explanation Clause"

11. The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear the reason that it is not possible in the dumping calculation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average or the transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

12. In the washers antidumping investigation, Commerce evaluated the difference between what the weighted-average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. The "explanation" that Commerce provided in the washers antidumping investigation is not inconsistent with Article 2.4.2 of the AD Agreement.

E. Korea's "As Such" Claims Related to the "Differential Pricing Methodology"

13. Korea has failed to adduce evidence sufficient to support its claims regarding the alleged "differential pricing methodology." While the United States does not agree that there is any validity to Korea's claims with respect to the so-called "differential pricing methodology," we continue to consider that Korea has not made a *prima facie* case of inconsistency.

II. KOREA'S CLAIMS UNDER THE SCM AGREEMENT AND GATT 1994 ARE WITHOUT MERIT

14. Korea's challenge to Commerce's countervailing duty determination is equally without merit. Contrary to the rhetoric in Korea's submissions, Commerce's findings were thoughtful, reasoned, and grounded in the evidence. It is Korea who has pushed the envelope in this dispute, offering strained, results-driven interpretations of the relevant obligations and Appellate Body guidance, while presenting a distorted picture of the factual record. The Panel should decline Korea's invitation to import new obligations into the SCM Agreement or GATT 1994, and to substitute its own assessment of the facts for that of the investigating authority.

A. The Department of Commerce's Findings on Disproportionality Were Reasoned and Adequate, and Supported by Positive Evidence

15. Turning to Korea's first claim, the evidence amply supports Commerce's determination that subsidies conferred on Samsung under RSTA 10(1)(3) were *de facto* specific. Samsung received a large percent of all subsidies distributed in 2010, out of nearly 12,000 participants. By comparison, the average recipient obtained a very small percentage. Commerce found that this disparity was contrary to what would be expected, and indicated disproportionality – an approach that is fully consistent with the text of Article 2.1(c) of the SCM Agreement and the Appellate Body's findings in the *US – Large Civil Aircraft* dispute.

16. Korea's primary argument – i.e., its "size" defense – has no basis in law or fact. Commerce observed that, even if Samsung's size argument were factually accurate, it would still not apply this standard because to do so would "undermine the purpose" of the disproportionality inquiry.

17. Korea has submitted a copy of a redetermination that the Department of Commerce conducted pursuant to remand from a domestic court. While that redetermination occurred well after this Panel was established, it nonetheless further supports the conclusion that Commerce's specificity findings were not in error.

B. Subsidies Conferred Under RSTA Article 26 are Regionally Specific

18. Equally, there is no basis for Korea's assertion that the significant amount of facilities subsidies received under RSTA Article 26 should avoid scrutiny under the SCM Agreement. Eligibility is expressly limited to investments located in a designated geographic region – the area

falling outside the Seoul overcrowding area. Korea's claim rests on legal theories that have no grounding in the text of the SCM Agreement, and have been repeatedly rejected by WTO panels.

19. Korea falls back on the argument that subsidies limited to large designated regions are not regionally specific. But Article 2.2 does not privilege or exempt certain categories of region. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large. And it would be particularly inappropriate to overlook such geographic limitations here. The area excluded from eligibility includes Seoul, the capital of Korea and site of a large proportion of Korea's economy and population.

C. Commerce Appropriately Found that RSTA Subsidies Were Not "Tied" to Particular Products, and Calculated the Subsidy Ratio Accordingly

20. Likewise, there is no basis for Korea's criticism of the ratios calculated with respect to subsidies received by Samsung under RSTA Articles 10(1)(3) and 26.

21. Korea attempts to ground its preferred approach in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. These provisions do not support Korea's arguments, but instead undermine them because they do not specify particular attribution methodologies, much less Korea's.

22. Absent rules on applying specific methodologies, an investigating authority must determine an appropriate approach. As explained in the U.S. first written submission, an investigating authority may derive guidance from certain provisions. Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that in determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts surrounding the Member's "bestowal" of the subsidy will be a key consideration. Annex IV of the SCM Agreement indicates that both "tied" and "untied" approaches to attribution are, in principle, compatible with the SCM Agreement. The Informal Group of Experts ("IGE") report to the Committee on Subsidies and Countervailing Measures is instructive, although not binding. Commerce's determination was consistent with these sources, and grounded in the facts relating to the bestowal of subsidies on Samsung.

23. Korea nonetheless argues that Commerce should have adopted a novel variation of the "tied" approach to attribution, based on the "retroactive" use and effect of the subsidy. And Korea criticizes Commerce for declining to accept and review accounting records that it says would have helped Commerce implement this approach by quantifying the amount of underlying expenses with some connection to washers. These arguments fail, for several reasons.

24. First, Korea has offered no basis in the SCM Agreement to consider that investigating authorities are compelled to calculate subsidy ratios based on how a portion of the benefit is "used."

25. Second, the structure, architecture, and design of the RSTA subsidy programs do not reflect a product-specific tie. Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on formulas that related to *aggregate* and *average* expenses for the *corporation as a whole*. It is not meaningful to attempt to trace a given KRW of tax credit received to any KRW of underlying expense, much less to a particular product.

26. Third, even aside from the legal flaws in Korea's argument, it also rests on a flawed factual premise. RSTA tax credits do not "retroactively" reduce expenses, much less those related to a particular product.

27. Finally, the documents that Korea refers to have nothing to do with the "bestowal" of the subsidy. It is undisputed that the granting authority, Korea, was not presented with these documents when it bestowed the tax credits. And even under Korea's theory, these documents would not enable Commerce to derive a meaningful subsidy ratio that carves out expenses and sales information for washers – as opposed to the entire Digital Appliances unit, which includes a range of product lines, such as refrigerators. Even Korea is unable to undertake the kind of forensic analysis that it suggests is needed for a "retroactive" approach. All of this confirms that Korea's preferred approach is not a more "precise" way to attribute subsidies.

D. Korea's Overseas Effects Theory Has No Basis In Law or Fact

28. Korea's final attempt to impugn Commerce's attribution methodology fares no better than its earlier attempts. Korea argues that the denominator in the subsidy ratio for RSTA 10(1)(3) should have included sales of merchandise produced outside Korea.

29. This argument has no legal basis. Consistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, Commerce attributed subsidies based on the way in which they were bestowed on Samsung. Korea argues that Commerce instead should have calculated the subsidy ratio based on the possible knock-on effects of subsidies on overseas manufacturing. But it is unclear why this effects-based investigation is required to ensure that the elements in the numerator "match" those in the denominator. Korea's proposed effects-based inquiry would also impose a considerable administrative burden on investigating authorities, with no apparent advantage. Needless to say, neither the Appellate Body nor any WTO panel has ever imposed the requirement that Korea suggests.

30. It is significant that Korea does not challenge Commerce's attribution of RSTA Article 26 facilities subsidies to domestic production. Korea asserts that "R&D" subsidies are different, and that they "normally" benefit overseas production. This argument has no basis in the bestowal of the subsidy. But even on a purely effects-based reasoning, Korea's argument is unsupported and untenable.

III. CONCLUSION

31. As we have demonstrated in the U.S. first written submission and again this morning, Korea's claims are without merit, and the United States respectfully requests that the Panel reject them.

ANNEX C-4

CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. In light of the late hour, the United States will limit ourselves to offering just a few short closing comments. This dispute, like all WTO disputes, is about the meaning of the covered agreements and the content of the obligations that WTO Members have accepted and agreed to in those agreements. Korea seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement, including, *inter alia*, by reading out of the AD Agreement an entire sentence.

2. During the course of this proceeding thus far, including in its first written submission, in its opening statement, and when pressed today during the back-and-forth of the question and answer session, Korea has utterly failed to offer the Panel anything that approaches a plausible interpretation of the second sentence of Article 2.4.2 of the AD Agreement; one that is rooted in the ordinary meaning of the terms of that provision, in their context, and in light of the object and purpose of the AD Agreement. Korea nowhere even suggests that the prohibition on zeroing it asks the Panel to impose on the second sentence of Article 2.4.2 could be based on the terms of that provision itself. Korea attacks the U.S. application of, *inter alia*, the terms "pattern," "significantly," and "explanation," all in an effort, not to give meaning to the terms of the second sentence of Article 2.4.2, but to deprive it of any meaning whatsoever.

3. Korea's claims under the SCM Agreement are equally without merit. We could not help noticing this morning that not one of the third parties offered any comments on the subsidy issues in this dispute during the third party session. The issue of zeroing obviously is quite charged and can perhaps overshadow the other issues in a dispute such as this one. We appreciate the Panel's questions this afternoon and the careful attention the Panel has already given to the important questions at issue in this dispute under the SCM Agreement. At stake is the ability of Members to address massive amounts of injurious subsidization to what Korea itself agrees is the largest company in Korea. Just like the antidumping issues, the resolution to Korea's subsidy claims will come from a proper application of the customary rules of interpretation; it will not be found in an argument made by the United States in a previous dispute, which was rejected by the Appellate Body. When the Panel undertakes the interpretive analysis for itself, it will find that Korea's proposed interpretations of the SCM Agreement are strained and results-driven, and when the Panel examines the facts, it will find that Korea's presentation of the factual record is distorted.

4. Pursuant to the DSU, this Panel's charge is to make an objective assessment of the matter before it and to clarify the *existing* provisions of the covered agreements in accordance with customary rules of interpretation of public international law. At the beginning and at the end of the panel's analysis is the text of the covered agreements. The terms. We agree with and appreciate the interventions of the third parties this morning that the terms of the agreement are what matters, not characterizations of the terms or even generally accepted notions about the purpose of provisions. Common words and phrases that have been used widely, like "zeroing," "masking," and "targeted dumping," may be helpful in enhancing understanding of the terms, but they also could prove a distraction. It will be critical for the Panel to ground its own interpretive analysis and its legal findings in the terms of the agreements themselves.

5. The United States recognizes that the Panel is only at the beginning of its work, and we hope that our first written submission and our presentation over these past two days have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavor to provide responses that bring clarity and understanding to the many complex issues in this dispute. Ultimately, we seek to aid the Panel in arriving at the correct conclusions, based on proper interpretations of the covered agreements. We are confident that, if we are successful in that effort, the Panel will find in our favor and dismiss Korea's claims.

6. Once again, the United States thanks the Panel members, and the Secretariat staff, for their time and attention to this matter.

ANNEX C-5

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. The United States has demonstrated that Korea has failed to establish any breach of any provision of any of the covered agreements. In this statement, we draw to the Panel's attention and correct a number of the misstatements made by Korea during these proceedings.

1. Korea Misstates the Appellate Body's Previous Zeroing Findings

2. From the outset, Korea has misstated the nature and extent of prior Appellate Body findings relating to the use of zeroing in connection with the alternative, average-to-transaction comparison methodology. We are confident the Panel will agree that the question of whether zeroing is permissible in connection with the alternative, average-to-transaction comparison methodology, applied pursuant to the second sentence of Article 2.4.2, is a novel one; one that has not been decided by the Appellate Body previously, either explicitly or implicitly.

2. Korea Fails to Identify Anything in the Text of the Second Sentence of Article 2.4.2 of the AD Agreement that Prohibits the Use of Zeroing

3. Korea distorts the findings of the Appellate Body because it can find no support for its argument in the text of the second sentence of Article 2.4.2. The prohibitions on zeroing that the Appellate Body has found in the past are rooted firmly in the text of the first sentence of Article 2.4.2. The Appellate Body has found that its textual interpretations are supported by contextual analysis of other provisions of the AD Agreement, including, *inter alia*, the terms "dumping" and "margin of dumping." But the obligations – the prohibitions on zeroing that the Appellate Body has found – are in the text of the first sentence of Article 2.4.2. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

3. Korea Has Not "Broken" Mathematical Equivalence, and the United States Has Not Abandoned that Argument

4. Rather than being broken, mathematical equivalence has been confirmed by Korea's own paid consultant. As Korea's consultant demonstrates, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the washers antidumping investigation, and also using hypothetical data.

5. Korea suggests that the United States has abandoned the mathematical equivalence argument, and goes as far as characterizing certain passages of the U.S. responses to the Panel's questions as an "abrupt change in the U.S. position." Korea has misunderstood the U.S. responses to the Panel's questions. When the U.S. arguments are examined, it is evident that Korea is asserting that the U.S. arguments convey the opposite of their actual meaning by selectively quoting U.S. statements, divorced from their context.

6. The dispute at this point is not about math. The parties agree on the math. The dispute is about so-called "assumptions" about the calculation of normal value, the export transactions used in the different comparison methodologies, and whether different adjustments may or should be made to export prices. The United States does not see why an investigating authority would calculate normal value differently, examine a different universe of export transactions, or make the kinds of adjustments that Korea proposes. In any event, these are questions of legal interpretation, and such questions are for the Panel to resolve itself. Korea's consultant has inadvertently waded into legal interpretation waters that are beyond the depth of his expertise.

4. Korea Misrepresents the U.S. Arguments Relating to the Negotiating History of the AD Agreement

7. Documents from the negotiating history of the AD Agreement confirm that the use of zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. Korea misrepresents the U.S. arguments related to the negotiating history of the AD Agreement.

8. Korea suggests that the United States "maintain[s] that Japan and Hong Kong approved the use of the zeroing practice when implementing the second sentence." This distortion of the U.S. position is plainly contradicted by what the United States actually argued in the U.S. first written submission. What is established by the negotiating history documents is that the concern about and opposition to asymmetrical comparisons and zeroing were connected. Neither Japan nor Hong Kong mentioned "zeroing" in their proposed changes to the Antidumping Code. One view of the negotiating history is that neither viewed doing so as necessary. That is, they could have considered it sufficient that the revised Code require the use of symmetrical comparisons, which would, by necessity, in their view, preclude the use of the zeroing methodology about which they had expressed concerns.

9. The cited negotiating history documents are consistent with the view that the use of zeroing is impermissible in connection with the application of the symmetrical comparison methodologies, but its use is allowed in connection with the application of the alternative, asymmetrical comparison methodology. The compromise is evidenced on the face of Article 2.4.2, and is confirmed by reference to documents from the negotiating history.

5. Korea's Statistical Arguments Rest on Flawed Premises and Mischaracterizations of what Commerce Actually Did

10. Korea has recognized that "there is no single 'right way' to determine a 'pattern'" and that "[t]he text does not specify any specific method." This recognition, however, has not prevented Korea from elaborating rigid, specific requirements that it contends Article 2.4.2 of the AD Agreement imposes on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. The obligations Korea asks the Panel to find simply are not supported by the text of the second sentence of Article 2.4.2, and Korea's arguments are based on flawed premises and mischaracterizations of Commerce's analysis.

11. The "pattern clause" of Article 2.4.2 of the AD Agreement does not require the use of any particular formal statistical techniques. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause." Korea mischaracterizes the *Nails* test, which does not involve the type of statistical analysis discussed by Korea. Korea also incorrectly alleges that Commerce "ignores actual market prices." Commerce most certainly does not ignore actual market prices. Commerce's analysis is based on an examination of all of the actual export prices reported by the respondents.

6. Korea's Arguments Related to the "Explanation Clause" Are Aimed at Depriving the Second Sentence of Article 2.4.2 of any Meaning

12. Korea's arguments related to the "explanation clause" would again read the second sentence of Article 2.4.2 out of the AD Agreement, contrary to the principle of effectiveness, and are at odds with the Appellate Body's recognition that the second sentence provides Members a means to "unmask targeted dumping" in "exceptional" situations. Korea openly invites the Panel to find that such exceptional situations simply never would arise. The Panel should decline Korea's invitation.

7. Korea Has Failed to Establish the Existence of any So-Called "Differential Pricing Methodology" Measure

13. Korea has failed to establish the existence of any "differential pricing methodology" measure, and thus Korea's "as such" claims relating to such a purported measure must fail. Korea seeks to minimize the U.S. arguments, suggesting that the lone basis for the U.S. position is that "Korea cannot challenge the differential pricing methodology in general because there is always

some chance the USDOC might change the policy in the future." Korea again misunderstands and misstates the U.S. arguments, which speak for themselves.

14. Korea has presented the Panel with little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be challenged "as such," but the Appellate Body has warned that panels may not simply divine the existence of a measure in the abstract on the basis of such a string of cases, or repeated action. In light of Korea's characterization of the measure it seeks to challenge, the Appellate Body's analysis in the zeroing disputes of the evidence necessary to establish the existence of a measure of this nature would appear to be most apt. Unfortunately for Korea, Korea has failed to adduce evidence here that is comparable to the evidence presented in the zeroing disputes.

8. Korea's Criticisms of the Cohen's d Test Are Exaggerated

15. In its second written submission, Korea contends that Commerce's use of the Cohen's *d* test as part of its differential pricing analysis reflects the use of "arbitrary benchmarks" with "little inherent value." As with its other arguments, Korea overstates what the evidence on the record of this dispute actually supports. Despite Korea's suggestion that "the Cohen's *d* test is not an accepted measure of 'significance'," academic literature in fact recognizes the usefulness of effect size, which can be measured by the Cohen's *d* coefficient, in measuring significance. Moreover, the thresholds associated with the Cohen's *d* test have been "widely adopted" and "provide a good basis for interpreting effect size and for resolving disputes about the importance of one's results."

9. Korea Also Misstates Prior Appellate Body Findings Related to the Disproportionality Analysis and Introduces a New, Largely Incomprehensible Argument

16. Korea similarly misunderstands and misstates the Appellate Body report in *US – Large Civil Aircraft (Second Complaint)* to support its claims under the SCM Agreement. Korea does not rely on the Appellate Body's findings in *US – Large Civil Aircraft (Second Complaint)* so much as it relies on arguments the United States made in that dispute, arguments that the Appellate Body rejected. To be clear, the United States argued that the subsidy at issue was not *de facto* specific, and the Appellate Body upheld the panel's finding that the subsidy was *de facto* specific. The U.S. arguments on which Korea relies were not successful.

17. On facts very similar to those in this dispute, the Appellate Body found that the subsidy challenged in *US – Large Civil Aircraft (Second Complaint)* was *de facto* specific because Boeing received a disproportionately large amount of the subsidy. On the basis of the Appellate Body's interpretation and application of Article 2.1(c) of the SCM Agreement, the Panel should find that Commerce's determination that RSTA Article 10(1)(3) was *de facto* specific because Samsung and LG received a disproportionately large amount of the subsidy is not inconsistent with Article 2.1(c).

18. Korea also advances a puzzling new argument that is premised on mischaracterizations of the facts and U.S. arguments, and on a misreading of Article 2.1(c). Korea now argues that the Panel should "focus upon" the amount of tax credits *earned* during the period of investigation rather than the amount of tax credits *granted*. However, this does not align with Article 2.1(c) of the SCM Agreement, which refers to the *granting* of disproportionately large amounts of the *subsidy*. Furthermore, the tax credit earned under RSTA Article 10(1)(3) in a given year is not the amount of subsidy granted. The amount of subsidy granted is the amount of revenue foregone by the Korean government. Korea mischaracterizes the facts of its own subsidy program and the argument of the United States.

10. Korea Misconstrues the Text of Article 2.2 of the SCM Agreement and the U.S. Arguments Regarding RSTA Article 26

19. Korea seeks to avoid the disciplines of the SCM Agreement by relying on irrelevant policy justifications and by advancing an overly restrictive – and ultimately untenable – interpretation of the term "enterprises." Korea suggests that the term "enterprises" in Article 2.2, which is collocated with the term "certain," somehow should not be read as "certain enterprises," which is defined for purposes of the SCM Agreement in Article 2.1 as "an enterprise or industry or group of enterprises or industries." Korea's suggestion simply is not credible. The Panel should reject

Korea's approach and find that Commerce's regional specificity determination reflects a straightforward application of Article 2.2 of the SCM Agreement that is not inconsistent with that provision.

11. Korea's Arguments against Commerce's Tying Analysis Rely Increasingly on Irrelevant Non-Record Evidence and Mischaracterizations

20. Korea's arguments regarding Commerce's attribution of subsidies similarly rely on misstatements and extraneous evidence and arguments. First, Korea persists in its misguided effort to color this dispute with the introduction of non-record evidence from separate antidumping proceedings that were subject to rules that are distinct from those that govern Commerce's countervailing duty investigation of washers from Korea. Second, Korea is not taking a principled stand in support of a requirement that investigating authorities tie subsidies to a particular product. Korea is simply advocating a subsidy calculation at a level of generality (the corporate division level) that is somewhat lower than the level of generality of Commerce's subsidy calculation (the company level). Third, Korea asserts that Commerce was "passive" when presented with evidence allegedly germane to the tying analysis. In reality, Commerce did not act passively, but appropriately focused on evidence relevant to the issue at hand. Finally, Korea again misunderstands and misstates that Commerce's tying analysis in the washers countervailing duty investigation was an "irrebuttable presumption." Commerce's approach did not presume that the subsidies were tied or untied; it simply provided a means of classifying the programs based on the nature of the programs themselves.

12. Korea Misstates the Facts Concerning Commerce's Determination of the Denominator Used to Calculate Samsung's Subsidy Rate

21. Korea continues to misconstrue Commerce's determination in the refrigerators countervailing duty investigation. Commerce did not make an affirmative finding that RSTA Article 10(1)(3) benefits should be attributed to Samsung's global sales in the refrigerators investigation. Commerce simply made a mistake based on Samsung's erroneous reporting of data. To demonstrate this, we are providing Exhibit USA-86, an excerpt of Samsung's response to the USDOC's initial questionnaire in the refrigerators countervailing duty investigation, which shows that Commerce instructed Samsung to "not include the volume and value of merchandise produced outside of Korea" in its reported sales data.

22. Korea also asserts that Samsung raised the "royalty payment" issue with Commerce during the washers countervailing duty investigation. This is yet another mischaracterization of the record by Korea. During the washers investigation, neither Samsung nor Korea argued that these royalty payments also supported a finding that RSTA Article 10(1)(3) benefits should be attributed to global production, and Commerce had no reason to consider them in that context.

13. Conclusion

23. The United States has set out in some detail in this statement numerous errors made by Korea in this proceeding, including interpretations that are divorced from the text of the agreements and misunderstandings, misstatements, or mischaracterizations of the facts and determinations made by Commerce, the arguments of the United States, and prior findings of the Appellate Body.

24. As we have demonstrated in the U.S. written submissions, statements, and responses to the Panel's questions, all of Korea's claims are without merit, and the United States respectfully renews its request that the Panel reject them.

ANNEX C-6

CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. You have heard extensive arguments from both sides in our written submissions and oral presentations. And you have told us that you have focused on those arguments and read our submissions numerous times. That certainly is reflected in the questions you have asked. Given that, we will not repeat the arguments we have already made.

2. We would simply acknowledge that the legal and interpretative issues before you are challenging and complex. In particular, a short sentence in the AD Agreement[1] setting forth an alternative comparison methodology that may be used under certain conditions sits squarely in the middle of a broad landscape of interpretative analyses by the Appellate Body concerning an issue that, to understate the matter, has been of great interest to WTO Members. Reconciling the terms, the purpose of that provision, and the object and purpose of the AD Agreement itself, as well as the many relevant findings of the Appellate Body will be no small undertaking. The probing questions of the Panel over the past two days, as well as the set of questions the Panel posed in connection with the first panel meeting, indicate that you well understand the difficult task the parties have asked you to undertake. So, thank you for agreeing to take on that task.

3. As the issues in dispute are novel, the Panel has the intellectually tantalizing opportunity, but also the weighty burden to be the first to reveal your solution to the puzzle presented by the second sentence of Article 2.4.2 of the AD Agreement. Of course, that solution must follow from an application of the customary rules of interpretation. That means, as the Panel well knows, a good faith reading of the ordinary meaning of the terms of that sentence in their context and in light of the object and purpose of the AD Agreement.

4. Additionally, the interpretative solution to the puzzle also must be a general solution, and a number of your questions recognize that. While this is a dispute between Korea and the United States in which Korea asks the Panel to make findings about certain U.S. measures (or alleged measures), the preliminary step for the Panel is to do that interpretative analysis to ascertain what the obligations are.

5. As we have argued, the Panel should find that the text of the AD Agreement cannot be read as narrowly and rigidly as Korea proposes. Rather, the agreement text affords investigating authorities in all Members, around the world, quite a bit of flexibility to approach the analytical questions in a variety of ways.

6. In that regard, I was struck by an observation by Dr. Cohen in the excerpt of the treatise that Korea has submitted to the Panel. In discussing the size conventions he developed, he noted that "the difference in size between apples and pineapples is of an order which hardly requires an approach via statistical analysis."[2]

7. The approaches to the application of the "pattern clause" that the U.S. Commerce Department has developed over time are, admittedly, quite complicated. The complexity, though, is borne of an effort to deal with thousands of transactions in numerous investigations in an objective, transparent, predictable way. Commerce has undertaken a good faith effort to grapple with the complexities that can arise from an analysis pursuant to the second sentence of Article 2.4.2, particularly in light of the Appellate Body's many interpretative findings related to zeroing.

8. Another investigating authority, though, might take a different, simpler approach. Perhaps that investigating authority handles antidumping investigations very rarely, or the investigations it handles involve far fewer imports.

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] Exhibit KOR-120, p. 13.

9. The interpretation of the second sentence of Article 2.4.2 of the AD Agreement must provide space for both kinds of approaches, by both kinds of investigating authorities.

10. As another observation about the interpretation of the second sentence of Article 2.4.2, it will be useful for the Panel to determine for itself and keep firmly in mind what it is that the second sentence is attempting to accomplish. You have our arguments on that. If you agree with us, and with the Appellate Body, that the purpose of the second sentence is to provide an investigating authority with the ability to unmask targeted or concealed dumping, then it is critical that the interpretation of that provision actually permits that to happen. It should not be the case that higher-priced export transactions, following an application of the second sentence, continue to obscure and mask lower-priced export transactions.

11. If the Panel agrees with that premise, which we urge you to do, then that explains why the alternative, average-to-transaction comparison methodology operates as we argue it does. That explains why combining the results of the alternative and normal methodologies in a mixed approach operates the way we argue it does.

12. Over the past two days, Korea's arguments have been exposed. Korea simply does not make sense of the second sentence of Article 2.4.2. As we have shown, Korea's arguments and its proposed interpretations, in fact, read the second sentence of Article 2.4.2 out of the AD Agreement. Korea's proposed interpretations just are not tenable.

13. For the reasons we have given, we again ask the Panel to reject Korea's claims and find that the challenged antidumping measures are not inconsistent with the provisions of the covered agreements.

14. As we have not discussed Korea's SCM claims[3] during the question and response portion of this meeting, we will not touch on our arguments related to those claims. We would note again, though, that we appreciate the Panel's flexibility in terms of extending the schedule for responding in writing to the Panel's written questions on the SCM issues. We look forward to addressing the Panel's questions in an effort to help the Panel better understand those issues.

15. In closing, the United States once again would like to thank the Panel members, as well as the Secretariat staff, for your time and for the careful attention you are giving to this matter.

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[3] Claims made under the *Agreement on Subsidies and Countervailing Measures*.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. This dispute is the first one to directly challenge "zeroing" in situations where dumping is targeted to particular purchasers, regions or time periods. It is important to recognize that these situations are very specific factual situations the contours of which are far from being clear, not only because the text of the second sentence is concise but also because recourse to it by the majority of the WTO Members has been relatively sparse so far. Considerable uncertainties exist as to when the second sentence of Article 2.4.2 could be invoked, how the comparison method provided in that sentence should be operated in practice and whether "zeroing" would be exceptionally permitted under the situation described in this second sentence.

(i) The third method should be an exception

2. A reading of Article 2.4.2 as a whole leads inevitably to the understanding that the third method is not expected to be routinely used. The adverb "normally" in the first sentence of this Article conveys an explicit instruction that the use of the third method (W-T) should not be the first option of investigating authorities. It may be used only if the authorities find a pattern of export prices which may indicate targeted dumping and are able to explain why the differences in prices cannot be taken into account appropriately by the "normal" methods (W-W or T-T). This understanding is reinforced by the auxiliary verb "may" in the second sentence of Article 2.4.2 as opposed to "shall" in the first sentence of this Article. Investigating authorities "may" have recourse to the W-T comparison method, i.e. this method is a mere possibility, not an obligation, and is certainly not automatic, contrary to the recourse to the W-W and T-T methods, which "shall normally" be used. The Appellate Body has already pronounced itself in the sense that the use of the W-T should be an exception.[1]

(ii) Not all "pattern[s] of export prices which differ significantly" matter for the purposes of resorting to the third method

3. With respect to the first condition for the use of the third method - that "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods" - Brazil understands that it is not all "pattern[s]of export prices which differ significantly" that matter for the purposes of resorting to the third method.

4. According to the United States, "[t]he relevant pattern at issue in the second sentence of Article 2.4.2 is that of export prices "which differ significantly…"[2], and this pattern is interpreted as being "a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as between different purchasers, regions or time periods"[3]. As Korea puts it, "[t]he focus […] is on *any* differences in pricing, irrespective of whether the pricing differences are *above* or *below* the average"[4]. Consistent with this interpretation, the USDOC, in its "Differential Pricing Methodology", considers not only low priced sales but also high priced sales when determining the comparison methodology to apply to the sales. In Brazil's view, the tests applied by the USDOC do not reveal a "pattern of export prices which differ significantly", as required by Article 2.4.2. They simply measure the percentage of sales that have passed the "Cohen's *d*" test and that, therefore, according to that methodology, are deemed to have a differential pricing. They do not consider whether the aggregate of those sales, i.e. the sales below the 0.8 and the sales above 0.8, form a pattern of export prices relevant for the purposes of the second sentence of Article 2.4.2. In addition, the tests seem to ignore the magnitude of the variations above and below 0.8.

5. Although an important variation in prices, both above and below the average, may be taken into consideration in assessing why the regular comparison methodologies would not be able to

[1] Appellate Body Report, *US – Zeroing (Japan)*, para. 131.
[2] U.S. First Written Submission, para. 60.
[3] U.S. First Written Submission, para. 65.
[4] Korea's First Written Submission, para. 114.

unmask the dumping, the mere existence of such variations is not sufficient to meet the conditions required by Article 2.4.2. The patterns of price variations that matter for determining the margin of dumping in the situations foreseen in that provision are, in normal circumstances, only those that are significantly *below* the price for the tested purchaser, region or time period. Patterns of price variations *above* that price *should not be considered relevant*, in principle, for the application of the third method, because in this case, no evidence of targeted dumping will normally have been found[5]. To allow a pattern of higher than average export prices to trigger the application of the third method seems not only contrary to the specific purpose of the second sentence of Article 2.4.2, which is to "unmask" "targeted dumping", but is also illogic in relation to the very purpose of the Anti-Dumping Agreement which is concerned with an specific price behavior that causes injury to the domestic industry of the importing country. It is important to recall that neither Article VI of the GATT 1994 nor the Anti-Dumping Agreement prohibit dumping "per se". In general, patterns derived from a subset of export prices whose average is higher than the overall average export price are not an issue in the Anti-Dumping Agreement, as the Agreement is concerned with such patterns of export price that a*re below the normal value and that cause injury to the industry*.

6. Therefore any decision about the existence of "a pattern of export prices which differ significantly" for the purposes of the second sentence of Article 2.4.2 must be based on criteria of analysis coherent with the object and purpose of the Anti-Dumping Agreement, which is to counteract dumping that causes injury. An interpretation of the "pattern clause" consistent with the object and purpose of the Anti-Dumping Agreement *is certainly not* one that mechanically considers patterns of price variations *above* the average *as relevant* for the application of the third method.

(iii) What type of explanation is to be provided?

7. With respect to the second condition for the use of the third method, Brazil interprets the requirement to provide "an explanation" as a central obligation in the context of Article 2.4.2 of the Anti-Dumping Agreement. This obligation must be understood as requiring from the authorities an elaboration on the reasons for the impossibility to use the symmetrical methods. It does not suffice to simply provide a reason without further explaining it and the "explanation" must have a "genuine explanatory value"[6].

8. Brazil is not convinced that the explanations given in the investigation at issue in this dispute have this genuine explanatory value. The existence of high priced sales in the non-targeted group that "mask" the low-priced sales in the targeted group cannot *per se* be the decisive factor for having recourse to the W-T method. Also, it is not even clear to Brazil that the W-W method will always conceal differences in export prices. On the contrary: the fact that Article 2.4.2 itself envisages the possibility that this method can take account of differences in export prices seems to deny this proposition. Similarly, to justify the recourse to the third method in function of a specific result, i.e. a higher margin of dumping obtained with the use of the W-T when compared to the margin obtained with the W-W or T-T methods, seems to fall short of what is required by the second sentence of Article 2.4.2. The use of the third method should be based on an analysis of the applicability of the symmetrical methods to a given factual situation and the corresponding conclusion that these methods cannot take into account the differences in

[5] Brazil would like to point out that it is possible to conceive, in theory, of a very specific set of factual circumstances that would justify the application of the third method based on a pattern where the average export price of the subset of "targeted" transactions is higher than the export price for the whole set of relevant transactions. Such situation might arise, for instance, if the normal values varied significantly – one could think of products subject to strong price variations due to seasonal fluctuations in supply and/or demand. To provide a mathematical example, consider a product whose normal values, by trimester, were 100, 40, 40 and 40 and whose export prices were 70, 50, 50 and 50 (assuming one transaction per trimester and equal quantities). Even though the export price for the first trimester is higher than the overall average export price in the example, the targeted dumping situation that might require, to be remedied, the application of the third methodology is the one manifested in that very same trimester (because then the normal value is so much higher than the export price). This is clearly a very specific situation in the context of the application of a trade policy tool which is already exceptional in itself. Brazil makes this observation essentially to underline the importance of investigating authorities to proceed rigorously with respect to suspected "targeted dumping" situations, analyzing the specific set of facts of each of these situations and providing the corresponding explanations.

[6] China's Third Party Submission, para. 28.

export prices. The results that would be obtained using the different methods, in themselves, do not seem to authorize the use of one or another method.

9. For Brazil, the adverb "appropriately" in the second sentence of Article 2.4.2 is linked contextually with the verb "taken into account", so that what should be assessed as "appropriate" is the application of the symmetrical methods to the concrete case and not the result of this application. In principle, the investigating authority should explain why the application of the symmetrical comparison methods was not appropriate to the circumstances of the case at issue, *independently of the final margin of dumping* (the result).

10. Brazil also thinks that the "explanation" to be provided must contemplate the reasons of why *both* symmetrical methods cannot be used. Had the drafters of the Anti-Dumping Agreement intended that an explanation be limited to only one of the symmetrical methods, they would have said so explicitly at the end of the second sentence by stating, for example " by the use of *one* of the symmetrical methods".

(iv) Operation of the third method in "targeted dumping" situations

11. With respect to how the W-T method should operate in practice once the conditions for its use are met, there seems to be considerable uncertainties in this regard. An interpretation of the second sentence of Article 2.4.2 that would limit the application of this method to the transactions within the pattern raises several doubts: how the results of the W-T (applied to the transactions within the pattern) and the W-W or T-T comparisons (applied to the rest of the transactions) would be combined for the purpose of calculating an overall dumping margin? Would it be possible to adjust the W-A normal values, so as to produce different mathematical results? The answers to these questions should be found on the basis of the text, object and purpose of the Anti-Dumping Agreement itself. In any case, this analysis should be subject to the provision governing fair comparison (Article 2.4), which emphasizes the need to justify, at the outset, that the reason for invoking the second sentence of Article 2.4.2 is fully consistent with this provision.

12. With respect to the adjustments that could be made in the W-A normal value to avoid mathematical equivalence of results between the W-W and the W-T methods, Brazil understands that if the same normal value data is used in both methods, it would be difficult to discard this argument. The alternative suggested by the *Appellate Body*[7], in Brazil's view, could only be performed when the differences in export prices occur among time periods. When the differences in prices occur among purchasers or regions, uncertainty would arise on *how* or even *if* this approach could be followed. Even the use of the same monthly W-A normal value under both methods would not produce different results, since both would be based in the same time periods. To be even more precise, the monthly W-A normal values in both methods and the monthly W-A export price in W-W or the individual export transactions in W-T would be weighted by the same quantities, what would produce the same result.

(v) The "as such" claim against the "Differential Pricing Methodology"

13. With respect to the Korean claim "as such" against the "Differential Pricing Methodology", it is well known that the legal standard for assessing the existence of an unwritten measure is firmly established and that panels "must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application"[8]. That being said, Brazil recalls, firstly, that the distinction between "as such" and "as applied" claims was a jurisprudential development to facilitate the understanding of the nature of a measure at issue. It neither governs the definition of a measure for purposes of WTO dispute settlement, nor does it define exhaustively the types of measures that are susceptible to challenge in WTO dispute settlement[9]. Secondly, the criteria set out in *US – Zeroing (EC)* must be assessed on a case-by-case basis, taking into consideration not only the characteristics and the nature of the measure that is being challenged *but also the period of time that the measure has been in place*. The amount of evidence that a complaining party must adduce against an unwritten measure that has been in place for several years is certainly not the

[7] *US – Stainless Steel (Mexico)*, AB report, para. 126.
[8] Appellate Body Report, *US – Zeroing (EC)*, para. 196.
[9] Appellate Body Report, *US – Continued Zeroing*, para. 179.

same as the one needed in relation to a measure recently put in effect, as is the case of the "Differential Pricing Methodology" that is being applied only since March 2013.

14. Last, but not the least, Brazil reminds the Panel that, although claims against unwritten measures must be carefully analyzed, these claims also "serve the purpose of preventing future disputes by allowing the root of WTO-inconsistent behavior to be eliminated"[10]. As they "seek to prevent Members *ex ante* from engaging in certain conduct"[11], these challenges are valuable in protecting the security and predictability needed to conduct future trade. "This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel"[12] independently of how they are categorized by the complainants ("as such", "as applied" or something else).

15. With this principle in mind, Brazil hopes that it will not be necessary another decade to obtain clarification on the use of the third method and especially on the use of "zeroing" in targeted dumping situations, in light of the disciplines of the Anti-Dumping Agreement.

(vi) The "systemic disregarding" in the "Differential Pricing Methodology"

16. Finally, with respect to what Korea calls the "systemic disregarding" in the context of the "Differential Pricing Methodology", Brazil understands that this practice seems to share the same rationale as that of "zeroing", inasmuch as it zeroes a negative result in the W-W comparison subset that could be used to offset the positive result in the W-T subset. And the effect also appears to be the same as that of "zeroing", found to be inconsistent in so many WTO disputes: it inflates the overall margin of dumping. Considering that the United States has not "respond[ed] to the substance of Korea's arguments that are specific to the "differential pricing methodology"[13], it would be important that the Panel further enquiries the United States as to the exact nature and precise content of this methodology. If the "systemic disregarding" is found to be like "zeroing", it would also not be consistent with the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement.

[10] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.
[11] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 172.
[12] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82, citing the Panel Report, *US – Superfund*, para. 5.2.2.
[13] United States' First Written Submission, para. 319.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. THE USE OF ZEROING WHEN APPLYING AVERAGE-TO-TRANSACTION METHODOLOGY IS AS SUCH INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. Canada submits that the use of zeroing when applying the exceptional average-to-transaction methodology is "as such" inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement.

2. When employing the average-to-transaction methodology, the USDOC calculates an intermediate result for each export transaction compared to the weighted average normal value. When aggregating these results, the USDOC does not offset the intermediate results of transactions for which the export price is lower than the normal value with intermediate results of transactions for which the export price is found to exceed normal value. Aggregation without offsetting is commonly referred to as "zeroing".

A. The use of zeroing violates the fair comparison requirement in Article 2.4

3. The Appellate Body has found numerous times that the practice of "zeroing" is inconsistent with the Anti-Dumping Agreement in the context of both the weighted average-to-weighted average ("average-to-average") and the transaction-to-transaction methodologies (*US – Zeroing (EC)*; *US – Softwood Lumber V (Article 21.5 – Canada)*; and *US – Zeroing (Japan)*). It also reached the same finding when considering the average-to-transaction methodology in the context of administrative reviews. (*US – Stainless Steel (Mexico)*, and *US – Continued Zeroing*)

4. The principles espoused in those decisions on zeroing demonstrate that zeroing is also not permissible even when an investigating authority employs the exceptional average-to-transaction methodology set out in Article 2.4.2 in the context of initial investigations.

5. The definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement applies throughout the Agreement. When examining the use of zeroing under the transaction-to-transaction methodology, the Appellate Body found that the concepts of "dumping" and "margins of dumping" can only be found to exist in relation to a product. Because the individual comparisons only yield intermediate results and not margins of dumping, margins of dumping cannot be found to exist under *any* methodology at the transaction level. (See *US – Zeroing (Japan)*, see also *US – Stainless Steel (Mexico)*, and *US – Continued Zeroing*)

6. This means that even when an investigating authority is justified in using the exceptional weighted average-to-transaction methodology, the results of the individual comparisons must be aggregated to determine the margin of dumping in accordance with Article 2.4.2.

7. The practice of zeroing during this aggregation is not only inconsistent with Article 2.4.2; it is also inconsistent with the obligation to make a "fair comparison" contained in Article 2.4. The chapeau of Article 2.4 requires that "[a] fair comparison shall be made between the export price and the normal value". The introductory clause to Article 2.4.2 indicates that the dumping calculation methodologies set out therein are subject to the fair comparison obligation in Article 2.4. (See *US – Softwood Lumber V* (Article 21.5 – Canada))

8. Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4.

9. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness, or lack of bias." (*US – Softwood Lumber V* (Article 21.5 – Canada))

10. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* stated that the use of zeroing can:

> In some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing [...] may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping. (footnote omitted)

11. When an investigating authority employs zeroing, it ignores the actual export price of a transaction made above normal value and rather, in effect, deems that the export price is equal to the normal value. The Appellate Body in *US – Softwood Lumber V* similarly observed that the practice of zeroing effectively treats certain export prices as less than they actually are.

12. Likewise, in this case, the USDOC practice of zeroing while employing the average-to-transaction methodology distorts certain facts related to an investigation and contains an inherent bias. It therefore cannot be described as "fair" in accordance with Article 2.4 of the Anti-Dumping Agreement.

B. The relationship between zeroing and mathematical equivalency

13. Regarding zeroing and mathematical equivalency, the United States argues that zeroing is permissible when applying the average-to-transaction methodology because failing to do so would lead to results that are mathematically equivalent to those obtained through the standard methodologies.

14. We note that the Appellate Body in *US – Softwood Lumber V* (Article 21.5 – Canada) has already rejected such reasoning. Moreover, it does not follow from the fact that a given methodology may yield a mathematical difference, that this methodology is permissible under the Anti-Dumping Agreement. This simple fact does not cure the deficiencies in the U.S. differential pricing methodology, including those we identify below.

II. THE USDOC DIFFERENTIAL PRICING METHODOLOGY IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

15. Canada submits that the USDOC differential pricing methodology is also "as such" inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

A. Article 2.4.2 of the Anti-Dumping Agreement only permits an investigating authority to rely on the average-to-transaction methodology in exceptional circumstances

16. Article 2.4.2 provides, in relevant part, that:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

17. This provision indicates that, in calculating a margin of dumping in an investigation, an investigating authority must normally employ either the average-to-average or the transaction-to-transaction methodology. The Appellate Body has stated that "[t]he asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which normally are to be used." (*US – Zeroing* (Japan), see also *US – Softwood Lumber V* (Article 21.5 – Canada))

18. Any methodology used to determine whether targeted dumping exists should be rigorous enough to reflect the fact that situations of targeted dumping are exceptional in nature. That methodology must also meet the criteria enunciated in the second sentence of Article 2.4.2.

19. Canada addresses two significant problems with the U.S. differential pricing methodology. First, the overly mechanical approach of the differential pricing methodology does not identify a pattern of export prices which differ significantly among different purchasers, regions or time periods. Second, no explanation is given for why such differences cannot be taken into account by one of the two symmetrical methodologies.

B. The USDOC differential pricing methodology does not establish the requisite pattern of export prices which differ significantly

20. In order to determine whether to apply the exceptional methodology in the second sentence of Article 2.4.2, the USDOC uses the Cohen's *d* test to identify transactions that have an effect size that is equal to or exceeds 0.8 or -0.8 on the Cohen's *d* scale and then applies a ratio test to determine the percentage of the overall value of sales that those transactions represent. (See *Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China:* Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. and Shandong Fufeng Fermentation Co., Ltd. (March 4, 2013), (KOR-33))

21. Canada submits that the application of the USDOC differential pricing methodology does not meet the requirement for a pattern contained in the second sentence of Article 2.4.2. The ordinary meaning of the word pattern includes, "[a] regular and intelligible form or sequence discernible in certain actions or situations". (*OxfordDictionaries.com)* This definition clearly implies a qualitative element.

22. Under the differential pricing methodology, the USDOC uses its ratio test to calculate the percentage of the volume of sales that have a Cohen's *d* result that equals or exceeds 0.8 or -0.8. If such percentage is greater than 33 percent the USDOC then concludes that there is a "pattern". (See *Differential Pricing Analysis; Request for Comments,* 79 Fed. Reg. 26720 (USDOC May 9, 2014))

23. To illustrate, let us consider a hypothetical investigation during which the differential pricing methodology is applied. Assume that three of the Cohen's *d* results calculated are 1.0, 2.1 and -1.5, and thus meet or exceed the "large effect" threshold. If those results represent 33 percent or more of the total volume of sales, the USDOC would find that there is a pattern of significant differences. But this not a pattern, it is merely a variance.

24. The USDOC methodology therefore does not include a proper assessment as to whether the variance in export prices follows any discernible sequence or "pattern" of price differences.

25. Moreover, Article 2.4.2 only permits the use of the average-to-transaction methodology when there is a demonstrated pattern of export prices which differ significantly "among purchasers, regions or time periods". Given the use of the disjunctive "or", these three categories are distinct. The USDOC, however, aggregates the results of its application of the Cohen's *d* test for all three categories before using this aggregated total to determine if the 33 percent and 66 percent thresholds are met. The use of this process to justify the application of the exceptional average-to-transaction methodology ignores the requirement to identify a pattern among purchasers, regions, or time periods set out in Article 2.4.2.

26. Consequently, the differential pricing methodology fails to identify a *pattern* of export prices which differ significantly *among purchasers, regions or time periods* and is therefore inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

C. The differential pricing methodology does not provide an explanation as to why one of the symmetrical methodologies cannot be used

27. An investigating authority must also explain why a pattern of export prices which differ significantly among different purchasers, regions or time periods cannot be taken into account appropriately by one of the two symmetrical methodologies before resorting to the average-to-transaction methodology. (See *US – Zeroing (Japan)*, see also *US – Softwood Lumber V* (Article 21.5 – Canada))

28. The USDOC provides no such explanation. Rather, it compares the dumping margins that would be obtained by using an average-to-average methodology to those that would be obtained by using the average-to-transaction methodology; if the differential is greater than 25 percent or if using the latter methodology results in an above *de minimis* dumping margin while the use of the former would not, then the USDOC uses the average-to-transaction methodology. (See *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26720 (USDOC May 9, 2014), (KOR-25))

29. This so-called "meaningful difference test" only demonstrates that using the two methodologies yields a different result, not that the difference in export prices cannot be taken into account by one of the symmetrical methodologies.

30. In addition, even if a mere difference could be seen as an explanation of why the use of the exceptional methodology could be justified, the use of zeroing in those calculations would still invalidate that test.

31. Korea has explained that the USDOC is using zeroing when applying its "meaningful difference test" pursuant to its differential pricing methodology. (Korea's first written submission, para. 197). This builds a bias into the system that makes it more likely that there will be a difference between the margin calculated pursuant to the average-to-transaction methodology and that calculated under the average-to-average methodology.

32. Canada notes that where a product is sold at a wide variance of export prices, with some above and others below normal value, even comparing the results calculated using the average-to-average methodology without zeroing to those obtained using the average-to-average methodology with zeroing could yield a substantial difference. Such a difference could exceed the 25 percent threshold established by the USDOC or result in a dumping margin exceeding the *de minimis* threshold in one case and no dumping in the other. This further demonstrates the inappropriateness of using zeroing in the "meaningful difference test".

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. ANTI-DUMPING ISSUES

A. Conditions on the Use of the Second Sentence of Article 2.4.2

1. The authority must identify a relevant pricing pattern

1. Article 2.4.2 of the *Anti-Dumping Agreement* establishes conditions that must be met before an investigating authority may resort to the exceptional W-T comparison methodology. "Normally" an authority must use one of the two symmetrical comparison methodologies (W-W or T-T) described in the first sentence of Article 2.4.2 in order to determine "margins of dumping" during the investigation phase of anti-dumping proceedings. The second sentence, however, allows an authority exceptionally to use the W-T comparison methodology if: (i) it establishes a "pattern of export prices which differ significantly among purchasers, regions or time periods"; and (ii) it provides "an explanation as to why such differences cannot be taken into account appropriately by use of a [W-W] or [T-T] comparison methodology".

2. Article 2.4.2, second sentence, requires that an investigating authority find a relevant pricing pattern of export prices which "differ significantly" among "different purchasers, regions or time periods". The individual export prices should not simply differ *per se*, but rather must form a discernible and intelligible "pattern" that can be distinguished from other prices falling outside the "pattern". Export prices in the pattern must differ "*significantly*", i.e., must differ in an "important, notable or consequential" way, which may have "both quantitative and qualitative dimensions".[1] The United States agrees that "significance" may have either quantitative or qualitative meaning. However, for the United States, it is enough for prices to differ on either basis to qualify as significantly different under Article 2.4.2. In other words, for the United States, large numerical differences satisfy this element even if they are *not* qualitatively significant, and conversely, qualitative differences pass even if they are numerically small. But this *uni-directional* approach to the question of "significance" is inconsistent with the requirements of Article 2.4.2 because, under a proper reading of this provision, relevant price differences must be meaningful in *both* senses of the word "significantly".

3. For China, *seasonality*, i.e., a regular and discernible cycle of prices over a period of time, is a qualitative dimension that must be taken into account by an authority. Numerically large differences in prices at different points in a seasonal cycle are not prices that "differ significantly" if the price difference is consistent with the regular fluctuation of the pricing cycle. This requirement of Article 2.4.2 finds support in Article 2.4 of the *Anti-Dumping Agreement*, which recognizes the fact that simply comparing market prices at different points in time can be an unfair comparison. The application of Article 2.4.2 is subject to Article 2.4.

2. The authority must provide an adequate explanation

4. Before using the W-T comparison methodology under the second sentence of Article 2.4.2, an authority must provide an *explanation* as to why a relevant pricing pattern cannot be taken into account appropriately through either a W-W or T-T comparison methodology. USDOC's brief acknowledgment in the *Washers* AD Determination that high prices may offset low prices (and *vice versa*), does not serve as an adequate explanation as to "why" *both* the W-W and T-T comparison methodologies cannot deal with the price differences identified. Rather, USDOC's explanation is devoid of explanatory content, fails to address the T-T methodology, and is a results-oriented justification of zeroing. As China explains below, zeroing is not permissible under the second sentence of Article 2.4.2. An explanation as to why zeroing is appropriate is thus not an explanation that accords with Article 2.4.2.

[1] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1272.

B. Limitations on the application of the W-T comparison methodology

1. Application to a limited group of sales within a "pattern"

5. Article 2.4.2 of the *Anti-Dumping Agreement* states that during the investigation phase, margins of dumping should "normally" be determined on the basis of the W-W or T-T comparison methodologies. Use of the W-T comparison methodology is *exceptional*. This means that the W-T comparison methodology may only be used on a limited basis. An investigating authority may only apply the W-T comparison methodology to those sales that comprise the relevant pricing pattern, with a "normal" comparison methodology used in relation to the remaining export sales. This is for several reasons.

6. *First*, the express textual connection in Article 2.4.2 between the concepts of the "export prices which differ significantly" and "the prices of individual export transactions" denotes a "parallelism" between the scope of those transactions which fall into the relevant pricing pattern and the scope of application of the W-T comparison methodology. This was confirmed by the Appellate Body when it said that:

> We […] read the phrase "individual export transactions" in [the second sentence of Article 2.4.2] as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.[2]

Thus, in order to determine a "margin[] of dumping" for the product as a whole, an authority first applies the W-T comparison methodology to the export prices that make up the pattern, then it aggregates these intermediate comparison results with those obtained from the transactions to which one of the symmetrical methodologies was applied.

7. *Second*, Article 2.4.2 limits the scope of application of the W-T comparison methodology to the extent necessary to "take into account appropriately" a relevant pricing pattern. The second sentence allows price differences to be taken into account "appropriately", and not in a generalized or excessive manner. Again, there is parallelism between the scope of the *problem* (a relevant pricing pattern that cannot be taken into account "appropriately") and the exceptional *remedy* provided. This is consistent with the fact that all comparison methodologies are subject to the "fair comparison" requirement of Article 2.4. An excessive use of the alternative comparison methodology, in response to a limited deficiency in the application of the symmetrical comparison methodologies, would not meet the requirement of "fair comparison".

8. *Third*, a general principle in WTO law is that an exception takes precedence over a general rule only to the extent of the conflict between the two provisions. Like other provisions of the covered agreements, Article 2.4.2 lays down a general rule that a symmetrical methodology should "normally" be used. The exception allowing use of the W-T methodology takes precedence over this general rule only to the extent necessary to "take[ ] into account appropriately" a relevant pricing pattern. For sales outside this pattern (for example, sales to customers, regions or time periods other than those found to be targeted, or sales of models or types of the product for which no relevant pricing pattern has been found), no conflict between the first and second sentences of Article 2.4.2 exists, and therefore, an authority must use a symmetrical comparison methodology.

9. *Finally*, China notes that a "relevant pricing pattern" necessarily can only exist in a subset all total export sales. The process of discerning a pattern – i.e., a "regular or intelligible form or sequence"[3] – serves to *distinguish* prices that fall within the pattern, on the one hand, from those that fall outside the pattern, on the other. Indeed, the United States' position that the pattern must include all sales because all sales are different from one another is at odds with the pattern

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[3] Definition of "pattern", Oxford English Dictionary Online (http://www.oed.com).

of prices actually identified by the *Nails Test* applied by USDOC in the *Washers* AD Determination. Under the *Nails Test*, the identified pattern did *not* comprise instances of dumping together with a group of higher priced sales which served to "mask" the low priced sales; instead it identified a specific *subset* of sales to certain customers, regions or time periods, within specific models of the product under investigation.

10. For all these reasons, there is no basis for USDOC to apply the W-T comparison methodology to all sales of an exporter.

2. Authorities cannot disregard or "zero" any intermediate comparison results in determining a "margin of dumping"

11. USDOC's practices of "zeroing" in conjunction with the W-T comparison methodology, and of the "systemic disregarding" of intermediate comparison results when it aggregates the results of W-W and W-T comparisons under the "differential pricing" methodology, cannot be reconciled with the requirement to determine a "margin of dumping". "Dumping" is *not* a transaction-specific concept, meaning transaction-specific comparisons are not, in themselves, "margins of dumping". Rather, both the *Anti-Dumping Agreement* and the GATT 1994 establish "dumping" as a "*product-related*" concept. The Appellate Body has thus concluded that "margins of dumping" may only be determined in relation to the product under investigation as a whole, encompassing *all of the export transactions* by an exporter.

12. Contrary to the United States' position, intermediate comparison results cannot constitute meaningful "evidence of dumping", because dumping only exists in the *aggregate* of all intermediate comparison results. The United States' analysis is fatally truncated. By focusing only on *some* transaction-specific results, the United States fails to acknowledge that transaction-specific comparison results in which export prices *exceed* normal value are evidence of an *absence* of dumping. Whether or not there actually is dumping can only be determined by aggregating all intermediate results together.

13. Thus, whatever method is used to calculate a margin of dumping, such a margin must be established for "the *product* as a whole".[4] As the meaning of "margins of dumping" is consistent across the entire *Anti-Dumping Agreement* (including, *a fortiori*, the two sentences of Article 2.4.2), all comparisons made between export price and normal value for individual *subsets* of the product subject to investigation must be aggregated in order to obtain a single margin of dumping. An authority is not permitted to disregard any comparison results by "zeroing" results where normal value *exceeds* export price, because this fails to generate a margin of dumping for the product as a whole. This applies equally to "systemic disregarding", whereby negative intermediate W-W comparison results are disregarded when aggregated together with the results of W-T comparisons.

14. The fact that the W-T comparison methodology is exceptional and only applies in limited circumstances does not provide a justification for the use of "zeroing". The second sentence of Article 2.4.2 provides an exception from the requirement, under the first sentence, to use a particular *comparison methodology* to determine the existence of "margins of dumping during the investigation phase". It thus allows use of a different *means* to find dumping. It does not modify the meaning of "dumping" or "margins of dumping" that applies throughout the *Anti-Dumping Agreement*.

15. Finally, a prohibition on the use of "zeroing" in conjunction with the W-T methodology does not, as the United States argues, reduce the second sentence of Article 2.4.2 to inutility. Where the conditions under the second sentence are met, the authority is permitted to use the alternative methodology when otherwise it would not be so permitted. Further, even if the second sentence is understood to require that there is a different *result* as between the W-W and W-T comparison methodologies, it is possible to obtain mathematically different results by varying the assumptions used in respect of each methodology. For example, if the temporal basis for the weighted average normal value is changed, mathematically different results generally arise.

[4] Appellate Body Report, *US – Zeroing (EC)*, para. 126.

II. COUNTERVAILING DUTY ISSUES

16. As to Korea's claim regarding the finding of *de facto* specificity, China notes that in *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body stated that the question whether a subsidy is "disproportionately large" depends, first, on whether "the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution"; and, second, on whether "the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy, in relational terms, to certain enterprises".[5] Thus, the question raised by Korea's claim regarding the finding of *de facto* specificity in relation to RSTA Article 10(1)(3) is whether USDOC's finding that Samsung received disproportionate amounts of the subsidy rested on more than a simple finding that Samsung received a greater share than other recipients. In China's view, the assessment of *de facto* specificity must be based on more than such a simplistic assessment.

17. With respect to Korea's claim regarding the amount of subsidy for the production of a certain product, China notes that, contrary to the United States' position that an authority is generally not obliged to determine the precise amount of subsidy directly attributable to a product, the Appellate Body in *US – Countervailing Measures on Certain EC Products* found that, subject to Article VI:3 of the GATT 1994, an authority must ascertain the precise amount of the attributable subsidy before imposing a countervailing duty. Therefore, USDOC was obliged to conduct a careful examination of all data submitted by the interested parties before determining a subsidy to be a "genuine and substantial cause" of a particular market effect observed for the product being investigated.

18. As to Korea's claim that USDOC failed properly to match the numerator and the denominator in its calculation of the *ad valorem* level of subsidy, China notes that the Appellate Body has expressly recognized that the elements taken into account in the numerator of a subsidy calculation must match those taken into account in the denominator.[6] An authority must base its determination on positive evidence. China is concerned that USDOC appears to have established a presumption that government subsidies benefit *solely* domestic production when, in fact, this may not be the case.

[5] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.
[6] Appellate Body Report, *US – Softwood Lumber IV*, footnote 196 to para. 164.

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THIRD PARTY RIGHTS

1. The EU requests that the rights of third parties be appropriately protected in this case. As notified to the DSB, the EU has a *substantial interest* in the matters before the Panel, within the meaning of Article 10.2 of the DSU, and we request that our interests as a Third Party (and by extension the interests of the other Third Parties) be *fully* taken into account throughout the panel process. In particular, given that the DSU Appendix 3 Working Procedures have been modified in a manner that risks to *diminish* the rights of the Third Parties as provided for in the DSU and the DSU Appendix 3 Working Procedures, we request that, at the same time, other appropriate modifications (outlined below) to the DSU Appendix 3 Working Procedures also be made in order to *re-balance* the Working Procedures, so as to *fully preserve* the rights of the Third Parties as provided for in the DSU and the DSU Appendix 3 Working Procedures. Consequently, given the introduction of such modification, in order to avoid the pronounced unfairness to the Third Parties that could otherwise result, the EU seeks the following *re-balancing* measures:

- Receipt by the Third Parties of submissions (including exhibits) to the Panel, that is, including first written submissions, rebuttals, preliminary or interim ruling requests and responses thereto, responses to questions and comments thereon and opening and closing oral statements.

- In addition to the Third Party session at the first meeting, the presence of the Third Parties during the rest of the first meeting, as well as at the second meeting.

- The opportunity to respond, orally or in writing, to any question the Panel might wish to address to all Third Parties or to the EU specifically, at the discretion of the Panel, and to indicate a desire to respond to a particular question addressed to a Party or other Third Party, subject to the Panel's agreement.

II. BCI PROCEDURES

2. The EU welcomes the adoption of BCI Procedures in this case. However, we have the following reservations about certain provisions. First, with reference to paragraph 2 of the BCI Procedures, we consider that a Member's right to submit information to a panel cannot be conditioned on the provision of such an authorising letter. Insofar as this rule represents an attempt to reflect Article 6.5 of the ADA, we point out that that provision does not govern the question, which is rather governed by Article 18 of the DSU and Article 17.7 of the ADA. Under the confidentiality regime established by those provisions, a Member's right to submit information to a panel cannot be fettered by a panel conditioning it upon authorization from a private body. Under Article 17.7, confidential information is provided to the panel by the litigating Member. The provision refers to a "person, body or authority" only to reflect the fact that, pursuant to Article 13 of the DSU, a panel may seek information from any individual or body it deems appropriate. Second, with reference to paragraph 1, we consider that designation is a matter, in the first place, for the Member providing the information. A Member may be encouraged to follow the designation used in the municipal proceedings, but cannot be obliged to do so from the outset. Third, linked to the preceding observation, we consider that designation is ultimately a matter for the Panel, at least in case of disagreement, and cannot be absolutely delegated to the investigating authority or any interested party. We therefore consider that the rules should contain a challenge clause by which the other party can challenge the designation proposed by the Member providing the information. Furthermore, in order to avoid a risk of over-designation in which neither party has a particular interest, the challenge clause should be open to both the Panel and Third Parties.

III. KOREA'S "AS APPLIED" CLAIMS AGAINST THE WASHERS ANTI-DUMPING DUTY ORDER

3. The EU considers that the purpose of the final sentence of Article 2.4.2 of the ADA, as reflected in the preparatory work, is to strike a reasonable compromise between two different points of view. The first point of view is that whether or not dumping exists must be measured by taking into account the average pricing behaviour of an exporter, in both domestic and export markets, as well as average costs, irrespective, on the export side, of the purchaser, region or time period. Thus, for this purpose, the data universe includes all export transactions to all purchasers and regions and in all time periods of the investigation period, to the full value of all export transactions, whether they are less or more than the normal value. This is so whether the comparison methodology is weighted average-to-weighted average or transaction-to-transaction. The second point of view is that whether or not dumping exists may be measured by comparing each export transaction with a normal value, and, if the export price exceeds the normal value, by recording a finding of zero dumping, that is, by not allowing any off-set between positive and negative results. The compromise, as enshrined in Article 2.4.2 of the ADA is that normally the first rule applies; but that exceptionally, if targeted dumping by purchaser, region or time period is demonstrated to exist, a normal value established on a weighted average basis may be compared to prices of individual export transactions.

4. Thus, what the final sentence of Article 2.4.2 of the ADA does is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. Thus, in the case of regional targeted dumping, a weighted average-to-weighted average comparison might lead to a determination of no dumping. However, a closer examination of one particular regional market within the importing Member might reveal that, in fact, the relatively low priced and dumped transactions are pouring into that region and devastating the local industry, and this is being off-set by relatively high priced transactions to other regions. In such a case, what the final sentence of Article 2.4.2 of the ADA does it to permit an investigating authority to respond to such a situation, by unmasking the targeted dumping. Instead of determining the existence and amount of dumping by reference to the entire territory of the importing Member, it is entitled instead to determine the existence of a pattern of export prices which differ significantly among different regions, and unmask the targeted dumping accordingly. The same observation applies, *mutatis mutandis*, with respect to targeted dumping by purchaser or time period.

5. In a normal anti-dumping calculation, that is, one that does not involve any determination of targeted dumping, an investigating authority is not required to assess the reason for which dumping is occurring. Rather, the determination of the existence and amount of dumping is based on an objective assessment of the data. If the export price is less than the normal value, then dumping exists. The EU fails to see why the situation should be any different under the final sentence of Article 2.4.2 of the ADA. In the case of regional targeted dumping, for example, the objective question is whether or not the product is being dumped into a particular region, based on an objective examination of the data. The reasons for which the dumping might be occurring, and specifically the reasons for the existence of the pattern and the use of the weighted average-to-transaction methodology, might be relevant to the explanation to be provided pursuant to the final sentence of Article 2.4.2 of the ADA, but such reasons are not relevant to the question of whether or not a pattern of relatively low priced exports by purchaser, region or time period, has been demonstrated to exist. We think that the terms "pattern" and "significantly" can be understood quantitatively; and we agree with the US' that the term can also be understood qualitatively.

6. The matter before the Panel has not already been decided by the existing case law on zeroing. On the contrary, in our view, panels and the Appellate Body have exercised considerable caution and judicial restraint in this matter, confining themselves to resolving the particular disputes that have come before them. Specific cases have addressed specific types of comparison methodologies in specific types of proceedings. However, a targeted dumping case has not previously come before any panel, and panels and the Appellate Body have been careful not to prejudge the issues related to targeted dumping. Thus, at most, what Korea and the US appear to be arguing is that the basic underlying logic that has been used to resolve previous disputes should be carried forward, in a systematic and consistent manner, in order to resolve the present dispute, and in such a way that Article 2.4 and particularly Article 2.4.2 are interpreted and applied coherently.

7. The EU disagrees that the final sentence of Article 2.4.2 requires that the existence and amount of targeted dumping, if any, must be calculated only on the basis of the export transactions passing the pattern and gap tests, as opposed to all transactions to or in the particular purchaser, region or time period. We fail to see how this would comport with the basic objective of the targeted dumping provision, which, as we have outlined above, is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. It is not clear to us how this can be achieved if the sole option open to an investigating authority would be to make a calculation only on the basis of the transactions that have passed the pattern and gap tests. The investigating authority must have the possibility of applying an appropriate methodology in order to address the targeted dumping, which can only mean that high priced export transactions to or in other purchasers, regions or time periods would not be allowed to offset the dumping amount.

8. The EU agrees with Korea that the Appellate Body has already decided that mathematical equivalence does not determine the matter, and that the explanations in the measure at issue make no reference to the possible use of the transaction-to-transaction methodology. The EU submits that the consistency of the measure at issue with the final sentence of Article 2.4.2 of the ADA should be assessed in that light.

IV. KOREA'S "AS SUCH" CLAIMS AGAINST THE NAILS II METHODOLOGY AND THE DIFFERENTIAL PRICING METHODOLOGY

9. The EU understands Korea's position to be that the Differential Pricing Methodology came into existence on 4 March 2013. We further understand that, consequently, as of that date, the Nails II Methodology has no longer been applied, and in fact does not exist. This Panel was established on 22 January 2014. Consequently, as of a date preceding this Panel's establishment, it appears that the Nails II Methodology no longer existed. This understanding appears to be generally shared by the US. In these circumstances, the EU considers that the Panel should not make any findings with respect to the Nails II Methodology.

10. The EU considers that it results from the different descriptions of the two methodologies provided by Korea itself that there are significant differences between them. In these circumstances, we consider that they are insufficiently similar to be treated as a single measure.

11. With regard to Differential Pricing Methodology and the first flaw, we share the view that a targeted dumping determination must ultimately be made with respect to the product as a whole (in relation to a particular exporter). With respect to the second flaw, we consider that, if there are, for example, 10 regions, and the relatively low priced transactions are distributed equally amongst them, there is no basis on which to find regional targeted dumping. However, if the relatively low priced transactions are in 2 adjacent regions, we consider that the transactions to the 2 regions may be cumulated for the purposes of determining whether or not there is a pattern of export prices which differ significantly among different regions. In effect, the 2 regions are treated as one. We would make the same remark with respect to related purchasers or adjacent time periods. With respect to the third flaw, we consider that it is difficult to understand the justification for combining data that are not generated on the basis of equivalent parameters.

V. KOREA'S CLAIMS UNDER THE SCM AGREEMENT

12. Korea argues that the USDOC miscalculated the amount of subsidisation with respect to the product concerned, and wrongly determined that the tax credits received by Samsung pursuant to Articles 10(1)(3) and 26 of the *Restriction of Special Taxation Act* (RSTA) were specific in accordance to Articles 1.2 and 2 of the SCM Agreement.

A. Calculation of the amount of subsidisation

13. The EU considers that Articles VI:3 of the GATT 1994 and 19.4 of the SCM Agreement require Members to accurately determine the per unit subsidy amount found to exist with respect to the product under investigation and not impose countervailing duties exceeding that amount. The inclusion of amounts that have been bestowed on products other than the product under investigation in the calculation of the amount of subsidisation of the product concerned would necessarily result in a breach of those provisions.

14. That being said, the EU further notes that, in practice, it may be very difficult to identify precisely the amounts that a company has received for the particular production or sale of the product concerned, especially when the company in question manufactures and sells a variety of products not covered by the investigation and which are made in the same production line. Likewise, when the subsidy found to exist is not granted on a product basis, but rather on a company basis, it may also be difficult to identify what portions were used by the company for manufacturing the product concerned as opposed to other products. In this respect, if the subsidy is clearly tied in law or in fact to the production or sale of a particular product, this may allow the investigating authority to allocate the amounts received by the company to those specific products and, thus, calculate the specific subsidisation for the product concerned. However, if the subsidy is not tied to any particular product (such as e.g. a tax reduction in the income tax of a company in a given year), it may be presumed that the company allocated this benefit across its entire production.

15. A relevant question for the Panel to examine appears to be whether RSTA Articles 10(1)(3) and 26 confer a subsidy with respect to a single or a variety of different products or whether they are granted on a company basis, provided that certain activities (such as investments on R&D or business assets) are conducted. In the latter case, when a company manufactures several products in addition to the product concerned, the specific amounts granted to the product concerned from a subsidy that is contingent upon certain activities conducted by that company may be more difficult to determine with precision. Indeed, since money is fungible and can be used to finance any cost incurred by the company, subsidies generally affecting the production or sales of any product may ultimately be used in the manufacturing or selling activities of many products. This is regardless of whether the subsidy covers costs relating to R&D activities already conducted or investments previously made. Likewise, the Panel may find it relevant to examine whether the Article 10(1)(3) tax credits were in law or in fact limited to benefit production or sales carried out in Korea. Whilst it appears that the subsidy was granted with respect to R&D activities conducted in Korea, this does not necessarily means that the subsidy benefitted only Samsung's domestic production, as the results of those activities could materialise in Samsung's total production (thus including exports).

B. Specificity

16. The EU recalls that Article 2 of the SCM Agreement has been the subject of clarifications provided by panels and the Appellate Body in recent cases, such as in *US-Anti-Dumping and Countervailing Duties (China)*, *EC – Large Civil Aircraft*, and *US – Large Civil Aircraft*. The EU suggests that the Panel consider the issues before it in light of the clarifications provided by these cases.

17. In particular, with respect to Korea's allegations regarding RSTA Article 10(1)(3) tax credits, the EU considers that the Panel should identify the amounts of subsidy granted to Samsung pursuant to that provision since its entry into force. Then, the Panel should determine whether those amounts are "disproportionately large" relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b). If there is a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, the Panel should also examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to Samsung. If, ultimately, the reasons for Samsung to obtain more tax credits than other eligible Korean companies is determined by the conditions for eligibility (i.e. qualifying investments in R&D activities), this may indicate that Samsung did not receive disproportionally large amounts for the entire period. Since the amount of subsidisation was established by reference to a particular year (i.e. 2011), the Panel may also look into whether Samsung received disproportionally large amounts of tax credits in that year as compared to other eligible Korean companies in the same period.

18. Turning to Korea's allegation regarding RSTA Article 26 tax credits, the EU considers that the Panel should examine whether the eligibility criteria in question are objective and neutral. It appears that, whilst the list of qualifying sectors covers many sectors, this does not necessarily imply that the eligibility criteria are neutral or objective, in the sense described in footnote 2 of the SCM Agreement. This list, however, could be more relevant to determine whether the subsidy appears to be non-specific in accordance with Article 2.1(a) of the SCM Agreement. Finally, with respect to Article 2.2 of the SCM Agreement, the EU considers it relevant to determine who the

granting authority is in this case. If the granting authority is the Government of Korea, then it would appear that companies located within the "overcrowding control region" of the Seoul Metropolitan Area and willing to make investments therein would be excluded from any tax credits pursuant to RSTA Article 26 and, thus, the subsidy would not be available to all enterprises within the jurisdiction of the granting authority.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Due to its systemic interest, Japan will address the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") as well as the conduct of the United States Department of Commerce (the "USDOC") with respect to the application of anti-dumping duties concerning *Large Residential Washers from Korea*.

II. THE USE OF ZEROING IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT INCLUDING WHEN APPLYING THE SECOND SENTENCE OF ARTICLE 2.4.2

2. The Appellate Body repeatedly found that zeroing is inconsistent with the relevant provisions of the Anti-Dumping Agreement. It emphasized that the concepts of "dumping" and "margins of dumping" do not pertain to individual transactions, but to a product under investigation as a whole.[1] Its decisions have been derived from the definition of "dumping" set out in Article 2.1 of the Anti-Dumping Agreement, which defines the determination of dumping in relation to "a product", as well as from Article VI:2 of the GATT 1994, which allows a Member and its authorities to levy anti-dumping duties with respect to "any [dumped] product" or "such product". The Appellate Body also clarified that the term "dumping" has the same meaning "in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper review, and periodic reviews",[2] and that the concepts of "dumping" and "margin of dumping" "should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[3]

3. While the second sentence of Article 2.4.2 permits an investigating authority to rely on a particular type of comparison methodology under exceptional circumstances, nothing in the provision allows the investigating authority to counteract the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-wide/specific, and not transaction-specific concepts. The second sentence states: "A normal value established on a weighted average basis may be compared to prices of individual export transactions". It does not contain any language that allows for a departure from the definition of dumping and margins of dumping. In this regard, the permission of the use of the asymmetric comparison methodology (W-T) as such by no means mandates or allows an investigating authority to apply zeroing. The Appellate Body clarified that the application of zeroing under the W-T methodology is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[4]

4. The USDOC's use of zeroing is also inconsistent with the fair comparison obligation under Article 2.4 of the Anti-Dumping Agreement. The Appellate Body stated that zeroing "cannot be described as impartial, even-handed, or unbiased" (i.e., "fair") in the sense of Article 2.4, because the use of zeroing "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[5] The Appellate Body found that zeroing in W-T comparisons in the context of periodic reviews and new shipper reviews is, as such, inconsistent with Article 2.4.[6] Nothing in the Anti-Dumping Agreement suggests that this well-established general proposition under Article 2.4 would not apply to the second sentence of Article 2.4.2.

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[1] Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 106.

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[4] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133.

[5] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142; Appellate Body Report, *US – Zeroing (Japan)*, para. 146.

[6] Appellate Body Report, *US – Zeroing (Japan)*, para. 169.

5. As for the argument of mathematical equivalence, as the United States admits, it is premised on the assumption that "all of the normal value and export price data that are fed into the calculations … are identical".[7] This has no basis in the Anti-Dumping Agreement. The Appellate Body explained the U.S. argument in a previous dispute, stating it would apply only "under the specific assumptions of the hypothetical scenario".[8] The Appellate Body suggested that an investigating authority may unmask targeted dumping by "focusing" on (i.e., establishing the margin of dumping based on) only export transactions constituting a "pattern", stating that the "universe" of export prices in the second sentence "would necessarily be more limited" than the "universe" in the first sentence.[9] In addition, an investigating authority could refer to different pools of home market transactions when calculating the normal values for the different comparison methodologies under the first and second sentences. In such case, the outcomes of the comparisons may be different because the groups of transactions making up the normal value may differ. In particular, the T-T comparison methodology under the first sentence will almost certainly never yield the same results as the W-T comparison methodology under the second sentence. As such, the pricing data considered under the first and second sentences of Article 2.4.2 are systematically different, which makes the mathematical equivalence argument implausible.

6. Further, the United States' argument that the negotiation history of the Anti-Dumping Agreement confirms that zeroing should be permissible under the second sentence is not convincing. The only conclusion that can be drawn from the evidence submitted by the United States is that some Members had serious concerns as to the use of zeroing in W-T comparisons. In any case, the views expressed by some delegations hardly represent the common intention of WTO Members.

III. THE USDOC FAILS TO PROPERLY FIND A "PATTERN" AS REQUIRED UNDER THE SECOND SENTENCE OF ARTICLE 2.4.2

A. The U.S. Methodologies Fail to Assess Qualitative Aspects of Differing Export Prices

7. Turning to the first requirement for invoking the second sentence of Article 2.4.2, the methodologies adopted by the USDOC to identify targeted dumping by finding a "pattern" suffer from fundamental flaws. The second sentence requires an investigating authority to find a "pattern of export prices which differ significantly among different purchasers, regions or time periods". Since the words "pattern" and "significant" both have qualitative aspects,[10] a "pattern" of differing export prices must convey proper *meaning* which reflects the purpose of the analysis to be conducted under the second sentence of Article 2.4.2.

8. In this regard, the Appellate Body clarified that the role of the second sentence is to "capture pricing patterns constituting 'targeted dumping'"[11] and to "unmask" such targeted dumping.[12] It also explained that "there are three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods".[13] Because "dumping" by definition refers to sales made at lower (not to higher) prices, targeted dumping can be found when an investigating authority must show that export prices for certain purchasers, regions or time periods are significantly lower than those for other purchasers, regions or time periods , in a way that the former can be conceived as "targeted." In doing so, an investigating authority must qualitatively assess the significance of the observed deviation of a certain group from other groups of purchasers, regions or time periods with respect to the specific fact pattern. Such assessment is also required as a very basic rule of statistics.[14] Furthermore, in order to evaluate whether observed price differences are "significant", one needs to take into

[7] United States First Written Submission, para. 181.
[8] Appellate Body Report, *US – Softwood Lumber V (Art. 21. 5 – Canada)*, para. 99.
[9] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[10] Korea First Written Submission, paras. 131 and 134-135.
[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127; Appellate Body Report, *US – Zeroing (Japan)*, para. 133. See also the United States' First Written Submission, at para. 176.
[12] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[13] Appellate Body Report, *EC – Bed Linen*, para. 62.
[14] Lane, David et al., *Online Statistics Education: A Multimedia Course of Study*, (http://onlinestatbook.com/), pp. 11-12 and 648 (JPN-2); McFarland, Henry B., The U.S. Department of Commerce's Approach to Targeted Dumping: The Wrong Test and the Wrong Response (June 25, 2014). p. 6. (JPN-3)

account the characteristics of the relevant product and market, including the price variances of such a product in the market.

9. The USDOC's methodologies suffer from a common inconsistency with the second sentence of Article 2.4.2, as they adopt purely quantitative benchmarks that are mechanically applied in all cases. Under the *Nails* test, the USDOC identifies a "pattern" through a two-step analysis consisting of the "pattern test",[15] for which the USDOC bases its assessment solely on quantitative thresholds such as one standard deviation and 33% (of volume across all models) and the "gap test". Under the Differential Pricing Methodology, the USDOC employs the so-called Cohen's *d* test, for which it relies on purely quantitative and mechanical thresholds such as Cohen's *d* of plus or minus 0.8. There is no evidence that the USDOC assesses or interprets the meaning of the observed price variations or calculated statistics in a qualitative manner in order to determine whether certain purchasers, regions or time periods are "targeted".

10. The shortcoming of the USDOC's methodologies of disregarding qualitative aspects is aggravated with respect to the Differential Pricing Methodology. The Differential Pricing Methodology also includes within the identified "pattern" those export transaction groups with *higher* weighted average prices than the normal value. It is hardly understandable how the Differential Pricing Methodology identifies targeted "dumping" by using a "pattern" which in fact consists of a disorderly mixture of higher and lower prices.

B. The USDOC Fails to Take All Models into Account When Determining Whether Certain Purchasers (or Regions or Time Periods) Are "Targeted"

11. As the Appellate Body clarified, nothing in the text of the second sentence of Article 2.4.2 suggests that "models" or "types" of the same product under investigation can be considered as such categories.[16] The identification of a "pattern" pursuant to the second sentence cannot be completed at the level of certain price variations for individual models sold. Accordingly, in order to find that a certain purchaser, region or time period is "targeted", an investigating authority must show that export prices for the specific purchaser, region or time period are significantly lower across all models.

12. The USDOC's methodologies fail to take all models into account when identifying a "pattern" of targeted dumping. Under the *Nails* test, the USDOC considers that the "pattern test" is satisfied if the weighted average prices for *certain* models are below the "one standard deviation" standard and the aggregated transaction volume for such models exceeds 33% of the entire volume sold to that purchaser (or region or time period) across all models. Under the Differential Pricing Methodology, the USDOC splits export transactions for particular purchaser, region and time period by different models, and aggregates those model-specific transaction groups that passed the Cohen's *d* threshold of plus or minus 0.8.[17]

C. The Differential Pricing Methodology Aggregates Unrelated Variations Across Different Purchasers, Regions and Time Periods

13. As explained by Korea, under the Differential Pricing Methodology, the USDOC aggregates unrelated price variations within the category of purchasers (or regions or time periods) in order to identify a "pattern".[18] In other words, it combines price irregularities "across" different purchasers (or regions or time periods), instead of examining the difference "among" these purchasers (or regions, or time periods). The USDOC also aggregates unrelated price variations across the *distinct categories* of purchasers, regions and time periods.[19] Such an aggregation turns the "or" in "different purchasers, regions or time periods" into an "and" without any legal basis. Thereby, the USDOC fails to properly identify a "pattern" of export prices which differ significantly "*among* different purchasers, regions *or* time periods" as required by the second sentence of Article 2.4.2.

[15] Korea's First Written Submission, at para. 105.
[16] Appellate Body Report, *EC – Bed Linen*, para. 62.
[17] Korea's First Written Submission, at paras. 204-208.
[18] Korea's First Written Submission, at paras. 222-226.
[19] Korea's First Written Submission, at paras. 227-233.

IV. THE USDOC FAILS TO PROVIDE AN ADEQUATE "EXPLANATION" AS REQUIRED UNDER THE SECOND SENTENCE OF ARTICLE 2.4.2

14. As Korea argues, the terms "explanation" and "why" require an investigating authority to provide clear and detailed reasons for or the purpose of the inability or impossibility to appropriately take into account a pattern of significantly different export prices by the use of a W-W or T-T comparison.[20] Moreover, under the principle of effective treaty interpretation, the "explanation" clause must be interpreted in such a manner that it has a role separate and distinct from that of the "pattern" clause.

15. The United States seems to argue that the explanation requirement is fulfilled as soon as an investigating authority finds a difference between the margin of dumping calculated using the W-T comparison methodology and that calculated using the W-W comparison methodology.[21] This interpretative approach is circular; since the United States employs zeroing when using the asymmetrical comparison methodology exceptionally provided for in the second sentence of Article 2.4.2. As a consequence, the two calculation methodologies automatically yield different results.

16. In order to understand the reason behind the explanation requirement, one needs to bear in mind that an exporter generally does not sell its product at a uniform price. Export prices usually vary because each export price is determined based on various factors, including demand levels and scales of transactions that may vary among different purchasers, regions and time periods, as well as behavior of consumers and other market participants. Given that it is perfectly normal to observe certain differences in export prices of a product in a given market, such variations are expected to be captured and appropriately considered by the methodologies pursuant to the first sentence, which the Members agreed shall "normally" be used. As such, an "explanation" has to be provided at least as to why observed variations in export prices are not a mere reflection of factors that normally exist in a given market or otherwise does not allow to establish an appropriate margin of dumping under the first sentence so as to properly counteract dumping causing injury.

V. THE APPLICATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2 SHOULD BE LIMITED TO THOSE TRANSACTIONS THAT CONSTITUTE A "PATTERN"

17. Under the *Nails II* test, the USDOC uses the W-T comparison methodology and uses zeroing for all sales. [22] The same approach is employed under the Differential Pricing Methodology if certain conditions are met[23] yet this expansive use of the W-T comparison methodology is contradicted by the second sentence of Article 2.4.2. As explained by the Appellate Body, "[t]he emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions, or time periods."" [24] As such, the phrase "individual export transactions" in that sentence should be read "as referring to the transactions that fall within the relevant pricing pattern."[25]

VI. CONCLUSION

18. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

[20] Korea's First Written Submission, at para. 156.
[21] United States First Written Submission, paras. 127-129.
[22] Korea's First Written Submission, at para. 108.
[23] Korea's First Written Submission, at paras. 198-200.
[24] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.
[25] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.

ANNEX D-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

Madam Chair, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel. In this oral statement, I will therefore briefly set out Norway's view on one of the legal issues raised: the use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology referred to in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*[1].

2. However, before I turn to this issue, Norway would like to underline that the resort to this methodology is indeed an exception, to be applied only in very limited situations where the normal methodologies for calculating dumping margins are not appropriate. The criteria stated in the second sentence of Article 2.4.2 must be fulfilled, and the methodology must comply with Article 2.4. As elaborated in more detail by Korea and a number of third parties, the United States' methodology disregards all the criteria for the application of Article 2.4.2.

3. I now turn to the issue of zeroing. In line with the Appellate Body's consistent rulings in numerous previous cases, Norway holds that the use of all forms of zeroing, in all forms of proceedings under the *Anti-Dumping Agreement* is prohibited. This applies regardless of the comparison methodology employed to calculate the dumping margin, including the third comparison methodology of the second sentence of Article 2.4.2.

4. The Appellate Body has repeatedly found that the practice of zeroing is inconsistent with the *Anti-Dumping Agreement* in the context of both the "weighted-average-to-weighted-average" methodology and the "transaction-to-transaction" methodology. It has furthermore come to the same conclusion in terms of the third comparison methodology in the context of administrative reviews. As Norway will show, it is clear from the principles and interpretations laid down by the Appellate Body, that zeroing is also prohibited in terms of the third comparison methodology in the context of initial investigations.

5. Based on Article 2.1 of the *Anti-Dumping Agreement*, and Article VI:1 of the *GATT 1994*[2], the Appellate Body has repeatedly found that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[3] Furthermore, the Appellate Body has underlined that the concepts of "dumping" and "margin of dumping" are exporter-specific,[4] and that "a single margin of dumping is to be established for each individual exporter or producer investigated".[5] The Appellate Body has further clarified that these two terms must have "the same meaning in all provisions of the *Agreement* and for all types off anti-dumping proceedings".[6] Norway points to the wording of Article 2.4.2, which explicitly refers to the "margins of dumping" and the comparison methodology used to determine the existence of these. Norway agrees with Korea that the cohesive interpretation of these terms by the Appellate Body precludes an interpretation of "dumping" and "margins of dumping" to the effect that these may be considered on a transaction-specific basis, including under the second sentence of Article 2.4.2.[7]

6. Norway would furthermore like to highlight that the Appellate Body has found that Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement* require aggregation of <u>all</u> results of intermediate comparisons when calculating the dumping margin. In *US – Softwood Lumber V*, the

[1] *The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*
[2] *The General Agreement on Tariffs and Trade 1994*.
[3] Appellate Body Report, *US – Zeroing (EC)*, para 126, Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93.
[4] Appellate Body Report, *US – Stainless Steel (Mexico*), paras. 89-90, Appellate Body Report, *US – Zeroing (EC)*, para. 128.
[5] Appellate Body Report, *US – Continued Zeroing*, para. 283.
[6] Appellate Body Report, *US – Zeroing (Japan),* para. 109.
[7] First Written Submission of Korea, para. 70.

Appellate Body ruled that the individual comparisons only represent "intermediate values" that the investigating authority had to aggregate in order to arrive at the margin of dumping for the product as a whole. The investigating authority furthermore "necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[8] Disregarding or artificially reducing to zero the results of intermediate comparisons, through the application of zeroing, is thus at odds with this and inconsistent with Article 2.4.2.

7. In this regard, Norway would like to underline that the Appellate Body has confirmed this interpretation, both in the context of the "transaction-to-transaction" methodology[9], as well as in the context of the "weighted-average-to-transaction" methodology in administrative reviews[10]. The Appellate Body has thus found that a comparison between normal value and the prices of individual export transactions does not detract from its coherent conclusion on this matter.

8. Norway struggles to see that there is anything in the wording of the second sentence of Article 2.4.2 that would allow a different interpretation in this regard. Furthermore, the object and purpose of the provision is to address dumping targeted at particular purchasers, region or time periods. These dumping situations reflects a pricing strategy where the exporter dumps prices on specific purchasers, regions or time periods, while retaining higher prices for other sales. The very nature of targeted dumping thus necessitates a reference to the overall pricing behavior of the exporter, in order to identify this type of dumping. It necessarily follows that dumping cannot take place at the level of each individual transaction.[11]

9. Norway notes that the United States claims that the negotiation history of the *Anti-Dumping Agreement* confirms that zeroing should be permissible under the second sentence of Article 2.4.2.[12] As Norway understands it, the gist of the argument seems to be that communications of two delegations and minutes of a negotiating meeting can be read as proof that the asymmetrical comparisons, that is comparisons between individual export transactions and weighted average normal value in anti-dumping investigations, and zeroing, were viewed as one and the same thing. Norway strongly disagrees with this assumption. In our opinion, the material only shows that some Members were concerned about the use of zeroing in "weighted-average-to-transaction" comparisons. This is a far cry from deducting a permission of applying zeroing when using said comparison methodology. Furthermore, we note that the United States previously has described the negotiating history of Article 2.4.2 in quite a different way. In *US – Softwood Lumber V*, the United States argued that there were two practices employed by Members to establish "margins of dumping" at the time of the Uruguay Round negotiations that were relevant for the interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical" comparisons, while the second practice was zeroing. The United States asserted that, because the negotiators were able to agree only on the issue of "asymmetry", it would be reasonable to expect that, absent modified text in the *Anti-Dumping Agreement* addressing zeroing, that practice would continue to be consistent with the *Anti-Dumping Agreement*.[13] In this case, the United States clearly saw these two practices as two separate issues.[14] The Appellate Body did not agree with the United States in that proceeding. Similarly, the material at hand does not in any way prove that the negotiators intended to allow zeroing when applying the third comparison methodology.

10. Moreover, the use of zeroing when applying this third comparison methodology is inconsistent with the obligation of Article 2.4 of the *Anti-Dumping Agreement* to make a "fair comparison" between the export price and the normal value. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness or lack of bias".[15] The Appellate Body has found that zeroing tends to inflate the margins calculated, and that it can, in some instances, turn a negative margin of dumping into a positive margin of dumping.[16] The Appellate

[8] Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[9] Appellate Body Report, *US – Softwood Lumber V (Art 21.5 – Canada)*, paras. 85-124.
[10] Appellate Body Report, *US – Stainless Steel (Mexico),* paras. 102-104.
[11] As held by the Appellate Body in *US – Stainless Steel (Mexico)*, para. 98*:* "A proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transaction over a period of time."
[12] First Written Submission of the United States, paras. 242-250.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 107.
[14] Appellate Body Report, *US – Softwood Lumber V,* para. 108.
[15] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 138.
[16] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.

Body has thus emphasized that there is an "inherent bias" in zeroing,[17] and that "this way of calculating cannot be described as impartial, even-handed or unbiased."[18] As with the other two comparison methodologies, 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 *Anti-Dumping Agreement*.

11. In conclusion, Norway holds that "dumping" and "margins of dumping" cannot occur at the level of individual transactions. This is in line with consistent findings of the Appellate Body, which has emphasized that the concepts have the same meaning throughout the *Anti-Dumping Agreement*. 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. Furthermore, zeroing cannot be said to be impartial, even-handed or unbiased. The use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology is hence inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

Madam Chair, Members of the Panel,

12. This concludes Norway's statement. I thank you for your attention.

[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[18] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142.

ANNEX D-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

Madam Chair, distinguished Members of the Panel,

1. Thailand appreciates the opportunity to present its view to the Panel in this dispute.

2. In Thailand's view, the use of zeroing is not permitted when applying a comparison methodology of weighted average-to-transaction (W-T) under the second sentence of Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

3. In previous disputes, the Appellate Body has held that whenever an investigating authority uses intermediate comparisons as a step to determine the overall dumping margin for the product, the investigating authority may not, in aggregating the results of those intermediate comparisons, "zero" the results of some of those comparisons.

4. Although the Appellate Body has not yet considered the use of zeroing in the W-T methodology in cases of "targeted dumping" under the second sentence of Article 2.4.2, Thailand submits that the Anti-Dumping Agreement does not permit the use of zeroing in such case. We recall that the first sentence of Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal price", which, in Thailand's view, must apply to Article 2.4 as a whole, including both the first and second sentences of Article 2.4.2. Allowing the use of zeroing in the W-T methodology under targeted dumping while prohibiting it in all other instances would render the previous interpretations of "fair comparison" with regard to zeroing meaningless.

5. The use of zeroing under any of the methodologies used to determine dumping and margins of dumping cannot be considered "fair" under Article 2.4 of the Anti-Dumping Agreement. In Thailand's view, therefore, the use of zeroing when applying the W-T methodology under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, is inconsistent with the Anti-Dumping Agreement.

6. Thailand submits that the use of the W-T methodology provided for under Article 2.4.2, second sentence, is permitted only in exceptional circumstances, in which two requirements are satisfied: "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods", and "an explanation is provided as to why such differences cannot [apply] the use of a weighted average-to-weighted average or transaction-to-transaction comparison." In this dispute, Thailand will not address the issue of how investigating authorities may identify in a WTO-consistent manner when these two exceptional circumstances exist. We simply request the Panel to reach conclusions on these issues that take into account the interests of both exporting Members and importing Members. We may address these issues in further detail in upcoming disputes in which these issues arise.

7. In conclusion, Thailand respectfully requests the Panel to find that the use of zeroing in the W-T comparison methodology in circumstances of "targeted dumping" under the second sentence of Article 2.4.2 is inconsistent with the Anti-Dumping Agreement.

Madam Chair, distinguished Members of the Panel, thank you for your kind attention.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. INTRODUCTION

Mr. Chairman, Distinguished Members of the Panel

1. The Republic of Turkey (hereinafter referred to as Turkey) would like to thank the Panel for the opportunity to share her viewpoint as a Third Party in the current proceedings. Turkey makes this oral submission due to her systemic interest in the correct and coherent interpretation of the Agreement on Implementation of Article VI of GATT 1994 (hereinafter referred to as ADA or Anti-Dumping Agreement).

2. In this context, Turkey has decided not to elaborate on the specific facts presented by the Parties and rather focus on the right legal interpretation of the second sentence of Article 2.4.2 of ADA.

II. INTERPRETATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2

3. Turkey understands that the dispute on the legal boundaries of the second sentence of Article 2.4.2 concentrates on two primary questions: a) What is the legal content of the conditions allowing the investigating authority to use of weighted average normal value - individual export prices comparison (hereinafter referred to as W-T comparison)? b) Does the W-T comparison, *per se*, necessarily lead to zeroing?

4. As regards the first question, Article 2.4.2 stipulates one substantive and one procedural condition. Article 2.4.2 reads as follows:

> 2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions *if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods*, and *if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison*. (emphasis added)

5. In Turkey's understanding, the article, on its face, envisages two conditions[1] rather than three as asserted by the Republic of Korea (hereinafter referred to as Korea). The investigating authority has to a reach a conclusion that a pattern of export prices displaying a significant difference among purchasers, regions or time periods is present. In Turkey's view, every component used in this sub-sentence is legally, logically and grammatically linked to each other. The word "pattern", for instance, cannot be read individually without considering the fact that the "pattern" is established by export prices which significantly differ in terms of purchaser, region or time. In that context, the words reflect the rationale of the drafters if they are construed together.

6. Concerning the substantive condition, Korea underlines that a "pattern", under Article 2.4.2, reflects an aggregated pricing behavior of the exporter which defines the totality of export sales and not individual transactions[2]. The U.S. interprets the word "pattern" in a more contextual manner and underlines that a "pattern" shows a regular and intelligible form or sequence of export prices which significantly differ among purchasers, regions and time periods[3]. In Turkey's view, the

[1] United States' first written submission, para. 52; footnote 74.
[2] Korea's first written submission, para. 86.
[3] United States' first written submission, para. 55.

assessment whether a "pattern" exists requires the evaluation whether single transactions repeat themselves consistently during the investigation period and such repetition form a structure that significantly differ among purchasers, regions and time periods. As a matter of fact, such an evaluation puts weight equally on the transactions itself and the export sales as a whole to pinpoint whether the repeating lines in export sales form a grouping or differing structure. We understand that this form or sequence should be observable and identifiable[4].

7. As explicitly stipulated in the provision, such a pattern should not only differ among purchasers, regions and time periods but that difference must be significant in scale. We are in the same line with the case law that "*significant*" has a meaning of "*notable, important or consequential*"[5]. In light of this definition the investigating authority should have enough discretion to decide what constitutes a notable, important or consequential difference by considering the merits of the investigation and peculiarities of individual export transactions.

8. Turkey does not support the legal interpretation that a "*pattern of significant difference*" should be necessarily an outcome of a specific intent to apply "*targeted dumping*" and that usual commercial practices are perfectly plausible if the differing export prices display a pattern in line with the expected results of these practices[6]. Neither from the reading of Article 2.4.2 nor from the examination of case law it is possible to conclude that the "*usual commercial*" practices are defenses to permit the act of targeted dumping[7].

9. The plain reading of the Article 2.4.2 shows that the W-T comparison acts as an exception and that the investigating authority can resort to the methodology only under certain conditions[8]. As an expected result of the due process requirement, diversion from the general rule requires an explanation on why normal methodologies, stipulated in the first sentence of Article 2.4.2, cannot be used appropriately. Turkey understands that this explanation should be in such a context that it should not deprive the interested parties from using their right of presenting evidences they consider relevant in respect of the question. Thus, the base of the test controlling the adequacy of the explanation should be Article 6.1 of the Anti-Dumping Agreement.

10. Concerning the second question, Turkey prefers not to present any comment on the specifics of the U.S. methodology and on mathematical equivalence argument at this stage of the proceedings.

11. Nevertheless, Turkey highlights her previously underscored viewpoint that the second sentence of Article 2.4.2 operates as an exception to the first sentence part of the Article and that the rules and procedures to be followed differ in terms of legal obligations and burden of explanation.

12. Turkey understands that the W-T comparison methodology was designed to address a specific case, namely targeted dumping. In this framework, it should be assessed carefully whether applying the legal discipline that was devised to mark the boundaries of the normal comparison methodologies of the first sentence of Article 2.4.2 can really fit the exceptional structure of the comparison methodology stipulated in the second half of the Article. As a matter of legal interpretation, Turkey would like to share her view that the application of the legal discipline envisaged for the first two methodologies shown in Article 2.4.2 may erode the effectiveness of the results expected from the W-T comparison methodology which is exceptional in nature and asymmetric in terms of comparison structure.

III. CONCLUSION

13. Mr. Chairman, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of Anti-Dumping Agreement.

[4] United States' first written submission, para. 73.

[5] *US – Large Civil Aircraft* (Second Complaint) (AB), para. 1272 (citing US-Upland Cotton (AB), para. 426).

[6] Korea's first written submission, para. 142

[7] United States' first written submission, para. 86.

[8] *U.S. – Softwood Lumber VI,* Article 21.5 (Panel), para. 5.33.

14. We thank you for your kind attention and remain at your disposal for any question you may have.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF VIET NAM

Madam Chair, distinguished Members of the Panel.

1. Viet Nam appreciates this opportunity to present its views as a third party in this dispute.

2. Viet Nam believes that this dispute is of great systemic importance for the disciplines under the *Agreement on Implementation of Article VI of the GATT 1994* ("Anti-Dumping Agreement") as well as the *General Agreement on Tariffs and Trade 1994* ("GATT 1994). The issues raised in this dispute related to the application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement have, in fact, been raised by Viet Nam in the context of administrative proceedings being conducted against imports from Viet Nam by the U.S. Department of Commerce (USDOC).

3. In this third party oral statement, Viet Nam submits that: (i) the use of "zeroing" by the USDOC under the W-T comparison methodology is "as such" inconsistent with several provisions of the Anti-Dumping Agreement and the GATT 1994; and (ii) the panel should, interpret the conditions for applying the second sentences of Article 2.4.2 of the Anti-Dumping Agreement consistently with the object and purpose of Article 2.4.2 and, in particular, its status as an exception to the preferred rules for the comparison of normal value and export price. This is essential for ensuring that recourse to the so-called third methodology remains an exception to the use of the two "normal" comparison methodologies under the first sentence of Article 2.4.2. This is what the drafters of the Anti-dumping Agreement intended by making the second sentence of Article 2.4.2 an exception.

I. General observations

4. As a general point, Viet Nam wishes to express its concern about the recent proliferation of investigations by the United States Department of Commerce (USDOC) in which the USDOC has used the third comparison methodology. This surge has largely coincided with the United States' decision to cease zeroing under the other two comparison methodologies. This gives cause for great concern. USDOC has found targeted dumping to exist in recent years with increasing frequency. Moreover, under the new "differential pricing" methodology which has replaced the targeted dumping methodology, USDOC now examines *automatically* – without a precipitating request by the applicant – whether the third methodology can be applied. All this undermines the exceptional nature of the second sentence of Article 2.4.2. Furthermore, by applying zeroing when using the third comparison methodology USDOC has created a back-door through which zeroing is re-introduced into common anti-dumping practice, to be used at will by investigating authorities.

5. It is essential that the conditions under which the third methodology may be used be interpreted in a manner that preserves their object and purpose as an exception, as confirmed by the Appellate Body. In contrast to the object and purpose of the second sentence of Article 2.4.2, the United States would have the panel read the conditions for application of the exception as being little more than mere formalities which find prices to differ significantly without reference to significance as a concept based on common sense, statistics, or the object and purpose of the Anti-Dumping Agreement itself. This approach is simply not consistent with how Article 2.4.2 is drafted or with the object and purpose of the provision within the broader context of the object and purpose of the Agreement.

II. "Zeroing" is just as prohibited under the average-to-transaction comparison methodology as it is prohibited under the average-to-average and transaction-to-transaction methodologies

6. Viet Nam disagrees with the United States' reading of the second sentence of Article 2.4.2 as permitting recourse to the "zeroing" methodology. Korea has put forward a convincing set of arguments in this regard.[1] For instance, the United States' reading of Article 2.4.2 presumes that

[1] Korea's First Written Submission, Section IV.

dumping can be found at the level of individual transactions. However, the Appellate Body has consistently ruled that "dumping" can only be determined for the product as a whole, and not for individual transactions.[2]

7. The fact that the second sentence of Article 2.4.2 is an exception[3] does not speak to the issue of zeroing. The second sentence is an exception to the "normally"[4] applicable comparison methodologies. It is exceptional not because it permits zeroing; rather, it is exceptional because it is asymmetrical – that is, what is compared on one side of the comparison (a weighted average) is different from what is on the other side of the comparison (individual transactions).

8. Viet Nam is also not convinced by the United States' mathematical equivalence argument.[5] The United States' numerical example appears to be somewhat simplistic and basic. Moreover, it would appear to rely on certain assumptions which are questionable under the second sentence of Article 2.4.2. For instance, the example appears to assume that an investigating authority may apply the third methodology to all export transactions, rather than only to transactions within the pattern. However, that is one of the many open questions that Korea has raised[6] and that Viet Nam hopes the panel will address. The United States has not demonstrated whether mathematical equivalence would hold in the absence of that assumption.

9. Moreover, as the Appellate Body has found, even if two methodologies were to yield the same mathematical result *in some cases*, this would not deprive the second sentence of Article 2.4.2 of its useful effect.[7] Rather, mathematical equivalence presupposes that the same result would obtain *in all cases*. The United States has not discharged this burden of proof on this point.

10. Hence, in the light of the text of Article 2.4.2 and the existing extensive case law, Viet Nam considers that the United States' recourse to zeroing under the second sentence of Article 2.4.2 is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.2 and 9.3 of the Anti-Dumping Agreement as well as with Articles VI:1 and VI:2 of the GATT 1994.

III. The United States does not comply with the conditions that govern recourse to the third methodology

11. Viet Nam is concerned about the United States' reading of the various conditions in Article 2.4.2, second sentence, that govern recourse to the exceptional third methodology. These conditions include, among other things, the existence of a "pattern" of prices that "differ significantly among different purchasers, regions or time periods", as well as a meaningful explanation why the two "normally" used comparison methodologies are insufficient to capture such differences.

12. Article 2.4.2 second sentence must be interpreted in a manner that preserves the useful effect of these conditions. These conditions must not be converted into mere formalities that are easily satisfied by an investigating authority in many cases. However, that appears to be precisely what the United States would have the panel do.

13. Both the United States "*Nails II*" and "differential pricing" methodologies would appear to establish an excessively low threshold for the phrases "pattern" and "differ significantly". Korea's first written submission highlights in detail numerous problematic aspects in this regard. Viet Nam did not see an adequate response to these arguments in the United States' submission.

14. For instance, under the "*Nails II*" approach, the United States uses one standard deviation as one of the criteria. Whatever the discretion of an investigating authority, this would appear to be far too low a threshold. Viet Nam would urge the panel to engage in a thorough statistical and quantitative analysis of this point. The "differential pricing" methodology appears even more problematic in this regard, since the United States appears to use only a 0.8 of one standard

[2] See for instance, Appellate Body Report, *US – Continued Zeroing*, para. 283.
[3] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[4] Article 2.4.2 of the *Anti-dumping Agreement*.
[5] United States' First Written Submission, Sections IV.B.5.c and IV.B.5.d.
[6] Korea's First Written Submission, Section V.C.3.
[7] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

deviation. This lowers the bar even further. It cannot be that numerical thresholds are set so low that they would potentially be satisfied in the vast majority of anti-dumping investigations.

15. These concerns are compounded by several other factors. For instance, USDOC uses *average* export prices per comparison point (e.g. per purchaser), rather than the *actual* prices of individual export transactions. Doing so affects the calculation of the standard deviation and in many cases will make it more likely that a given purchaser, region or time-period will fall below the cut-off points and will be deemed to form a "pattern". Moreover, the use of such computed averages – which are different from the prices of actual export transactions – appears inconsistent with the term "export prices" in Article 2.4.2. Another example is what Korea has identified as the "vertical", "horizontal" and "cross-category" variation practice.[8] Viet Nam shares these concerns expressed by Korea.

16. These aspects of the United States' methodology inappropriately create the possibility that random, relatively minor and commercially entirely commonplace price fluctuations will be characterized as a "pattern" of prices that "differ significantly". This makes it unduly easy to apply the third methodology. This cannot have been the intention of the drafters of the Anti-dumping Agreement or they would not have classified the third methodology as an exception.

17. Also, USDOC considers it entirely irrelevant that lower prices may reflect standard commercial practices, for instance, routine seasonal fluctuations or lower prices to large-volume customers. In Viet Nam's view, contrary to the United States' arguments, such considerations are highly relevant for an effective interpretation of the term "pattern", both in its ordinary meaning and in the context at hand. Beyond all technicalities of the second sentence of Article 2.4.2, it cannot be that the Anti-dumping Agreement entitles WTO Members to burden exporters with higher anti-dumping duties simply because they follow standard business practices. Viet Nam agrees with Korea's arguments on this point.[9]

18. Finally, Viet Nam is concerned that the United States' practice reduces to an empty formality the requirement to provide an "explanation" as to why the two "normally" applicable methodologies cannot be used. First, the United States fails to provide any explanation with respect to the T-T methodology, contrary to the plain meaning of Article 2.4.2. Second, the explanation that the W-W methodology "conceals" certain price differences is, as Korea correctly argues, merely a description of what any averaging process entails by its very essence. Finally, saying that the W-T methodology with zeroing yields a higher margin than the W-W methodology without zeroing is not an explanation why price differences "cannot be taken into account appropriately" by the W-W methodology. When zeroing is applied the margins of dumping will always be higher than if zeroing is not applied because of the absence of any offset for the margin by which export prices exceed normal value. Recourse to the third methodology cannot be driven, or justified, by the fact that the application of zeroing will always result in the highest possible dumping margin. Nothing in Article 2.4.2 supports such an interpretation when choosing among the possible methodologies for determining the margins of dumping.

IV. The third methodology, to the extent it may be applied, can only be applied to the transactions constituting the identified pattern

19. Finally, Viet Nam agrees with Korea that, assuming the third methodology can be used, it can only be applied to the transactions found to "differ significantly", that is, within the pattern. The two "normal[]" methodologies should be applied to transactions outside the pattern.

V. Conclusion

20. Madam Chair, distinguished Members of the Panel,

21. This is the first time that a panel will rule on the consistency of a Member's actions with the second sentence of Article 2.4.2. Your ruling will set an important precedent for the interpretation and the application of this provision. Viet Nam recognizes that, like many provisions under the Anti-dumping Agreement, Article 2.4.2 second sentence leaves a margin of discretion to the

[8] See Korea's First Written Submission, paras. 217-233.
[9] Korea's First Written Submission, paras. 142-144.

investigating authorities in how to operationalize its various conditions. However, this discretion cannot entail recourse to zeroing, nor can it justify reducing the conditions in Article 2.4.2 to formalities or thresholds that can easily be satisfied potentially in any investigation.

22. For the reasons explained above, Viet Nam would like to urge the panel to rule that the United States' "*Nails II*" methodology (as such and as applied in the *Washers* investigation) and the "differential pricing" methodology (as such); as well as other aspects of the United States' approach to the third methodology, are inconsistent with Articles 2.1 2.4, 2.4.2, 9.2 and 9.3 of the *Anti-dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994.

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