WORLD TRADE ORGANIZATION

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

AB-2016-2

Report of the Appellate Body

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AD	anti-dumping / anti-dumping duty
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 adopted by the Panel for the protection of BCI, attached as Annex A-2 to the Panel Report
CONNUM	control number
CVD	countervailing duty
DPM	Differential Pricing Methodology that replaced the Nails II methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
GOK	Government of Korea
HRD	human resources development
IGE	Informal Group of Experts
joint request	Joint request of the United States and Korea for additional procedures for the protection of BCI
LGE	LG Electronics, Inc.
LRWs	large residential washers
Nails II methodology	Methodology that was used by the USDOC to determine whether to apply the W-T comparison methodology
Panel	Panel in these proceedings
Panel Report	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R, 11 March 2016
R&D	research and development
Refrigerators anti-dumping investigation	USDOC [A-580-865] Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea
RSTA	Korea's Restriction of Special Taxation Act
RSTA Article 10(1)(3) tax credit programme	The tax credit programme under Article 10(1)(3) of the RSTA entitled "Tax Deduction for Research and Manpower Development"
RSTA Article 26 tax credit programme	The tax credit programme under Article 26 of the RSTA entitled "Tax Deduction for Facilities Investment"
RSTA Enforcement Decree	Presidential Decree No. 22037 enforcing the RSTA, issued on 18 February 2010
Samsung	Samsung Electronics Co., Ltd
SCM Agreement	Agreement on Subsidies and Countervailing Measures

Abbreviation	Description
SCM Committee	Committee on Subsidies and Countervailing Measures
SEL	Samsung Electronics Logitech
Seoul overcrowding area	The "overcrowding control region" of the Seoul metropolitan area pursuant to Article 23 of the RSTA Enforcement Decree as defined in Article 9 and Table 1 of the Enforcement Decree of the Seoul Metropolitan Area Readjustment Planning Act
SES	Samsung Electronics Service
SGEC	Samsung Gwangju Electronics Co., Ltd
SMEs	small and medium enterprises
T-T	transaction-to-transaction
USDOC	United States Department of Commerce
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331
Washers anti-dumping investigation	USDOC [A-580-868] Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea
Washers countervailing duty investigation	USDOC [C-580-869] Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
W-T	weighted average-to-transaction
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization
W-W	weighted average-to-weighted average

PANEL EXHIBITS CITED IN THIS REPORT

Exhibit No.	Short title (if any)	Description
KOR-1		USDOC [A–580–868] 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, No. 247 (26 December 2012), pp. 75988-75992
KOR-2	*Washers* final CVD determination	USDOC [C-580-869] Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 77, No. 247 (26 December 2012), pp. 75975-75978
KOR-18	*Washers* AD I&D memorandum	USDOC [A–580–868] Issues and Decision Memorandum for the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea (18 December 2012)
KOR-21		Oxford Dictionaries online, definition of "pattern" <http://www.oxforddictionaries.com/us/definition/american_english/pattern>, accessed 18 September 2014
KOR-25		USDOC, Differential Pricing Analysis; Request for Comments, *United States Federal Register*, Vol. 79, No. 90 (9 May 2014), pp. 26720-26723
KOR-32	*Washers* preliminary AD determination	USDOC [A–580–868] Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Large Residential Washers From the Republic of Korea, *United States Federal Register*, Vol. 77, No. 150 (3 August 2012), pp. 46391-46401

Exhibit No.	Short title (if any)	Description
KOR-33	*Xanthan gum* calculation memorandum	USDOC [A-570-985] Memorandum regarding 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 (4 March 2013)
KOR-36		*Dictionnaires de français Larousse* online, definition of "*configuration*" <http://www.larousse.fr/dictionnaires/francais/configuration>, accessed 18 September 2014
KOR-37		*Diccionario de la lengua española de Real Academia Española* online, definition of "*pauta*" <http://lema.rae.es/drae/?val=pauta>, accessed 18 September 2014
KOR-41 (BCI)	*Washers* final AD calculation for Samsung memorandum	USDOC [A-580-868] Memorandum to File regarding Antidumping Duty Investigation of Large Residential Washers from Korea – Samsung Final Determination Calculation Memorandum (18 December 2012) (contains BCI)
KOR-42 (BCI)	*Washers* final AD calculation for LGE memorandum	USDOC [A-580-868] Memorandum to File regarding Antidumping Duty Investigation of Large Residential Washers from Korea – Final Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (18 December 2012) (contains BCI)
KOR-43		USDOC, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, *United States Federal Register*, Vol. 79, No. 62 (1 April 2014), pp. 18262-18276
KOR-44 (BCI)		USDOC [C-580-869] Remand Redetermination, *Samsung Electronics Co., Ltd v. United States*, Final Results of Redetermination Pursuant to Court Order, USCIT, Court No. 13-00099, Slip Op. 14-39 (11 April 2014) (contains BCI)
KOR-45	*Washers* preliminary AD calculation for LGE memorandum	USDOC [A-580-868] Memorandum to File regarding Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea – Preliminary Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (27 July 2012)
KOR-46	*Washers* preliminary AD calculation for Samsung memorandum	USDOC [A-580-868] Memorandum to File regarding Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea – Preliminary Determination Margin Calculation for Samsung Electronics Co., Ltd and Samsung Electronics America, Inc. (27 July 2012)
KOR-72 (BCI)	Samsung *Washers* CVD questionnaire response	Response dated 9 April 2012 of Samsung Electronics Co., Ltd to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (contains BCI)
KOR-75 (BCI)	GOK *Washers* CVD questionnaire response	Response dated 9 April 2012 of the Government of Korea to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (contains BCI)
KOR-76	GOK *Washers* CVD questionnaire response	Response dated 9 April 2012 of the Government of Korea to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (including excerpts of Article 10 of the RSTA and Article 9 of the RSTA Enforcement Decree)
KOR-77	*Washers* final CVD I&D memorandum	USDOC [C-580-869] 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)
KOR-78 (BCI)	*Washers* CVD GOK questionnaire verification memorandum	USDOC [C-580-869] Memorandum to File regarding Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea – Verification of the Questionnaire Responses Submitted by the Government of the Republic of Korea (22 October 2012) (contains BCI)
KOR-79 (BCI)	*Washers* CVD Samsung questionnaire verification memorandum	USDOC [C-580-869] Memorandum to File regarding Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea – Verification of the Questionnaire Responses Submitted by Samsung Electronics Co., Ltd, Samsung Electronics [Logitech], and Samsung Electronics Service (22 October 2012) (contains BCI)

Exhibit No.	Short title (if any)	Description
KOR-81	GOK *Washers* CVD questionnaire response	Response dated 9 April 2012 of the Government of Korea to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (BCI-redacted version)
KOR-82 (BCI)	GOK *Washers* CVD case brief	Case Brief of the Government of Korea, Large Residential Washers from the Republic of Korea [C-580-869] (31 October 2012) (excerpt) (contains BCI)
KOR-85	*Washers* preliminary CVD determination	USDOC [C-580-869] Large Residential Washers From the Republic of Korea: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Determination, *United States Federal Register*, Vol. 77, No. 108 (5 June 2012), pp. 33181-33194
KOR-90	Samsung *Washers* CVD case brief	Case Brief of Samsung Electronics Co., Ltd, Large Residential Washers from the Republic of Korea [C-580-869] (2 November 2012) (excerpt)
KOR-91	GOK *Washers* CVD supplemental questionnaire response	Response of the Government of Korea to the USDOC's first supplemental questionnaire in the *Washers* CVD investigation [C-580-869] (containing exhibit S-25, "Excerpts from Seoul Metropolitan Area Readjustment Planning Act (with its Enforcement Decree)" (Korean/English))
KOR-96		USDOC [A-580-868] Large Residential Washers From the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014, *United States Federal Register*, Vol. 80, No. 45 (9 March 2015), pp. 12456-12458 USDOC [A-580-868] Memorandum regarding Large Residential Washers from Korea: Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014 (3 March 2015) USDOC [A-580-868] Memorandum to File regarding 2012-2014 Administrative Review of Large Residential Washers from Korea – Preliminary Results Margin Calculation for LGE (2 March 2015) (BCI-redacted version)
KOR-98 (BCI)	*Refrigerators* AD I&D memorandum *Refrigerators* AD Samsung cost verification memorandum	USDOC [A-580-865] Issues and Decision Memorandum for the Antidumping Duty Investigation of Bottom Mount Refrigerator-Freezers from the Republic of Korea (16 March 2012) (excerpts) USDOC [A-580-865] Memorandum to File regarding Verification of the Cost Response of Samsung Electronics Co., Ltd and Samsung Gwangju Electronics Co., Ltd in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea (21 December 2011) (excerpts) (contains BCI annexes)
KOR-99 (BCI)	*Washers* AD Samsung cost verification memorandum	USDOC [C-580-868] Memorandum to File regarding Verification of the Cost Response of Samsung Electronics Co., Ltd in the Less-Than-Fair-Value Investigation of Large Residential Washers from the Republic of Korea (17 October 2012) (contains BCI)
KOR-100 (BCI)	*Washers* preliminary AD calculation for LGE memorandum	USDOC [A-580-868] Memorandum to File regarding 2012-2014 Administrative Review of Large Residential Washers from Korea: Preliminary Results Margin Calculation for LGE (2 March 2015) (contains BCI annexes)
KOR-115 (BCI)	*Washers* CVD GOK questionnaire verification exhibit 10	Excerpts of exhibit 10 provided by Samsung to the USDOC in the *Washers* CVD GOK questionnaire verification (contains BCI)
KOR-121	*Washers* anti-dumping order	USDOC [A-201-842, A-580-868] Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, *United States Federal Register*, Vol. 78, No. 32 (15 February 2013), pp. 11148-11150
KOR-126 (BCI)	*Washers* CVD GOK questionnaire verification exhibit 12	Excerpts of exhibit 12 provided by Samsung to the USDOC in the *Washers* CVD GOK questionnaire verification (contains BCI)

Exhibit No.	Short title (if any)	Description
KOR-141		USDOC [A-580-868] Large Residential Washers From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review; 2012–2014, *United States Federal Register*, Vol. 80, No. 179 (16 September 2015), pp. 55595-55596 USDOC [A-580-868] Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Large Residential Washers from the Republic of Korea (8 September 2015)
USA-5		Oxford English Dictionary online, definition of "differ" <http://www.oed.com/view/Entry/52452?rskey=CRXlmt&result=2&print>, accessed 4 February 2014
USA-7		Oxford English Dictionary online, definition of "significantly" <http://www.oed.com/view/Entry/179570?redirectedFrom-significantly&print>, accessed 4 February 2014
USA-15		Negotiating Group on MTN Agreements and Arrangements, Amendments to the Anti-Dumping Code, Communication from the Delegation of Hong Kong, Addendum, GATT Document MTN.GNG/NG8/W/51/Add.1, 22 December 1989
USA-16		Negotiating Group on MTN Agreements and Arrangements, Communication from Japan, GATT Document MTN.GNG/NG8/W/30, 20 June 1988
USA-17		Negotiating Group on MTN Agreements and Arrangements, Communication from Japan Concerning the Anti-Dumping Code, GATT Document MTN.GNG/NG8/W/81, 9 July 1990
USA-18		Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989, MTN.GNG/NG8/13
USA-25	CVD preamble regulations	USDOC, Countervailing Duties: Final Rule, *United States Federal Register*, Vol. 63, No. 227 (25 November 1998), pp. 65348-65418
USA-26 (BCI)		USDOC [C-580-869] Memorandum to File regarding Final Countervailing Duty Determination: Large Residential Washers from the Republic of Korea (18 December 2012) (contains BCI)
USA-29	IGE Report	Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures, Note from the Informal Group of Experts (revision), G/SCM/W/415/Rev.2, 15 May 1998
USA-31		*The New Shorter Oxford English Dictionary on Historical Principles*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, pp. 644-645 and 1078-1079, and Vol. 2, pp. 2527-2528
USA-48		*The New Shorter Oxford English Dictionary on Historical Principles*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1614
USA-100		Response dated 10 April 2012 of Samsung Electronics Co., Ltd to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (BCI-redacted version)

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Short Title	Full Case Title and Citation
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057

Short Title	Full Case Title and Citation
Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
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, DSR 2013:IV, p. 1041
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 – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
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 – 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
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
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
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
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – DRAMS (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
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 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 – 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 – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3

Short Title	Full Case Title and Citation
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027
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 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	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
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 I	GATT Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, SCM/185, 15 November 1994, unadopted
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 – Lead and Bismuth II	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R, DSR 2000:VI, p. 2623
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
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 – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
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)	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 – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117

Short Title	Full Case Title and Citation
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	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
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 – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
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 (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

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea

United States, *Appellant/Appellee*
Korea, *Other Appellant/Appellee*

Brazil, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
European Union, *Third Participant*
India, *Third Participant*
Japan, *Third Participant*
Norway, *Third Participant*
Saudi Arabia, *Third Participant*
Thailand, *Third Participant*
Turkey, *Third Participant*
Viet Nam, *Third Participant*

AB-2016-2

Appellate Body Division:

Graham, Presiding Member
Bhatia, Member
Ramírez-Hernández, Member

1 INTRODUCTION

1.1. The United States and Korea each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*[1] (Panel Report). The Panel was established on 22 January 2014 to consider a complaint by Korea[2] with respect to the consistency of the United States' measures imposing definitive anti-dumping and countervailing duties on imports of large residential washers (LRWs) from Korea with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

1.2. On 3 September 2014, after consultations with the parties, the Panel adopted additional working procedures for the protection of business confidential information (BCI Procedures).[3] On 12 December 2014, the Panel rejected China's request for enhanced third party rights.[4] On 13 February 2015, the Panel also rejected the European Union's request to amend certain aspects of its working procedures and found that there was no need to modify its BCI Procedures in light of the "reservations" raised by the European Union.[5]

1.3. With regard to the United States' measures imposing definitive anti-dumping duties on imports of LRWs from Korea[6], Korea challenged before the Panel certain aspects of the methodologies used by the United States Department of Commerce (USDOC) to determine whether to apply the weighted average-to-transaction (W-T) comparison methodology. Specifically, Korea challenged: (i) the so-called "Nails II methodology"[7] used in the anti-dumping

[1] WT/DS464/R, 11 March 2016.
[2] Request for the Establishment of a Panel by Korea of 5 December 2013, WT/DS464/4.
[3] Panel Report, para. 1.10 and Annex A-2.
[4] China had indicated that it was a party to a parallel panel proceeding (WT/DS471) and accordingly requested enhanced third party rights. (Panel Report, paras. 1.11-1.12)
[5] Panel Report, paras. 1.13-1.14.
[6] The anti-dumping measures that the Panel referred to are those cited in paragraphs 2.4.a-2.4.e of the Panel Report.
[7] The methodology that was used by the USDOC to determine whether to apply the W-T comparison methodology, introduced in the Polyethylene Retail Carrier Bags from Taiwan anti-dumping investigation in March 2010.

investigation conducted by the USDOC concerning imports of LRWs from Korea[8] (*Washers* anti-dumping investigation); (ii) the so-called "Differential Pricing Methodology" that replaced the Nails II methodology as of March 2013 (DPM) "as such"; (iii) the DPM "as applied" in the first administrative review of the anti-dumping order imposing anti-dumping duties on LRWs from Korea issued by the USDOC on 15 February 2013[9] (*Washers* anti-dumping order); and (iv) the ongoing and future application of the DPM in connection with the *Washers* anti-dumping investigation. Korea also challenged the USDOC's use of "zeroing" in the context of the W-T comparison methodology.[10] Specifically, Korea challenged: (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.[11]

1.4. With regard to the United States' measures imposing definitive countervailing duties on imports of LRWs from Korea in connection with the *Washers* countervailing duty investigation[12], Korea challenged under the SCM Agreement the USDOC's determinations that two tax credit programmes[13] were specific. Moreover, Korea raised claims under the SCM Agreement and the GATT 1994 challenging the manner in which the USDOC calculated the *ad valorem* subsidy rate for Samsung Electronics Co., Ltd (Samsung)[14] under those programmes.[15]

1.5. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 11 March 2016, the Panel found as follows concerning the anti-dumping measures at issue:

a. with regard to the *Washers* anti-dumping investigation:

   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[16];

   ii. Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement 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[17];

   iii. the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement by merely focusing on the difference between the margin of dumping calculated using the weighted average-to-weighted average

[8] USDOC [A-580-868] Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea.

[9] USDOC [A-201-842, A-580-868] Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, *United States Federal Register*, Vol. 78, No. 32 (15 February 2013), pp. 11148-11150 (Panel Exhibit KOR-121).

[10] Zeroing occurs in the context of establishing margins of dumping using the W-T comparison methodology when the USDOC sets at zero any negative comparison result when the results from multiple comparisons between the weighted average normal value and each of the individual export transactions are aggregated. (Panel Report, para. 7.172)

[11] Panel Report, para. 2.2.

[12] USDOC [C-580-869] Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea. The countervailing duties that the Panel referred to are those cited in paragraphs 2.4.f-2.4.i of the Panel Report.

[13] The two tax credit programmes are established under Article 10(1)(3) of Korea's Restriction of Special Taxation Act (RSTA), entitled "Tax Deduction for Research and Manpower Development" (RSTA Article 10(1)(3) tax credit programme), and under Article 26 of the RSTA, entitled "Tax Deduction for Facilities Investment" (RSTA Article 26 tax credit programme), respectively.

[14] The amount of subsidy under the RSTA Article 10(1)(3) tax credit programme was conferred on Samsung and its three Korean subsidiaries, i.e. Samsung Gwangju Electronics Co., Ltd (SGEC), Samsung Electronics Service (SES), and Samsung Electronics Logitech (SEL), whereas the amount of subsidy under the RSTA Article 26 tax credit programme was conferred on Samsung and its two Korean subsidiaries, SGEC and SEL. (USDOC [C-580-869] Memorandum to File regarding Final Countervailing Duty Determination: Large Residential Washers from the Republic of Korea (18 December 2012) (Panel Exhibit USA-26 (BCI)), p. 5)

[15] Panel Report, para. 2.3.

[16] Panel Report, para. 8.1.a.i.

[17] Panel Report, para. 8.1.a.ii.

(W-W) comparison methodology and the margin of dumping calculated using the W-T comparison methodology, and by failing to consider whether the factual circumstances surrounding the relevant price differences were suggestive of something other than "targeted dumping"[18]; and

iv. Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement by failing to explain why the relevant price differences could not be taken into account appropriately by the transaction-to-transaction (T-T) comparison methodology[19];

b. with regard to the DPM:

i. the DPM is inconsistent "as such" with the second sentence of 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"[20] accounts for 66% or more of the value of total sales[21];

ii. Korea failed to establish that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement 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[22];

iii. the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement because, in applying the "meaningful difference test"[23], the DPM focuses on the 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 or the "mixed" comparison methodology.[24] The Panel also found that the DPM fails to provide for any consideration of whether the factual circumstances surrounding the relevant price differences are suggestive of something other than "targeted dumping"[25];

iv. Korea failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement 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[26];

v. the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement because, by aggregating random and unrelated price

[18] Panel Report, para. 8.1.a.iii.
[19] Panel Report, para. 8.1.a.iv.
[20] The Cohen's *d* test is used by the USDOC as part of the DPM to evaluate the extent of price differences. The Cohen's *d* test is described in greater detail in paragraph 5.9 of this Report.
[21] Panel Report, para. 8.1.a.vi.
[22] Panel Report, para. 8.1.a.v.
[23] Under the "meaningful difference test", the USDOC examines whether the W-W comparison methodology can appropriately account for identified differences in prices. The meaningful difference test is described in greater detail in paragraph 5.12 of this Report.
[24] As we explain below, where the value of the transactions that pass the Cohen's *d* test accounts for more than 33% but less than 66% of the value of total sales, the USDOC combines the application of the W-T comparison methodology to certain transactions (i.e. those transactions that pass the Cohen's *d* test) with the application of the W-W comparison methodology to other transactions (i.e. those transactions that do not pass the Cohen's *d* test). This was referred to as the "mixed" comparison methodology by the Panel. Where the value of the transactions that pass the Cohen's *d* test accounts for 66% or more of the value of total sales, the USDOC applies the W-T comparison methodology to all sales.
[25] Panel Report, para. 8.1.a.vii.
[26] Panel Report, para. 8.1.a.viii.

variations, the DPM does not properly establish "a pattern of export prices which differ significantly among different purchasers, regions or time periods"[27];

vi. Korea failed to establish that the United States' use of "systemic disregarding"[28] under the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement[29]; and

vii. Korea failed to establish that the United States' use of "systemic disregarding" under the DPM is inconsistent "as such" with Article 2.4 of the Anti-Dumping Agreement[30]; and

c. with regard to zeroing:

i. 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[31];

ii. 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[32];

iii. 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[33];

iv. 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[34]; and

v. 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.[35]

1.6. In addition, the Panel found as follows concerning the countervailing duties at issue:

a. the USDOC's original and remand determinations that the "RSTA Article 10(1)(3) tax credit programme"[36] is *de facto* specific because Samsung received subsidies under that programme in disproportionately large amounts are inconsistent with Article 2.1(c) of the SCM Agreement[37];

[27] Panel Report, para. 8.1.a.ix.

[28] As we explain below, "systemic disregarding" occurs when the W-T comparison methodology applied to the transactions that pass the Cohen's *d* test is combined with the W-W comparison methodology applied to the transactions that do not pass the Cohen's *d* test and, if the latter yields an overall negative comparison result, the same is disregarded or set to zero.

[29] Panel Report, para. 8.1.a.x.

[30] Panel Report, para. 8.1.a.xi.

[31] Panel Report, para. 8.1.a.xii.

[32] Panel Report, para. 8.1.a.xiii.

[33] Panel Report, para. 8.1.a.xiv.

[34] Panel Report, para. 8.1.a.xv.

[35] Panel Report, para. 8.1.a.xvi. The Panel, however, declined to make any findings regarding Korea's allegations 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". (Ibid., para. 8.2) Moreover, the Panel did 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 did it consider it necessary to address Korea's claims against zeroing under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in "subsequent connected stages" of the *Washers* anti-dumping investigation. The Panel also did not consider it necessary to address Korea's "as applied" and "ongoing conduct" claims concerning the DPM. (Ibid., para. 8.3)

[36] See *supra*, fn 13.

[37] Panel Report, para. 8.1.b.i.

b. 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[38];

c. Korea failed to establish that the USDOC's determination of regional specificity in respect of the "RSTA Article 26 tax credit programme"[39] is inconsistent with Article 2.2 of the SCM Agreement[40];

d. Korea failed to establish that the USDOC's failure to tie the subsidies claimed by Samsung under the RSTA Article 10(1)(3) and Article 26 tax credit programmes to Samsung's digital appliance products (including LRWs) is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994[41]; and

e. 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 to Samsung under the RSTA Article 10(1)(3) tax credit programme.[42]

1.7. In accordance with Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and having found that the United States had acted inconsistently with certain provisions of the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994, the Panel recommended that the United States bring its measures into conformity with its obligations under those Agreements.[43]

1.8. On 19 April 2016, the United States notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal[44] and appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[45] (Working Procedures). On 25 April 2016, Korea notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal[46] and other appellant's submission pursuant to Rule 23 of the Working Procedures. On 9 May 2016, Korea and the United States each filed an appellee's submission.[47] On 9 May 2016, China filed a third participant's submission.[48] On 10 May 2016, Brazil, Canada, the European Union, Japan, Norway, and Viet Nam each filed a third participant's submission.[49] On 17 June 2016, India, Saudi Arabia, Thailand, and Turkey each notified its intention to appear at the oral hearing as a third participant.[50]

1.9. On 22 April 2016, the Appellate Body Secretariat transmitted the Working Schedule for Appeal drawn up by the Appellate Body Division hearing this appeal, setting out the deadlines for filing written submissions.

1.10. On 5 April 2016, Korea and the United States had jointly addressed a letter to the Chair of the Appellate Body, attaching a request that the Division that would eventually hear an appeal in this dispute adopt, pursuant to Rule 16(1) of the Working Procedures, additional procedures for the protection of BCI on the record of this dispute (joint request). Korea and the United States

[38] Panel Report, para. 8.1.b.ii.
[39] See *supra*, fn 13.
[40] Panel Report, para. 8.1.b.iii.
[41] Panel Report, para. 8.1.b.iv.
[42] Panel Report, para. 8.1.b.v.
[43] Panel Report, para. 8.5.
[44] WT/DS464/7.
[45] WT/AB/WP/6, 16 August 2010.
[46] WT/DS464/8.
[47] Pursuant to Rules 22 and 23(4) of the Working Procedures.
[48] Pursuant to Rule 24(1) of the Working Procedures.
[49] Pursuant to Rule 24(1) of the Working Procedures.
[50] India, Saudi Arabia, Thailand, and Turkey each submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For the purposes of this appeal, we have interpreted these actions as notifications expressing the intention of India, Saudi Arabia, Thailand, and Turkey to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

requested the Division to adopt additional procedures for the protection of BCI on the basis of the BCI procedures adopted by the Panel, and attached draft procedures to the joint request. They explained that BCI procedures in this appeal would serve "the interest of fairness and orderly procedure in the conduct of an appeal", according to Rule 16(1) of the Working Procedures. On 8 April 2016, the European Union addressed a letter to the Chair of the Appellate Body commenting on the joint request. The European Union expressed the view that BCI procedures at the appellate stage should not be based on the Panel's BCI procedures.

1.11. By letter dated 19 April 2016, the United States sought guidance from the Appellate Body on how to proceed with filing its appellant's submission, which was to be filed that day and contained information that was designated as BCI in the Panel proceedings. In a letter issued on the same day, the Chair of the Appellate Body, on behalf of the Division hearing this appeal, informed the United States, Korea, and the third parties that, pending a final decision on the joint request, the Division had decided to provide provisional additional protection to information marked as BCI in the United States' appellant's submission and in an eventual other appellant's submission by Korea.[51]

1.12. On 21 April 2016, the Chair of the Appellate Body addressed a letter on behalf of the Division hearing this appeal to the participants, asking them to substantiate further why certain information contained in their submissions and in the Panel record warranted special protection at the appellate stage beyond that already provided under the confidentiality standards set out in Articles 17.10 and 18.2 of the DSU, and the Rules of Conduct.[52] Korea and the United States responded to this request with separate communications on 26 April 2016. On the same date, the Division invited the third participants to provide further comments on the joint request and on Korea's and the United States' responses of 26 April 2016. On 27 April 2016, the European Union provided comments and, on 28 April 2016, China indicated that it had no objection to the requested additional protection of BCI.

1.13. On 9 May 2016, the Division hearing this appeal issued a Procedural Ruling on the protection of BCI on the record in this dispute, which is contained in Annex D of the Addendum to this Report, WT/DS464/AB/R/Add.1.

1.14. By letter dated 19 May 2016 to the Chair of the Appellate Body, Korea requested authorization, pursuant to Rule 18(5) of the Working Procedures, to correct certain clerical errors in its Notice of Other Appeal, other appellant's submission, and appellee's submission. In accordance with Rule 18(5), the Division, by letter dated 20 May 2016, provided the United States, the third participants, and third parties with an opportunity to comment in writing on the request by 23 May 2016. No objections to Korea's request were received and, on 25 May 2016, the Division authorized Korea to correct the clerical errors in its Notice of Other Appeal, other appellant's submission, and appellee's submission, as identified in its letter of 19 May 2016.

1.15. In a letter from the Appellate Body dated 15 June 2016, the United States and Korea were asked to keep their opening statements at the oral hearing to 30 minutes each and the third participants to keep their opening statements to a maximum of five minutes each. In a communication dated 16 June 2016, China requested the Division to allocate further five minutes for its opening statement. China also stated that it looked forward to a full opportunity to engage on the relevant issues during the hearing, in light of its direct and immediate interest in the issues

[51] This provisional additional protection prescribed that: (i) no person may have access to BCI except a Member of the Appellate Body or its Secretariat, an employee of a participant, third participant or third party, and an outside advisor for the purposes of this dispute to a participant, third participant or third party; (ii) 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; (iii) a participant, third participant or third party having access to BCI shall not disclose that information other than to those persons authorized to receive it pursuant to these provisional procedures; and (iv) each participant and third participant shall have responsibility in this regard for its employees, as well as any outside advisors used for the purposes of this dispute.

[52] The Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are directly incorporated into the Working Procedures for Appellate Review (WT/AB/WP/6), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

raised in this appeal.[53] By letter dated 17 June 2016, the Presiding Member explained that, in light of the many issues raised in this appeal and in order to be able to complete the hearing within a reasonable time-frame, the Division did not consider that it would be appropriate to extend the time allocated for opening statements.

1.16. On 17 June 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period stipulated in Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, and informed the Chair of the DSB that the circulation date of the Appellate Body Report in this appeal would be communicated to the participants and third participants after the oral hearing.[54] The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body in 2016, scheduling difficulties arising from overlap in the composition of the Divisions hearing the different appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat. On 7 July 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Report in this appeal would be circulated to WTO Members no later than Wednesday, 7 September 2016.[55]

1.17. The oral hearing in this appeal was held on 20-21 June 2016.[56] The participants and six third participants (Brazil, Canada, China, Japan, Norway, and Viet Nam) made opening oral statements. The participants and third participants responded to questions posed by the Appellate Body Division hearing this appeal.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[57] The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS464/AB/R/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission are reflected in the executive summaries of those submissions provided to the Appellate Body[58] and are contained in Annex C of the Addendum to this Report, WT/DS464/AB/R/Add.1.

4 ISSUES RAISED IN THIS APPEAL

4.1. With regard to the anti-dumping measures, the following issues are raised in this appeal:

a. whether the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in relation to the Nails II methodology and the DPM. In particular:

   i. whether the Panel erred in its interpretation of the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 in finding that "the relevant 'pattern' … comprises only low-priced export transactions to each particular 'target' (be that a

[53] China explained that several issues of interpretation raised in this appeal are directly relevant to the parallel panel proceedings in the dispute *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings involving China* (DS471).

[54] WT/DS464/9.

[55] WT/DS464/10.

[56] On 25 April 2016, the United States had informed the Appellate Body that it would have significant difficulty participating in an oral hearing scheduled during the week of 6 June 2016 or 4 July 2016, due to the unavailability of key members of the United States' delegation during those periods.

[57] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

[58] Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are 'non-pattern' transactions"[59] (raised by the United States);

ii. whether the Panel erred in finding 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 purchasers, regions or time periods" (raised by the United States);

iii. whether the Panel erred in finding that the United States acted inconsistently with the second sentence of Article 2.4.2 because the USDOC applied the W-T comparison methodology to all export transactions, including transactions other than those constituting the patterns of transactions that it had determined to exist in the *Washers* anti-dumping investigation (raised by the United States);

iv. whether the Panel erred in finding that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 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 accounts for 66% or more of the value of total sales (raised by the United States);

v. whether the Panel erred in finding that 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 because the USDOC determined the existence of "a pattern of export prices which differ significantly" based on purely quantitative criteria, without any qualitative assessment of the "reasons" for the relevant price differences (raised by Korea);

vi. whether the Panel erred in finding that Korea failed to establish that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 because it determines the existence of "a pattern of export prices which differ significantly" based on purely quantitative criteria, without any qualitative assessment of the "reasons" for the relevant price differences (raised by Korea);

vii. whether the Panel erred in finding that 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 because the USDOC did not explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology (raised by Korea); and

viii. whether the Panel erred in finding that Korea failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 because when, having concluded that the W-W comparison methodology cannot appropriately take into account the observed price differences, it does not also consider whether the relevant price differences could be taken into account appropriately by the T-T comparison methodology (raised by Korea);

b. whether the Panel erred in finding that the use of "systemic disregarding" in the context of the DPM, whereby, when the W-T comparison methodology applied to "pattern transactions" is combined with the W-W comparison methodology applied to "non-pattern transactions", an overall negative comparison result arising from the application of the W-W comparison methodology is disregarded or set to zero, is not inconsistent "as such" with Article 2.4 and the second sentence of Article 2.4.2 of the Anti-Dumping Agreement (raised by Korea); and

c. whether the Panel erred in its interpretation and application of Articles 2.4, 2.4.2, and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 when it found that the use of zeroing when applying the W-T comparison methodology is inconsistent

[59] United States' appellant's submission, para. 34.

"as such" with these provisions and that the United States acted inconsistently with Article 2.4 and the second sentence of Article 2.4.2 by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation (raised by the United States).

4.2. With regard to the countervailing duties, the following issues are raised in this appeal:

a. whether the Panel erred in its interpretation and application of Article 2.2 of the SCM Agreement by upholding the USDOC's determination that the RSTA Article 26 tax credit programme was regionally specific (raised by Korea);

b. whether the Panel failed to conduct an objective assessment of the matter before it in articulating its findings on regional specificity, thereby acting inconsistently with its duties under Article 11 of the DSU (raised by Korea);

c. whether the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by upholding the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA were not tied to particular products (raised by Korea);

d. whether the Panel failed to conduct an objective assessment of the matter before it in finding that tax credits bestowed under Article 10(1)(3) of the RSTA are not research and development (R&D) subsidies, thereby acting inconsistently with its duties under Article 11 of the DSU (raised by Korea); and

e. whether the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by upholding the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA to the sales value of Samsung's products manufactured in Korea only (raised by Korea).

5 ANALYSIS OF THE APPELLATE BODY

5.1. We first address the claims raised on appeal under the Anti-Dumping Agreement and the related claims under the GATT 1994, before turning to the claims on appeal under the SCM Agreement and the related claims under the GATT 1994.

5.1 Claims under the Anti-Dumping Agreement and related claims under the GATT 1994

5.1.1 Background

5.1.1.1 The Nails II methodology and the *Washers* anti-dumping investigation

5.2. The *Washers* anti-dumping investigation was initiated on 19 January 2012 and concerned LRWs produced by three Korean companies, including LG Electronics, Inc. (LGE) and Samsung.[60] During the investigation, the USDOC applied the Nails II methodology to determine whether "targeted dumping" was occurring and whether to use the W-T comparison methodology to determine dumping margins for LGE and Samsung.

5.3. The Nails II methodology applied a two-stage test run on a model basis, with each model being assigned a control number (CONNUM).[61] First, following an allegation of "targeted dumping" by a member of the domestic industry, the "standard deviation test" aimed to establish whether there were price differences by considering whether the weighted average price to one "targeted" group (i.e. customer, time period, or region) in a particular CONNUM was below a benchmark price equal to one standard deviation below the weighted average mean price in that CONNUM. Second,

[60] USDOC [A–580–868] Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Large Residential Washers From the Republic of Korea, *United States Federal Register*, Vol. 77, No. 150 (3 August 2012) (*Washers* preliminary AD determination) (Panel Exhibit KOR-32), p. 46391.

[61] Panel Report, fn 54 to para. 7.10. See also USDOC [A–580–868] Issues and Decision Memorandum for the Antidumping Duty Investigation of Large Residential Washers from the Republic of Korea (18 December 2012) (*Washers* AD I&D memorandum) (Panel Exhibit KOR-18), pp. 19-20.

the "gap test" aimed to establish whether the observed price differences were significant. Where the gap between the weighted average price of the sales to the "targeted" group and the next highest weighted average price of sales to a "non-targeted" group exceeded the average gap among the weighted average prices between the "non-targeted" groups, those sales were considered to have passed the gap test.

5.4. If both tests were met[62], the USDOC evaluated the difference between the weighted average dumping margin calculated using the W-W comparison methodology (without zeroing) and that calculated using the W-T comparison methodology (with zeroing). The W-T comparison methodology was applied to all export sales where there was a meaningful difference between the two results.

5.5. During the *Washers* anti-dumping investigation, a domestic producer of LRWs had alleged that "targeted dumping" was occurring with respect to LRWs produced in, and exported from, Korea by LGE and Samsung.[63] LGE and Samsung asserted that the alleged "targeted" sales corresponded to, *inter alia*, normal promotional practices.[64] The USDOC, however, took the view that it was not required "to consider why [the price] differences exist".[65] Applying the Nails II methodology, the USDOC found "a pattern of U.S. prices … that differs significantly among certain time periods, customers, and regions" for LGE as well as for Samsung.[66] The identified "pattern" was "defined by all of the respondent's U.S. sales".[67] Moreover, the USDOC explained that using the W-W comparison methodology "conceal[ed] differences" between the export prices and that there was 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.[68] Consequently, the USDOC applied the W-T comparison methodology with zeroing to all of LGE's and Samsung's export transactions to establish margins of dumping for these two exporters.[69]

5.6. On 26 December 2012, the USDOC issued a Notice of Final Determination finding that LRWs were being sold or were likely to be sold in the United States at less than fair value.[70] On this basis, and on the basis of the material injury determination of the United States International Trade Commission, the USDOC issued, on 15 February 2013, the *Washers* anti-dumping order.[71]

[62] The alleged "targeted" group was found to have passed the standard deviation test when more than 33% of the sales to the "targeted" group passed this test. Moreover, if the sales passing the gap test accounted for more than 5% of the producer's sales by volume (for the basis being tested, i.e. purchasers, regions, or time periods), the USDOC considered the price differences to be significant.

[63] *Washers* preliminary AD determination (Panel Exhibit KOR-32), pp. 46391 and 46394.

[64] *Washers* AD I&D memorandum (Panel Exhibit KOR-18), pp. 15-18.

[65] *Washers* AD I&D memorandum (Panel Exhibit KOR-18), p. 23.

[66] *Washers* preliminary AD determination (Panel Exhibit KOR-32), p. 46395.

[67] *Washers* AD I&D memorandum (Panel Exhibit KOR-18), p. 34.

[68] Panel Report, para. 7.54 (quoting *Washers* preliminary AD determination (Panel Exhibit KOR-32), p. 46395, and referring to USDOC [A-580-868] Memorandum to File regarding Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea – Preliminary Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (27 July 2012) (*Washers* preliminary AD calculation for LGE memorandum) (Panel Exhibit KOR-45), pp. 3-4; and USDOC [A-580-868] Memorandum to File regarding Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea – Preliminary Determination Margin Calculation for Samsung Electronics Co., Ltd and Samsung Electronics America, Inc. (27 July 2012) (*Washers* preliminary AD calculation for Samsung memorandum) (Panel Exhibit KOR-46), p. 3); and para. 7.56 (quoting *Washers* AD I&D memorandum (Panel Exhibit KOR-18), p. 20, and referring to USDOC [A-580-868] Memorandum to File regarding Antidumping Duty Investigation of Large Residential Washers (Washing Machines) from Korea – Samsung Final Determination Calculation Memorandum (18 December 2012) (*Washers* final AD calculation for Samsung memorandum) (Panel Exhibit KOR-41 (BCI)), p. 2; and USDOC [A-580-868] Memorandum to File regarding Antidumping Duty Investigation of Large Residential Washers from Korea – Final Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (18 December 2012) (*Washers* final AD calculation for LGE memorandum) (Panel Exhibit KOR-42 (BCI)), p. 2).

[69] Panel Report, para. 7.11 (referring to *Washers* AD I&D memorandum (Panel Exhibit KOR-18), pp. 33-34); and para. 7.173 (referring to Korea's response to Panel question No. 1.2, para. 13).

[70] USDOC [A–580–868] 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, No. 247 (26 December 2012), pp. 75988-75992 (Panel Exhibit KOR-1).

[71] Panel Exhibit KOR-121.

5.1.1.2 The DPM and the first administrative review of the *Washers* anti-dumping order

5.7. The USDOC initiated an administrative review of the *Washers* anti-dumping order on 1 April 2014.[72] In this administrative review, the USDOC applied the DPM, which replaced the Nails II methodology as of March 2013[73], to determine whether to apply the W-T comparison methodology to establish dumping margins for LGE.[74]

5.8. Unlike the Nails II methodology, where an allegation of "targeted dumping" from the domestic industry was required, the USDOC applies the DPM on its own motion.[75] The DPM consists of three main components.[76]

5.9. First, the "Cohen's *d* test" evaluates the extent of the difference between the mean price of a test group that comprises the sales to a particular purchaser, region, or time period and the mean price of a comparison group that comprises all other sales of comparable merchandise.[77] The Cohen's *d* test is applied by the USDOC when the test and comparison groups each have at least two observations (i.e. two transactions) and when the sales quantity for the comparison group accounts for at least 5% of the total sales quantity of the comparable merchandise. The Cohen's *d* coefficient is then 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 the difference is quantified by one of three fixed thresholds defined by the Cohen's *d* test: small (0.2); medium (0.5); or large (0.8). The difference is considered significant if the Cohen's *d* coefficient is equal to or exceeds the large threshold.

5.10. Unlike the Nails II methodology, the DPM is not concerned with prices that are "targeted" at a *particular* customer, region, or time period. Rather, the focus is on any differences in prices, irrespective of whether such prices are *above* or *below* the average and without the prior identification of a specific purchaser, region, or time period. The DPM thus analyses any given export transaction in three different ways (by purchaser, region, and time period) in order to identify six possible types of price variation, namely: (i) higher prices to a particular purchaser; (ii) lower prices to a particular purchaser; (iii) higher prices in a particular region; (iv) lower prices in a particular region; (v) higher prices during a particular time period; and (vi) lower prices during a particular time period.[78]

5.11. Second, the "ratio test" assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. When the result of the ratio test is above 66%, in the sense that the value of the transactions to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for 66% or more of the value of the total sales, the application of the W-T comparison methodology (with zeroing) is being considered for all export transactions. When it is between 33% and 66%, a combined application of the W-T comparison methodology and the W-W comparison methodology is being considered (this is referred to as the "mixed" comparison methodology by the Panel). When it is below 33%, the application of the W-T comparison methodology is not being considered.

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[72] USDOC, Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, *United States Federal Register*, Vol. 79, No. 62 (1 April 2014) (Panel Exhibit KOR-43), pp. 18262 and 18264.

[73] Panel Report, para. 7.89 (referring to USDOC [A-570-985] Memorandum regarding 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 (4 March 2013) (*Xanthan gum* calculation memorandum) (Panel Exhibit KOR-33)).

[74] Unlike LGE, Samsung did not participate in this administrative review.

[75] Panel Report, fn 268 to para. 7.138. See also USDOC, Differential Pricing Analysis; Request for Comments, *United States Federal Register*, Vol. 79, No. 90 (9 May 2014) (Panel Exhibit KOR-25), p. 26722.

[76] Panel Report, para. 7.107. These steps are described in detail at Panel Report, para. 7.100 (quoting *Xanthan gum* calculation memorandum (Panel Exhibit KOR-33), pp. 3-5).

[77] Groups of purchasers are defined using reported customer code information. Regions are defined by reported destination codes (i.e. zip codes) and are grouped into regions based on standard definitions published by the United States Census Bureau, a sub-agency of the USDOC. Time periods are defined by quarter. Finally, comparable merchandise is defined using CONNUMs, as well as other characteristics of the sales, other than purchaser, region, and time period. (See Panel Report, para. 7.100 (quoting *Xanthan gum* calculation memorandum (Panel Exhibit KOR-33), pp. 3-5))

[78] Panel Report, para. 7.138.

5.12. Third, the "meaningful difference test" examines whether the use of the W-W comparison methodology can appropriately account for the differences found to exist in the first two stages of the analysis. By applying this test, the USDOC compares the weighted average dumping margin obtained using the W-T comparison methodology with that resulting from the use of the W-W comparison methodology. If there is a meaningful difference between the two results, this demonstrates that the W-W comparison methodology cannot account for the identified price differences. A difference is considered meaningful if there is a 25% relative change in the weighted average dumping margin or if the weighted average dumping margin moves across the *de minimis* threshold. If the meaningful difference test is met and the result of the ratio test is above 66%, the W-T comparison methodology is applied to all export transactions. By contrast, if the meaningful difference test is met and the result of the ratio test is between 33% and 66%, the W-T comparison methodology is applied to those sales that pass the Cohen's *d* test and the W-W comparison methodology is applied to the remaining sales.[79]

5.13. Applying the DPM in the first administrative review of the *Washers* anti-dumping order, the USDOC determined that 47.12% of LGE's sales passed the Cohen's *d* test.[80] The result of the ratio test was thus between 33% and 66%. The USDOC further determined that the meaningful difference test was met.[81] Consequently, the USDOC applied the W-T comparison methodology (with zeroing) to those sales that passed the Cohen's *d* test and the W-W comparison methodology (without zeroing) to the remaining sales of LGE. When combining the overall comparison results of the W-T and the W-W comparison methodologies, the USDOC disregarded the overall negative comparison result arising from the W-W comparison methodology (this is referred to as "systemic disregarding"). The preliminary results of the first administrative review of the *Washers* anti-dumping order were presented on 9 March 2015 and the final results were published on 8 September 2015.[82]

5.1.2 Article 2.4.2 of the Anti-Dumping Agreement

5.14. Article 2.4.2 of the Anti-Dumping Agreement reads:

> 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.

5.15. The first sentence of Article 2.4.2 provides for two symmetrical comparison methodologies that "shall normally" be used by investigating authorities to establish "margins of dumping": (i) the W-W comparison methodology, whereby dumping margins are established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all

[79] Where the result of the ratio test is below 33%, the USDOC does not apply the W-T comparison methodology.

[80] USDOC [A-580-868] Memorandum to File regarding 2012-2014 Administrative Review of Large Residential Washers from Korea: Preliminary Results Margin Calculation for LGE (2 March 2015) (*Washers* preliminary AD calculation for LGE memorandum) (Panel Exhibit KOR-100 (BCI)), p. 1.

[81] *Washers* preliminary AD calculation for LGE memorandum (Panel Exhibit KOR-100 (BCI)), p. 2.

[82] Panel Report, para. 7.170 (referring to USDOC [A-580-868] Large Residential Washers From the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014, *United States Federal Register*, Vol. 80, No. 45 (9 March 2015), pp. 12456-12458 / USDOC [A-580-868] Memorandum regarding Large Residential Washers from Korea: Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014 (3 March 2015) / USDOC [A-580-868] Memorandum to File regarding 2012-2014 Administrative Review of Large Residential Washers from Korea – Preliminary Results Margin Calculation for LGE (2 March 2015) (BCI-redacted version) (Panel Exhibit KOR-96); and USDOC [A-580-868] Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Large Residential Washers from the Republic of Korea (8 September 2015) (Panel Exhibit KOR-141)).

comparable export transactions; and (ii) the T-T comparison methodology, whereby normal value and export prices are compared on a transaction-specific basis. As the Appellate Body has explained, the W-W and T-T comparison methodologies "fulfil the same function" and there is no "hierarchy between the two".[83] Accordingly, the Appellate Body found:

> An investigating authority may choose between the two depending on which is most suitable for the particular investigation. Given that the two methodologies are alternative means for establishing "margins of dumping" and that there is no hierarchy between them, it would be illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology.[84]

5.16. The second sentence of Article 2.4.2 provides for a comparison methodology that is asymmetrical: the W-T comparison methodology, whereby a weighted average normal value is compared to prices of individual export transactions. This comparison methodology may be used if the following two conditions are met: first, "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and, second, "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."[85]

5.17. The second sentence of Article 2.4.2 allows investigating authorities to address pricing behaviour that is focused on, or "targeted" to, purchasers, regions, or time periods by having recourse to the W-T comparison methodology. The function of the second sentence of Article 2.4.2 is, therefore, to enable investigating authorities to identify so-called "targeted dumping" and to address it appropriately.[86] The Appellate Body has stated that "[t]his provision 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."[87] The Appellate Body has further suggested that the second sentence of Article 2.4.2 allows investigating authorities to "unmask targeted dumping".[88]

5.18. Whereas the first sentence of Article 2.4.2 provides that investigating authorities "shall normally" use the W-W or the T-T comparison methodology, the second sentence of Article 2.4.2 stipulates that a weighted average normal value "may be compared" to prices of individual export transactions, provided the two above-mentioned conditions are met. In particular, the requirement in the second sentence of Article 2.4.2 that an explanation be provided contemplates that there may be circumstances in which an investigating authority identifies a "pattern of export prices which differ significantly among different purchasers, regions or time periods", but where "such differences" could be taken into account appropriately by the W-W or T-T comparison methodology.[89] It follows that the W-T comparison methodology is an "exception" to the comparison methodologies in the first sentence that are normally to be used. In *US – Zeroing (Japan)*, the Appellate Body stated that "[t]he asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which normally are to be

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

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

[85] See also Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 86; and *US – Zeroing (Japan*), para. 131. The Panel referred to these two conditions as the "pattern clause" and the "explanation clause", respectively. Moreover, the Panel referred to the first part of the second sentence of Article 2.4.2, which sets out that "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions" as the "methodology clause". (Panel Report, para. 7.9)

[86] The second sentence of Article 2.4.2 does not expressly refer to "targeted dumping". However, the notion of "targeted dumping" appears to be implied in the reference in the second sentence of Article 2.4.2 to "a pattern of export prices which differ significantly among different purchasers, regions or time periods".

[87] Appellate Body Report, *EC – Bed Linen*, para. 62.

[88] Appellate Body Reports, *US – Zeroing (Japan)*, para. 135; *US – Stainless Steel (Mexico)*, para. 127. In *US – Stainless Steel (Mexico)*, the Appellate Body also stated that "[t]he second sentence of Article 2.4.2 provides an asymmetrical comparison methodology to address a so-called pattern of 'targeted' dumping found among certain purchasers, in certain regions, or during certain time periods." (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 122)

[89] Appellate Body Report, *US – Zeroing (Japan)*, para. 131. The Appellate Body explained that "[t]he second requirement … contemplates that there may be circumstances in which targeted dumping could be adequately addressed through the normal symmetrical comparison methodologies." (Ibid.)

used."[90] In the same vein, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body stated that the W-T comparison methodology "may be used only in exceptional circumstances" and that it is "an exception".[91]

5.19. We start our analysis with the United States' claims that the Panel erred in its interpretation of the relevant "pattern" and in finding that the DPM does not properly establish a "pattern", before addressing the United States' claims pertaining to the scope of application of the W-T comparison methodology. We then turn to Korea's claims concerning the identification of a pattern of prices which differ "significantly" and its claims regarding the explanation to be provided under the second sentence of Article 2.4.2. Finally, we examine Korea's claims regarding the use of "systemic disregarding" in the context of the DPM and then the United States' claims regarding the use of zeroing in the application of the W-T comparison methodology.

5.1.3 The relevant "pattern" for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

5.20. The first condition set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is that the investigating authority identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The Panel's reasoning and conclusions regarding the relevant "pattern" are interspersed throughout its Report. First, the Panel agreed with the parties that the term "pattern" refers to a "regular and intelligible form or sequence discernible in certain actions or situations" and that random price variation does not constitute a pattern.[92] On this basis, the Panel found that, "[i]f 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."[93] The Panel further considered that the relevant "pattern" is composed of a subset of export transactions set aside for specific consideration in the second sentence of Article 2.4.2.[94] The Panel clarified that, if particular prices are observed to differ by purchaser, region, or time period, those prices may be treated as a "pattern". The Panel stated that, 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".[95] The Panel did not specify, however, whether the subset of export transactions set aside for specific consideration necessarily comprises export prices which differ significantly because they are significantly *lower* than other export prices or whether a pattern could comprise prices which differ significantly because they are significantly *higher* than other export prices.

5.21. Moreover, in the specific context of the DPM, which seeks to identify prices that differ significantly because they are higher or lower than other export prices, the Panel considered that "prices that are too high and prices that are too low do not belong to the same pattern".[96] In light

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[90] Appellate Body Report, *US – Zeroing (Japan)*, para. 131.

[91] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97, respectively.

[92] Panel Report, para. 7.45 (referring to Korea's first written submission to the Panel, paras. 86 and 132-133; Oxford Dictionaries online, definition of "pattern" <http://www.oxforddictionaries.com/us/definition/american_english/pattern>, accessed 18 September 2014 (Panel Exhibit KOR-21); and United States' first written submission to the Panel, paras. 59 and 73).

[93] Panel Report, para. 7.46. The Panel explained that the price differences are "regular" and "intelligible" because they pertain only to that particular purchaser, region, or time period. The Panel further noted that a form or sequence of price differences may be intelligible if there is regularity to that form or sequence that may be detected in respect of a particular purchaser, region, or time period. (Ibid., paras. 7.46-7.47) Elsewhere in its Report, the Panel also stated:

> [I]n 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.

(Ibid., para. 7.28) Specifically, the Panel accepted Korea's argument that, to be "intelligible", the price differences must have some relationship to one another. As the Panel observed, "[t]his relationship exists when the significantly differing prices relate to the same purchaser, region or time period." (Ibid., fn 79 to para. 7.28 (referring to Korea's first written submission to the Panel, para. 132))

[94] Panel Report, para. 7.24. See also paras. 7.27-7.28.

[95] Panel Report, para. 7.28.

[96] Panel Report, para. 7.144.

of the use of the words "or" and "among" in the phrase "among different purchasers, regions or time periods" in the second sentence of Article 2.4.2, the Panel also found that a pattern cannot be found to exist *across* purchasers, regions, and time periods, "cumulatively".[97] The Panel considered that a pattern of prices which differ significantly 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" (with the same being true for a pattern of prices which differ significantly among different regions or time periods).[98]

5.22. On appeal, the United States claims that the Panel erred in its interpretation of the relevant "pattern" under the second sentence of Article 2.4.2 because it concluded that "the relevant 'pattern' ... comprises only low-priced export transactions to each particular 'target' (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are 'non-pattern' transactions."[99] In particular, the United States submits that a pattern includes both lower and higher export prices that "'differ significantly' from each other".[100] In the context of the DPM, the United States also argues that the focus does not need to be on export sales that are priced *lower* than other export sales; rather, a pattern may also be identified by considering prices that are *higher* than other export prices.[101] At the oral hearing, the United States further clarified that identifying a pattern does not require an assessment of how export prices relate to normal value.[102] Moreover, the United States submits that the relevant "pattern" is one that would transcend multiple purchasers, regions, or time periods.[103] According to the United States, the phrase "among different purchasers, regions or time periods" in the second sentence of Article 2.4.2 is to be construed as allowing an investigating authority to find a pattern of export prices which differ significantly among different purchasers, different regions, *or* different time periods, *or* any combination of these categories.[104]

5.23. For its part, Korea argues that the pattern is the group of prices that stand out in some discernible way from the other prices, but does not exclude the possibility that a pattern could comprise export prices that differ significantly because they are *higher* than other export prices.[105] At the oral hearing, Korea also agreed with the United States that export prices are not benchmarked against normal value to identify a pattern in accordance with the second sentence of Article 2.4.2.[106] Regarding the issue of whether a pattern can transcend multiple purchasers, regions, or time periods, Korea submits that the pattern focuses on purchasers, regions, and time periods, which Korea sees as three "fundamentally independent and distinct" categories.[107]

5.24. Turning to our analysis, we observe that, according to the second sentence of Article 2.4.2, the investigating authority is required to "find a pattern of export prices which differ significantly among different purchasers, regions or time periods". Assuming the requisite explanation under the second sentence of Article 2.4.2 is provided by the investigating authority, the identification of the pattern is the trigger for the application of the W-T comparison methodology.

[97] Panel Report, para. 7.141. See also para. 7.142.

[98] Panel Report, para. 7.142.

[99] United States' appellant's submission, para. 34. See also paras. 48 and 55. In particular, the United States argues that, by relying on the object and purpose of the second sentence of Article 2.4.2, rather than the object and purpose of the Anti-Dumping Agreement as a whole, the Panel failed to apply properly the customary rules of interpretation of public international law to interpret the relevant "pattern". (United States' appellant's submission, para. 54) We note that the Panel relied on the object and purpose of the second sentence of Article 2.4.2 in its analysis of the scope of application of the W-T comparison methodology and that the United States makes a similar argument when turning to this issue on appeal. (Panel Report, para. 7.26; United States' appellant's submission, para. 68) We thus address this argument below when we address the issue of the scope of application of the W-T comparison methodology.

[100] United States' appellant's submission, para. 53. (emphasis original) At the oral hearing, the United States clarified that the pattern is not always required to include all export transactions, but that it may.

[101] United States' appellant's submission, paras. 240-242. We recall that, unlike the Nails II methodology, the DPM seeks to identify lower and higher export prices compared to other prices.

[102] See also United States' appellant's submission, para. 241.

[103] United States' appellant's submission, para. 52.

[104] United States' appellant's submission, para. 247.

[105] Korea's appellee's submission, paras. 119-120. By contrast, Brazil and China submit that a pattern cannot be composed of high-priced sales. (Brazil's third participant's submission, para. 5; China's third participant's submission, para. 26)

[106] The European Union and Brazil disagreed with this proposition at the oral hearing. In particular, the European Union stated that the term "significantly" implies that the weighted average of the prices found to differ is below normal value.

[107] Korea's appellee's submission, para. 125 et seq., spec. paras. 125, 128, and 134.

5.25. The word "pattern" is not explicitly defined in the text of the Anti-Dumping Agreement. We agree with the Panel that, in the context of the second sentence of Article 2.4.2, a "pattern" can be defined as "[a] regular and intelligible form or sequence discernible in certain actions or situations".[108] As the United States notes[109], this definition of the word "pattern" is frequently used in conjunction with the word "of", such as is the case in the second sentence of Article 2.4.2 where the reference is to a "pattern *of* export prices".[110] Moreover, this definition accords with the French and Spanish versions of the Anti-Dumping Agreement. The French version refers to the term "*configuration*", which can be defined as a "[*f*]*orme extérieure d'un ensemble; relief*" (the exterior shape of a system; relief); and the Spanish version refers to the term "*pauta*", which can be defined as an "[*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).[111] Understanding the word "pattern" as a regular and intelligible form means that there must be regularity to the sequence of "export prices which differ significantly" and this sequence must be capable of being understood.[112] In particular, the word "intelligible" excludes the possibility of a pattern merely reflecting random price variation, something that is not challenged on appeal.[113]

5.26. The relevant "pattern" in the second sentence of Article 2.4.2 is one of export prices which *differ* significantly. The verb "differ", which can be defined as "[t]o have contrary or diverse bearings, tendencies, or qualities; to be not the same; to be unlike, distinct, or various, in nature, form, or qualities, or in some specified respect"[114], expresses a relative concept. As such, prices that are found to differ necessarily differ from other prices. However, by its terms, the second sentence of Article 2.4.2 refers to a pattern of "prices which differ". This wording indicates that the focus in the pattern is on the prices that are found to differ, not on all prices. Therefore, whereas an investigating authority would analyse the prices of all export sales made by the relevant exporter or producer to identify a pattern[115], the distinguishing factor that allows that authority to discern which export prices form part of the pattern would be that the prices in the pattern differ significantly from the prices not in the pattern.

5.27. Our interpretation accords with the ordinary meaning of the word "pattern" as used in the context of the second sentence of Article 2.4.2. As explained, the pattern is a *regular* and *intelligible* form or sequence of "export prices which differ significantly", which means that there must be regularity to the sequence of prices and that this sequence must be capable of being understood. We consider that a pattern that would comprise both the prices found to differ significantly from other prices and those other prices (namely, a pattern comprising all the transactions to all purchasers, in all regions, and in all time periods) would effectively be composed of prices that do not form a regular and intelligible sequence.

5.28. In addition, an interpretation of the term "pattern" as comprising only those prices which differ significantly from other prices gives meaning and effect to the second sentence of

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[108] Panel Report, para. 7.45 (referring to Korea's first written submission to the Panel, para. 86; Oxford Dictionaries online, definition of "pattern" <http://www.oxforddictionaries.com/us/definition/american_english/pattern>, accessed 18 September 2014 (Panel Exhibit KOR-21); and United States' first written submission to the Panel, para. 59). The participants agree with this definition. (United States' appellant's submission, para. 38; Korea's appellee's submission, para. 108)

[109] United States' appellant's submission, para. 38.

[110] Emphasis added.

[111] *Dictionnaires de français Larousse* online, definition of "*configuration*" <http://www.larousse.fr/dictionnaires/francais/configuration>, accessed 18 September 2014 (Panel Exhibit KOR-36); *Diccionario de la lengua española de Real Academia Española* online, definition of "*pauta*" <http://lema.rae.es/drae/?val=pauta>, accessed 18 September 2014 (Panel Exhibit KOR-37), respectively.

[112] The definition of the word "intelligible" includes "[c]apable of being understood; comprehensible". (Oxford English Dictionary online, definition of "intelligible" <http://www.oed.com/view/Entry/97408?redirectedFrom=intelligible#eid>, accessed 18 July 2016)

[113] Panel Report, para. 7.45 (referring to United States' first written submission to the Panel, para. 73; and Korea's first written submission to the Panel, paras. 132-133).

[114] Oxford English Dictionary online, definition of "differ" <http://www.oed.com/view/Entry/52452?rskey=CRXlmt&result=2&print>, accessed 4 February 2014 (Panel Exhibit USA-5).

[115] We consider that the determination of dumping under any of the three comparison methodologies set out in Article 2.4.2 necessarily starts with an analysis based on the prices of all export sales made by the relevant exporter or producer. In the context of identifying a pattern of export prices among, for example, different purchasers, an investigating authority would examine the prices of export sales made to one or more purchasers as compared to the prices of export sales made to the other purchasers.

Article 2.4.2, whose function is to allow investigating authorities to identify and address "targeted dumping". Indeed, by comprising only the transactions found to differ from other transactions, the pattern focuses on the "targeted" transactions. This is also consistent with the Appellate Body's statements in *US – Zeroing (Japan)* that "[t]he prices of transactions that fall within [the] *pattern* must be found to differ significantly from other export prices" and that "[t]his 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."[116]

5.29. We thus agree with the Panel that, under the second sentence of Article 2.4.2, "a sub-set of export transactions is set aside for specific consideration."[117] We further agree with the Panel that, once prices are identified as being different from other prices, "they constitute the relevant 'pattern'" and that, "[a]lthough 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'."[118] The text of the second sentence of Article 2.4.2 does not expressly specify whether the prices need to differ significantly because they are *lower* than other prices, or whether they may differ because they are *higher* than other prices. Nor does the text of the second sentence of Article 2.4.2 specify whether those prices found to differ need to be below normal value. However, the Anti-Dumping Agreement as a whole is concerned with injurious "dumping"[119], and Article 2.4.2 sets out the methodologies that investigating authorities may use to establish margins of dumping. Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement refer to export prices that are *lower* than normal value as "dumped" prices. Significantly, the function of the second sentence of Article 2.4.2 is to allow investigating authorities to identify and address "targeted dumping". Therefore, although we recognize that a pattern may be identified in a variety of factual circumstances, we consider that the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 comprises prices that are significantly *lower* than other export prices among different purchasers, regions or time periods. We fail to see how an investigating authority could identify and address "targeted dumping" by considering significantly higher export prices. If the prices found to differ significantly are higher than other export prices, the other (lower) export prices would not "mask" the (higher) dumped prices found to form the pattern.

5.30. Turning to the issue of whether a pattern can be found to exist *across* purchasers, regions, or time periods, we recall that, pursuant to the second sentence of Article 2.4.2, a pattern involves export prices which differ significantly in relation to specified sub-groups, namely, "among different purchasers, regions or time periods". As the Panel noted, these terms determine how the relevant "pattern" must be identified.[120]

5.31. Starting with the text of the second sentence of Article 2.4.2, we observe that, depending on the context in which it is used, the conjunction "or" can be exclusive or inclusive.[121] We further observe that, as the Panel considered, the term "among" refers to something "*in relation to the rest of the group [it belongs] to*".[122] The use of this word in the second sentence of Article 2.4.2 emphasizes membership of a group, and 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 such, the word "among" serves to specify the dimensions in relation to which export prices which differ significantly may be discerned (i.e. purchasers, regions, or time periods). This understanding of the word "among" suggests that each category should be considered on its own, in the sense that a pattern of prices which differ significantly among different purchasers must be

[116] Appellate Body Report, *US – Zeroing (Japan)*, para. 135. (emphasis original)
[117] Panel Report, para. 7.24.
[118] Panel Report, para. 7.28.
[119] See Appellate Body Report, *US – Continued Zeroing*, para. 284.
[120] Panel Report, para. 7.141.
[121] Appellate Body Report, *US – Line Pipe*, para. 164. We note Korea's argument that the Anti-Dumping Agreement repeatedly uses the conjunction "and" when it wishes to have multiple items being considered together. (Korea's appellee's submission, para. 130) However, we are not convinced that how the terms "and" and "or" are used elsewhere in the Anti-Dumping Agreement is relevant to the interpretation of the term "or" as used in the present context.
[122] Panel Report, para. 7.142. (emphasis original) We note that the United States does not challenge this definition of the term "among".

found in the price variation within purchasers, as between one or more particular purchasers and the other purchasers (with the same applying to regions and time periods, respectively[123]).

5.32. Importantly, the terms "or" and "among" in the second sentence of Article 2.4.2 draw meaning from the immediate context in which they appear. In particular, the need to identify a pattern provides contextual support for an interpretation of the terms "or" and "among" as requiring the investigating authority to consider each category (purchasers, regions, and time periods) on its own. As we have explained, the sequence of "export prices which differ significantly" must be both regular and intelligible. As such, a pattern cannot merely reflect random price variation. This means that an investigating authority is required to identify a regular series of price variations relating to one or more particular purchasers, or one or more particular regions, or one or more particular time periods to find a pattern. A single "pattern" comprising prices that are found to be significantly different from other prices *across* different categories would effectively be composed of prices that do not form a regular and intelligible sequence.

5.33. Therefore, we consider that the words "or" and "among" as used in the phrase "among different purchasers, regions or time periods" cannot be interpreted to mean that the three categories can be considered cumulatively to find one single pattern. This means that some transactions that differ among purchasers, taken together with some transactions that differ among regions, and some transactions that differ among time periods, cannot form a single pattern. Accordingly, "a pattern" has to be identified among different purchasers, or among different regions, or among different time periods, and cannot transcend these categories. In *EC – Bed Linen*, the Appellate Body also understood the three categories to work independently from one another. In that case, the Appellate Body noted 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".[124] As the Panel correctly observed, the Appellate Body did not identify any other types of "targeted dumping".[125]

5.34. Finally, we note the United States' argument that the word "among" is used once in the second sentence of Article 2.4.2 and is not repeated before each category, which would suggest that those categories may be considered collectively in identifying a pattern. According to the United States, for the Panel's reading of the word "among" to be correct, one would expect that word to appear before the mention of each category, i.e. "*among* different purchases [*sic*], *among* different regions or *among* different time periods".[126] We consider, however, that this repetition would have conveyed an identical meaning to that of the existing text. We thus agree with the Panel that, "[i]f 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" and that "[t]he price differences are 'regular' and 'intelligible' because they pertain only to that particular purchaser, region or time period."[127] We further agree with the Panel that "a 'pattern' can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods."[128]

5.35. Consequently, in order to find a pattern, the export prices to one or more particular purchasers must differ significantly from the prices to the other purchasers, or the export prices in one or more particular regions must differ significantly from the prices in the other regions, or the export prices during one or more particular time periods must differ significantly from the prices during the other time periods. Our interpretation does not exclude the possibility that the same exporter or producer could be practicing more than one of the three types of "targeted dumping". We also do not exclude the possibility that a pattern of significantly differing prices to a certain

[123] A pattern of prices which differ significantly among different regions must be found in the price variation within regions, as between one or more particular regions and the other regions, and a pattern of prices which differ significantly among different time periods must be found in the price variation within timeperiods, as between one or more particular time periods and the other time periods.

[124] Appellate Body Report, *EC – Bed Linen*, para. 62. In *US – Stainless Steel (Mexico)*, the Appellate Body stated that "[t]he second sentence of Article 2.4.2 provides an asymmetrical comparison methodology to address a so-called pattern of 'targeted' dumping found among certain purchasers, in certain regions, or during certain time periods", thus also suggesting that these three categories work independently from one another. (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 122)

[125] Panel Report, para. 7.141.

[126] United States' appellant's submission, para. 250. (emphasis original)

[127] Panel Report, para. 7.46.

[128] Panel Report, para. 7.141. (fn omitted)

category may overlap with a pattern of significantly differing prices to another category. For instance, the same transactions could "target" certain purchasers in certain regions, in which case the investigating authority might find that a pattern of significantly differing prices among different purchasers and a pattern of significantly differing prices among different regions exist.

5.36. For the reasons set out above, we consider that a "pattern" for the purposes of the second sentence of Article 2.4.2 comprises *all* the export prices to one or more particular purchasers which differ significantly from the export prices to the other purchasers because they are significantly *lower* than those other prices, or *all* the export prices in one or more particular regions which differ significantly from the export prices in the other regions because they are significantly *lower* than those other prices, or *all* the export prices during one or more particular time periods which differ significantly from the export prices during the other time periods because they are significantly *lower* than those other prices. For the purposes of this Report, we refer to these transactions forming the relevant "pattern" as "pattern transactions".

5.37. Consequently, we uphold the Panel's conclusions regarding the relevant "pattern" set out in, *inter alia*, paragraphs 7.24, 7.27-7.28, 7.45-7.46, 7.141-7.142, and 7.144 of its Report.

5.1.4 Whether the Panel erred in finding that "the DPM is inconsistent 'as such' with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] 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'"

5.38. Having set out the interpretation of the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, we now turn to the claim raised by the United States that pertains to the identification of a pattern under the DPM. We recall that the United States requests us to reverse the Panel's finding 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'."[129]

5.39. As the Panel observed, the DPM examines any given export transaction in three different ways (by purchaser, region, and time period) in order to identify six possible types of price variation that the USDOC considers to pass the Cohen's *d* test: (i) prices that are "too high" to a particular purchaser; (ii) prices that are "too low" to a particular purchaser; (iii) prices that are "too high" in a particular region; (iv) prices that are "too low" in a particular region; (v) prices that are "too high" during a particular time period; and (vi) prices that are "too low" during a particular time period.[130] The Panel noted that the USDOC then aggregates the value of these six different types of price variation to determine whether a pattern exists. As we have set out above, the Panel found that a pattern can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods − not *across* these categories "cumulatively" − and that "prices that are too high and prices that are too low do not belong to the same pattern".[131] With these considerations in mind, the Panel concluded that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 because it aggregates random and unrelated price variations and thus does not properly establish "a pattern of export prices which differ significantly among purchasers, regions or time periods".[132]

5.40. The United States acknowledges that the USDOC aggregates the results of the Cohen's *d* test. The USDOC does so without double-counting those export sales that pass the Cohen's *d* test for more than one category.[133] According to the United States, however, there is no aggregation of random and unrelated price variations. Rather, the results of the Cohen's *d* test represent different aspects of the exporter's overall pricing behaviour.[134] The United States also argues that the DPM

[129] United States' appellant's submission, para. 219 (quoting Panel Report, para. 7.147).
[130] Panel Report, para. 7.138.
[131] Panel Report, para. 7.144. See also para. 7.141.
[132] Panel Report, paras. 7.147 and 8.1.a.ix.
[133] United States' appellant's submission, para. 243.
[134] United States' appellant's submission, para. 245.

does, in fact, consider export prices relative to other prices in the same category (i.e. by purchasers, regions, or time periods).[135]

5.41. The fact that the DPM starts by considering export prices relative to other prices in the same category before aggregating the results of the Cohen's *d* test is not dispositive of whether the DPM properly identifies a pattern for the purposes of the second sentence of Article 2.4.2. We have found above that a pattern can only be found in prices which differ significantly either among purchasers, or among regions, or among time periods, not *across* these categories. We have also found that the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 is comprised of the export prices to one or more particular purchasers which differ significantly from the prices to the other purchasers because they are *lower* than those other prices (with the same applying to regions and time periods, respectively).

5.42. It is undisputed between the participants that the DPM aggregates prices found to differ among different purchasers, among different regions, and among different time periods for the purposes of identifying a single pattern. As the Panel correctly considered, the DPM "effectively identifies a 'pattern' of export prices *across* different categories (purchasers, regions or time periods), rather than 'among' the constituents of each category".[136] It is equally undisputed that the DPM aggregates prices that are higher and lower than other export prices within a given category. As we have just set out, finding a pattern across the three categories is inconsistent with the second sentence of Article 2.4.2. Moreover, a proper interpretation of the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 means that it cannot be identified by considering prices that are higher than other prices.

5.43. Consequently, we uphold the Panel's finding, in paragraph 8.1.a.ix of its Report[137], that "the DPM is inconsistent 'as such' with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] 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'".

5.1.5 Whether the Panel erred in finding that the W-T comparison methodology should only be applied to "pattern transactions"

5.44. We turn now to consider the United States' appeal of the Panel's findings regarding the scope of application of the W-T comparison methodology. The issue raised by the United States on appeal is whether the W-T comparison methodology can be applied to all transactions or whether it should only be applied to those transactions that form the relevant "pattern". In the *Washers* anti-dumping investigation, only certain transactions passed the standard deviation and gap tests under the Nails II methodology. The USDOC nonetheless applied the W-T comparison methodology to all of Samsung's and LGE's export transactions.[138] For its part, the DPM applies the W-T comparison methodology to all export transactions in certain situations, namely, when the value of the sales that pass the Cohen's *d* test accounts for 66% or more of the value of the total sales.[139]

5.45. The Panel found that the word "individual" in the phrase "individual export transactions" in the first part of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement indicates that the W-T comparison will not involve all export transactions, but only certain transactions identified individually.[140] The Panel further found that the only textual basis for individual identification of export transactions is that they form the pattern under the second sentence of Article 2.4.2. The Panel found support for its interpretation in the requirement that lies on investigating authorities to explain why "'such differences' cannot be taken into account appropriately by one of the symmetrical comparison methodologies."[141] The Panel considered that such explanation refers back to the "pattern transactions" and does so precisely because only those "pattern transactions" should be subject to a W-T comparison. The Panel also relied on the exceptional nature of the W-T

[135] United States' appellant's submission, para. 249.
[136] Panel Report, para. 7.143. (emphasis original)
[137] See also Panel Report, para. 7.147.
[138] Panel Report, para. 7.11 (referring to *Washers* AD I&D memorandum (Panel Exhibit KOR-18), pp. 33-34).
[139] Panel Report, para. 7.100 and fn 225 to para. 7.118.c.
[140] Panel Report, para. 7.22.
[141] Panel Report, para. 7.23.

comparison methodology, which suggests that "something different from the first sentence should be undertaken, i.e. assessment of only the pattern transactions set aside for specific consideration."[142] Finally, the Panel relied on the object and purpose of the second sentence of Article 2.4.2 to enable investigating authorities to "'unmask' so-called 'targeted dumping'"[143], as well as on the Appellate Body report in *US – Zeroing (Japan)*, where the Appellate Body read "'individual export transactions' … as referring to the transactions that fall within the relevant pricing pattern".[144]

5.46. Accordingly, the Panel found that the W-T comparison methodology should only be applied to those transactions that constitute the "pattern of export prices which differ significantly among different purchasers, regions or time periods".[145] Consequently, the Panel found that the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation because the USDOC applied the W-T comparison methodology to all export transactions, including transactions other than those constituting the patterns of transactions that the USDOC had determined to exist.[146] The Panel also found that the DPM is inconsistent "as such" with this provision because it applies the W-T comparison methodology to all export transactions, where the value of the sales that pass the Cohen's *d* test accounts for 66% or more of the value of the total sales.[147]

5.47. The United States claims that there is no textual and contextual support for the Panel's finding that the W-T comparison methodology should only be applied to the transactions constituting the pattern. In particular, the United States contends that the relevant definition of the word "individual" is "single; separate" and that this word merely suggests that prices of single, separate export transactions may be compared to a normal value established on a weighted average basis, not that the scope of application of the W-T comparison methodology is limited to certain transactions.[148] In this context, the United States also takes issue with the fact that the Panel assumed that the application of the W-T comparison methodology is limited to "pattern transactions" because the second sentence of Article 2.4.2 provides no other basis for identifying "individual" export transactions.[149] The United States further submits that the Panel misapplied Article 31 of the Vienna Convention on the Law of Treaties[150] (Vienna Convention) by relying on the object and purpose of the second sentence of Article 2.4.2, rather than that of the Anti-Dumping Agreement itself.[151] Finally, the United States argues that the Panel's reliance on the Appellate Body's statements in *US – Zeroing (Japan)* was "misplaced" and that these statements do not support the Panel's interpretation.[152]

5.48. Korea submits that the United States reads the term "individual" more narrowly than the Appellate Body did in *US – Zeroing (Japan)*[153] and unduly focuses on specific words without considering the second sentence of Article 2.4.2 as a whole.[154] In particular, Korea is of the view that the textual reference to "such differences" in the context of the explanation to be provided under the second sentence suggests that this provision creates a group of sales that meet the conditions for the exception, and to which the W-T comparison methodology may be applied, and another group of sales that do not.[155] Korea further argues that the United States' interpretation of the second sentence of Article 2.4.2 would lead to absurd results, in that an authority would be

[142] Panel Report, para. 7.24.
[143] Panel Report, para. 7.26.
[144] Panel Report, para. 7.25 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 135; and referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, fn 166 to para. 99).
[145] Panel Report, para. 7.29.
[146] Panel Report, paras. 7.29 and 8.1.a.i.
[147] Panel Report, paras. 7.119.c and 8.1.a.vi.
[148] United States' appellant's submission, paras. 59-62, spec. para. 60 (quoting Oxford Dictionaries online, definition of "individual" <http://www.oxforddictionaries.com/us/definition/american_english/individual>).
[149] United States' appellant's submission, para. 64.
[150] Done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.
[151] United States' appellant's submission, para. 68.
[152] United States' appellant's submission, paras. 69-76.
[153] Korea's appellee's submission, para. 148.
[154] Korea's appellee's submission, paras. 147 and 149.
[155] Korea's appellee's submission, paras. 146 and 150.

allowed to apply an exceptional comparison methodology to all export transactions once it has found a pattern to exist, irrespective of how few transactions constitute this pattern.[156]

5.49. Starting with our analysis of the text of the second sentence of Article 2.4.2, we recall that, pursuant to this provision, "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions". By its express terms, the second sentence of Article 2.4.2 refers to a comparison to the prices of *individual* export transactions. The word "individual" can be defined as "[e]xisting as a separate indivisible entity; numerically one; single, as distinct from others of the same kind; particular"[157]; or, as argued by the United States, as "single; separate".[158] This definition alone does not clarify whether the W-T comparison methodology can be applied to all transactions or whether it should only be applied to certain transactions, namely, the "pattern transactions". The term "individual export transactions" in the second sentence of Article 2.4.2 draws meaning from the immediate context in which it appears.[159]

5.50. The second sentence of Article 2.4.2 requires, *inter alia*, that the investigating authority 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."[160] The term "such differences" refers back to the "export prices which differ significantly" and, therefore, form part of the pattern. As set out above, the requirement in the second sentence of Article 2.4.2 that an explanation be provided contemplates that there may be circumstances in which an investigating authority identifies a "pattern of export prices which differ significantly among different purchasers, regions or time periods" but where "such differences" could be taken into account appropriately by the W-W or T-T comparison methodology.[161] It follows that recourse to the W-T comparison methodology is permissible only to the extent that it is necessary to remedy the inability of the normally applicable comparison methodologies to take into account appropriately the identified "pattern".

5.51. Furthermore, the first sentence of Article 2.4.2 provides for two comparison methodologies that "shall normally" be used by investigating authorities to establish margins of dumping. Under the first sentence of Article 2.4.2, the consideration is in respect of all export transactions. By contrast, the emphasis in the second sentence of Article 2.4.2 is on a "pattern". Both conditions in the second sentence of Article 2.4.2, namely, that a pattern of significant price differences be established and that an explanation be provided, pertain to "pattern transactions". Moreover, the W-T comparison methodology is considered to be an exception to the symmetrical comparison methodologies in the first sentence. The structure of Article 2.4.2, which distinguishes the normally applicable methodologies from the exceptional W-T comparison methodology, thus serves as further indication that the W-T comparison methodology should only be applied to those transactions justifying its use, namely, the "pattern transactions". We, therefore, agree with the Panel that "[t]he exceptional nature of this comparison methodology suggests that something

[156] Korea's appellee's submission, para. 153.

[157] Oxford English Dictionary online, definition of "individual" <http://www.oed.com/view/Entry/94633?redirectedFrom=individual#eid>, accessed 18 July 2016.

[158] United States' appellant's submission, para. 60 (quoting Oxford Dictionaries online, definition of "individual" <http://www.oxforddictionaries.com/us/definition/american_english/individual>).

[159] The ordinary meaning of a treaty term is to be ascertained in its context and in light of the object and purpose of the treaty. Moreover, the principles of treaty interpretation set out in the Vienna Convention are to be followed in a holistic fashion. (See Appellate Body Reports, *China – Publications and Audiovisual Products*, para. 348; and *US – Continued Zeroing*, para. 268) In *US – Offset Act (Byrd Amendment)*, the Appellate Body cautioned that "dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents." (Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248) Along the same lines, in *China – Publications and Audiovisual Products*, the Appellate Body held that dictionaries, however useful as a starting point, "are not necessarily capable of resolving complex questions of interpretation because they typically catalogue all meanings of words." (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348 (referring to Appellate Body Reports, *US – Gambling*, para. 164; *US – Softwood Lumber IV*, para. 59; *Canada – Aircraft*, para. 153; and *EC – Asbestos*, para. 92))

[160] Emphasis added.

[161] In *US – Zeroing (Japan)*, the Appellate Body explained that "[t]he second requirement … contemplates that there may be circumstances in which targeted dumping could be adequately addressed through the normal symmetrical comparison methodologies." (Appellate Body Report, *US – Zeroing (Japan)*, para. 131)

different from the first sentence should be undertaken, i.e. assessment of only the pattern transactions set aside for specific consideration."[162]

5.52. For the reasons set out above, we agree with the Panel that: (i) the use of the word "individual" in the second sentence of Article 2.4.2 indicates that the W-T comparison methodology does not involve all export transactions, but only certain export transactions identified individually; and (ii) the "individual export transactions" to which the W-T comparison methodology may be applied are those transactions falling within the relevant "pattern".[163] Accordingly, we read the phrase "individual export transactions" as referring to the universe of export transactions that justify the use of the W-T comparison methodology, namely, the "pattern transactions". Our interpretation gives meaning and effect to the second sentence of Article 2.4.2, whose function is to allow investigating authorities to identify and address "targeted dumping". It also accords with the object and purpose of the Anti-Dumping Agreement. Although the Anti-Dumping Agreement does not contain a preamble expressly setting out its object and purpose, it is apparent from the text of this Agreement that it deals with injurious dumping by allowing Members to take anti-dumping measures to counteract injurious dumping and imposing disciplines on the use of such anti-dumping measures.[164]

5.53. Applying the W-T comparison methodology to "pattern transactions" only is also in line with the Appellate Body's observations in *US – Zeroing (Japan)*, where the Appellate Body "[read] the phrase 'individual export transactions' … as referring to the transactions that fall within the relevant pricing pattern", and considered that "[t]his 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."[165] The Appellate Body added 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."[166]

5.54. We note that the United States makes a number of arguments that take issue with the Panel's reliance, in paragraphs 7.25 and 7.27 of its Report, on the Appellate Body's statements in *US – Zeroing (Japan)*.[167] First, the United States argues that this case did not involve the application of the second sentence of Article 2.4.2. While this is correct, the Appellate Body was nonetheless addressing legal issues raised on appeal, as the panel had drawn contextual support from the second sentence of Article 2.4.2 for its finding that zeroing is permitted under the T-T comparison methodology. Second, the United States asserts that the Appellate Body merely suggested that an investigating authority *may* limit the application of the W-T comparison methodology. While the Appellate Body's use of the word "may" could, if read in isolation, be perceived as being ambiguous, the remaining parts of the relevant paragraph in its report make

[162] Panel Report, para. 7.24.

[163] Panel Report, para. 7.22.

[164] In *US – Continued Zeroing*, the Appellate Body stated that the Anti-Dumping Agreement "deals with 'injurious dumping', and … counteract[ing] the material injury caused, or threatened to be caused, by 'dumped imports' to the domestic industry producing a 'like product'". (Appellate Body Report, *US – Continued Zeroing*, para. 284 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98)) The United States claims that, by relying on the "object and purpose" of the second sentence of Article 2.4.2, rather than that of the Anti-Dumping Agreement as a whole, the Panel failed to apply properly the customary rules of interpretation of public international law. (United States' appellant's submission, para. 68 (quoting Panel Report, para. 7.26)) Pursuant to Article 31(1) of the Vienna Convention, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31(1) of the Vienna Convention thus refers to the object and purpose of the treaty as a whole, not of the particular provisions under interpretation. However, this does not exclude that individual provisions have a function, or a role to play in a treaty. As we have explained, the function of the second sentence of Article 2.4.2 accords with the object and purpose of the Anti-Dumping Agreement. Moreover, interpreting the second sentence of Article 2.4.2 in light of its function ensures that meaning and effect are given to that provision. The Panel correctly identified the rationale of the second sentence of Article 2.4.2. Therefore, we reject the United States' arguments pertaining to the Panel's reliance on the "object and purpose" of the second sentence of Article 2.4.2.

[165] Appellate Body Report, *US – Zeroing (Japan)*, para. 135. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body stated that "the universe of export transactions to which the weighted average-to-transaction comparison methodology applies would be different from the universe of transactions examined under the weighted average-to-weighted average methodology." (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, fn 166 to para. 99)

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

[167] United States' appellant's submission, paras. 69, 72, 85, and 179-181.

clear that the Appellate Body excluded the possibility that the W-T comparison methodology might apply to "non-pattern transactions".[168] Finally, we disagree with the United States that the Panel's understanding of the scope of application of the W-T comparison methodology was derived exclusively from that Appellate Body report. The Panel conducted its own analysis of the second sentence of Article 2.4.2, and relied on the Appellate Body report in *US – Zeroing (Japan)* as "[f]urther support" for its interpretation.[169]

5.55. Based on the foregoing considerations, in particular in light of the function of the second sentence of Article 2.4.2 to allow investigating authorities to identify and address "targeted dumping", we consider that the W-T comparison methodology should only be applied to those transactions that justify its use, namely, those transactions forming the relevant "pattern".

5.56. We, therefore, uphold the Panel's finding, in paragraph 7.29 of its Report, 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'." We further uphold the Panel's consequential findings: (i) in paragraph 8.1.a.i of its Report[170], that "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"; and (ii) in paragraph 8.1.a.vi of its Report[171], that "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[s] for 66% or more of the value of total sales".

5.1.6 The extent to which price differences are to be assessed quantitatively, qualitatively, and in light of the "reasons" for these price differences

5.57. Korea claims that the Panel erred in finding that a "pattern of export prices which differ significantly" can be established "solely based on quantitative differences … regardless of the factual context of the prices and the differences".[172] This claim on appeal raises the issue of whether a "pattern of export prices which differ significantly" can be established based on purely quantitative criteria, without a qualitative assessment and without considering the "reasons" for the price differences.[173]

5.58. According to the Panel, the text of Article 2.4.2 of the Anti-Dumping Agreement contains no requirement to consider the "reasons" for the price differences in order to identify a pattern, and an examination of the relevant numerical price values suffices.[174] The Panel further found that "an

[168] We recall that the Appellate Body "[read] the phrase 'individual export transactions' … as referring to the transactions that fall within the relevant pricing pattern." The Appellate Body added that "[t]his 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." (Appellate Body Report, *US – Zeroing (Japan)*, para. 135 (emphasis added)) As the Panel observed, the term "necessarily" used by the Appellate Body excludes the possibility that the W-T comparison methodology might in certain circumstances also apply to "non-pattern transactions". (Panel Report, para. 7.27)

[169] Panel Report, paras. 7.22-7.25. The United States also stresses that the Appellate Body misquoted the second sentence of Article 2.4.2 when stating 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 [sic] significantly among different purchasers, regions or time periods[].'" (United States' appellant's submission, para. 181 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 135) (emphasis added by the United States)) The use of the word "differs" is a clerical error that does not affect the reasoning of the Appellate Body. This is apparent from the sentence that directly follows the misquotation, where the Appellate Body explained that "[t]he prices of transactions that fall within [the] *pattern* must be found to differ significantly from other export prices." (emphasis original) This is a clear indication that the Appellate Body understood that the second sentence of Article 2.4.2 focuses on prices that differ, not a pattern that differs.

[170] See also Panel Report, para. 7.29.

[171] See also Panel Report, para. 7.119.c.

[172] Korea's other appellant's submission, para. 154.

[173] We understand the Panel and the participants to use the term "reasons" for the price differences, as well as the phrase "why prices differ", to refer to the issue of whether the investigating authority should consider if the price differences are the result of normal price fluctuations or reflect "targeting" conduct to establish the existence of a pattern. We refer to this as the *reasons for* or the *cause of* the price differences.

[174] Panel Report, para. 7.46.

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."[175] As the Panel noted, those "reasons" could, however, be relevant in the context of the explanation to be provided under the second sentence of Article 2.4.2.[176] The Panel acknowledged that, in certain factual circumstances, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances.[177] For example, a relatively minor numerical difference between two large prices may not be significant, whereas the same numerical difference between two much smaller prices may be significant. The Panel, however, found that this relates to *how*, not *why*, the relevant prices differ.[178] Accordingly, the Panel rejected Korea's claim that the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation because the USDOC determined the existence of a pattern of export prices which differ significantly on the basis of purely quantitative criteria, without any qualitative assessment of the "reasons" for the relevant price differences.[179] The Panel also found that the DPM is not inconsistent "as such" with this provision because it determines the existence of a pattern of export prices which differ significantly on the basis of purely quantitative criteria, without any qualitative assessment of the "reasons" for the relevant price differences.[180]

5.59. Korea claims that the Panel mischaracterized its claim as if it were solely that the authority must state the reasons why prices differ.[181] Korea argues that, while it discussed the factual context of the *Washers* anti-dumping investigation in terms of the "reasons" why prices may be differing before the Panel, this was not its sole or even principal argument.[182] Moreover, Korea requests us to reverse the Panel's findings that the authorities need not consider qualitative factors as part of making a proper finding of export prices that "differ significantly" and constitute a "pattern".[183] Specifically, Korea argues that the Panel erred in finding that the authority is not required to examine the "reasons" for the price differences to establish the existence of a pattern.[184] Korea recalls that the term "significantly" entails both qualitative and quantitative aspects. Yet, while acknowledging this, in Korea's view, the Panel effectively held that the term "significantly" can be analysed in purely quantitative terms.[185] According to Korea, qualitative considerations are relevant *both* as part of determining whether price differences are "significant" and form a "pattern" and as part of determining whether a W-W comparison can "take into account appropriately" the significant price differences.[186]

[175] Panel Report, para. 7.48.

[176] Panel Report, para. 7.48. With respect to this explanation, the Panel considered that, where price differences are caused by factors other than "targeted dumping", these differences can "normally" be taken into account appropriately by one of the "normal" comparison methodologies. The Panel, therefore, considered that the authority must analyse the factual circumstances to consider whether something other than "targeted dumping" is responsible for the relevant price differences to satisfy the explanation requirement under the second sentence of Article 2.4.2. Consequently, the Panel found that the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation and that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2. (Panel Report, paras. 7.72-7.77, 7.119.b, 8.1.a.iii, and 8.1.a.vii) Neither of these findings has been appealed.

[177] Panel Report, para. 7.49.

[178] The Panel found support for its approach in the panel report in *US − Upland Cotton*, where the panel did not refer to the underlying "reasons" for the price suppression to establish whether the price suppression was significant within the meaning of Article 6.3(c) of the SCM Agreement. (Panel Report, paras. 7.49-7.50 (quoting Panel Report, *US − Upland Cotton*, paras. 7.1328-7.1330)) The Panel found further support for its approach in the Appellate Body report in *US − Large Civil Aircraft (2nd complaint)*, where the Appellate Body stated that the assessment of the significance of lost sales under Article 6.3(c) of the SCM Agreement has both "quantitative and qualitative dimensions", without suggesting that the qualitative dimension extends to consideration of the "reasons" for those lost sales. (Panel Report, para. 7.51 (quoting Appellate Body Report, *US − Large Civil Aircraft (2nd complaint)*, para. 1272))

[179] Panel Report, paras. 7.52 and 8.1.a.ii.

[180] Panel Report, paras. 7.119.a and 8.1.a.v.

[181] Korea's other appellant's submission, heading IV.B.

[182] Korea's other appellant's submission, para. 160 (quoting Panel Report, para. 7.33, in turn referring to Korea's oral statement at the second Panel meeting, para. 26).

[183] Korea's Notice of Other Appeal, para. 6.

[184] Korea's other appellant's submission, para. 167.

[185] Korea's other appellant's submission, para. 175.

[186] Korea's other appellant's submission, para. 178.

5.60. The United States, in turn, is of the view that Korea attempts to expand its claims beyond what is set forth in its panel request.[187] Moreover, while the United States acknowledges that the term "significantly" has both quantitative and qualitative aspects[188], according to the United States, this does not mean that the authority must examine the "reasons" for the price differences, and a pattern may be discerned through a simple examination of the relevant numerical price values.[189] At the oral hearing, the United States clarified that, in its view, there may be instances where a purely quantitative analysis suffices to find that price differences are significant.[190]

5.61. Addressing first whether the Panel mischaracterized Korea's claim, we note that Korea's request for the establishment of a panel refers to "commercial reasons", "market explanations", and "economic or market factors" that the USDOC allegedly fails to consider.[191] In our view, these references show that Korea claimed that qualitative aspects should be considered. Even if these references should be understood to go to the more narrow issue of *why* differences might exist between export prices, Korea's panel request is otherwise broadly drafted. The "commercial reasons", "market explanations", and "economic or market factors" that the USDOC allegedly fails to consider appear to be mere examples of how, according to Korea, the USDOC fails to identify a pattern in accordance with the second sentence of Article 2.4.2[192], and as such are in the nature of arguments rather than claims.[193] The Panel rejected Korea's claims that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation and that the DPM is inconsistent "as such" with this provision "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".[194] We thus understand the Panel to have concluded that both the Nails II methodology and the DPM involve a purely quantitative analysis, which the Panel did not find to be inconsistent with the second sentence of Article 2.4.2. As such, the Panel sufficiently addressed Korea's claims and arguments, and not only whether the USDOC would have needed to consider the "reasons" for the price differences. Therefore, we disagree with Korea that the Panel mischaracterized its claim.

5.62. Turning to the issue of whether the Panel erred in finding that a pattern of export prices which differ *significantly* can be established on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences, we recall that, pursuant to the second sentence of Article 2.4.2, the relevant "pattern" is one of export prices which differ *significantly*. The term "differ" is thus qualified by the term "significantly". As the Panel correctly recognized[195], "significant" can be defined as "important, notable or consequential".[196] We thus

[187] United States' appellee's submission, para. 125. We note that neither of the participants has raised a claim or an argument under Article 6.2 of the DSU.

[188] United States' appellee's submission, paras. 129 and 131.

[189] United States' appellee's submission, paras. 129 and 134.

[190] See also United States' appellee's submission, para. 139.

[191] Request for the Establishment of a Panel by Korea of 5 December 2013, WT/DS464/4, pp. 4-5.

[192] We also observe that Korea's claims and arguments as set out in its first written submission to the Panel were not confined to whether the "reasons" for the price differences have a role to play in the identification of a pattern. In its first written submission to the Panel, Korea claimed that the Nails II methodology that was applied in the *Washers* anti-dumping investigation and the DPM are inconsistent with the second sentence of Article 2.4.2 because "the USDOC applies fixed numerical criteria to determine whether there is a 'pattern of export prices which differ significantly' … *and* categorically rejects the relevance to its inquiry of the commercial context in which the alleged pattern of significant pricing differences arise." (Korea's first written submission to the Panel, para. 349 (emphasis added))

[193] Article 6.2 of the DSU does not prohibit a party from including in its panel request statements "that foreshadow its arguments in substantiating the claim", and the presence of such arguments "should not be interpreted to narrow the scope of … the claims". (Appellate Body Report, *EC – Selected Customs Matters*, para. 153)

[194] Panel Report, paras. 7.52, 7.119.a, 8.1.a.ii, and 8.1.a.v. (emphasis added)

[195] Panel Report, para. 7.48.

understand the word "significantly" to speak to the extent of the price differences and to suggest something that is more than just a nominal or marginal difference in prices. Under the second sentence of Article 2.4.2, the something that must be important, notable, or consequential is the difference in export prices.

5.63. Furthermore, the term "significantly" has both quantitative and qualitative dimensions.[197] Accordingly, assessing the extent of the differences in export prices to establish whether those export prices differ *significantly* for the purposes of the second sentence of Article 2.4.2 entails both quantitative and qualitative dimensions. As part of the qualitative assessment, circumstances pertaining to the nature of the product or the markets may be relevant for the assessment of whether differences are "significant" in the circumstances of a particular case. The significance of differences may indeed be affected by objective market factors, such as the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. Hence, what may be deemed "significant" price differences in one instance may fail to meet the same threshold when different variables are considered. For example, the Panel observed that, in a more price-competitive market, smaller differences may be significant.[198] Unless the investigating authority considers such qualitative aspects, it will not know if and how these aspects are relevant to its assessment of whether prices differ significantly. Therefore, we disagree with the Panel to the extent it considered that an investigating authority may properly find that certain prices differ significantly within the meaning of the second sentence of Article 2.4.2 if they are notably greater in purely numerical terms.[199]

5.64. Our understanding of the term "significant" accords with previous Appellate Body reports. For example, in the context of Article 6.3(c) of the SCM Agreement[200], in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body found that "an assessment of whether a lost sale is significant can have both quantitative and qualitative dimensions."[201] Regarding the qualitative dimension,

[196] See e.g. Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 1272 (quoting Appellate Body Report, *US – Upland Cotton*, para. 426, in turn referring to Panel Report, *US – Upland Cotton*, para. 7.1326); *US – Tyres (China)*, para. 176 (quoting *Shorter Oxford English Dictionary*, 5th edn, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2835); and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2833). See also Oxford English Dictionary online, definition of "significantly" <http://www.oed.com/view/Entry/179570?redirectedFrom-significantly&print>, accessed 4 February 2014 (Panel Exhibit USA-7), where the word "significantly" is defined as, *inter alia*, "[i]n a significant manner; *esp.* so as to convey a particular meaning; expressively, meaningfully."

[197] The Panel and the participants agree. (See Panel Report, para. 7.51; Korea's other appellant's submission, para. 171; and United States' appellee's submission, para. 131)

[198] Panel Report, para. 7.49.

[199] The Panel considered 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." (Panel Report, para. 7.48) We note that, relying on the Appellate Body report in *China – GOES*, the Panel stated that "the Appellate Body considered that an authority could determine the existence of 'significant price undercutting' simply by comparing two prices". (Ibid., fn 105 to para. 7.48 (referring to Appellate Body Report, *China – GOES*, para. 241)) The Panel read a sentence in that Appellate Body report, which makes a reference to Article 3.2 of the Anti-Dumping Agreement, out of context, especially as the meaning of the term "significant" was not at issue in that case. Moreover, that report has to be read in light of the Appellate Body's subsequent reports in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, in which, as set out in footnote 202 below, the Appellate Body clarified that the factual circumstances of each case will necessarily play a role in assessing "significance". (Appellate Body Reports, *China – HP-SSST (EU) / China – HP-SSST (Japan)*, para. 5.161)

[200] Article 6.3(c) of the SCM Agreement provides that "[s]erious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where … the effect of the subsidy is a *significant price undercutting* by the subsidized product as compared with the price of a like product of another Member in the same market or *significant price suppression, price depression or lost sales* in the same market". (emphasis added)

[201] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1272 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1218).

the Appellate Body referred to the "highly price-competitive" nature of the market.[202] We also note that the panel in *US – Upland Cotton*, in considering a case of significant price suppression under the same provision, found that "it may be relevant to look at the degree of the price suppression … in the context of the prices that have been affected" to assess whether the price suppression is significant.[203] As the panel reasoned:

> 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.[204]

5.65. The words "significantly" and "pattern" in the second sentence of Article 2.4.2, however, do not imply an examination into the cause of (or reasons for) the differences in prices. The second sentence of Article 2.4.2 requires an investigating authority to find "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The text does not impose an additional requirement to ascertain whether the significant differences found to exist are unconnected with "targeted dumping". As the Panel correctly observed, in *US – Large Civil Aircraft (2nd complaint),* there was no suggestion by the Appellate Body that the qualitative dimension of the significance of lost sales extends to consideration of the cause of (or reasons for) those lost sales.[205] Similarly, the Panel correctly observed that the *US – Upland Cotton* panel did not refer to the underlying cause of (or reasons for) price suppression as being relevant to the potential significance of the degree of price suppression.[206] The text of the second sentence of Article 2.4.2 also does not imply an examination of the motivation for, or intent behind, the differences in prices. We thus see merit in the United States' argument that, under the second sentence of Article 2.4.2, the investigating authority is charged with finding whether a pattern of export prices exists, not whether an exporter or producer has intentionally patterned its export prices to "target" and "mask" dumping.[207]

5.66. Based on the foregoing, we find that the requirement to identify prices which differ *significantly* means that the investigating authority is required to assess quantitatively and qualitatively the price differences at issue. This assessment may require the investigating authority to consider certain objective market factors, such as circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. The investigating authority is, however, not required to consider the cause of (or reasons for) the price differences. Therefore, we agree with the Panel that an investigating authority is not required to consider the cause of (or reasons for) the price differences to establish the existence of a pattern under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. However, we reverse the Panel's finding in

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[202] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 1272. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1218; and Panel Report, *Korea – Commercial Vessels*, para. 7.571. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body was faced with interpreting Article 3.2 of the Anti-Dumping Agreement, which refers to "significant price undercutting". The Appellate Body considered that "[w]hat amounts to *significant* price undercutting … will … necessarily depend on the circumstances of each case." The Appellate Body further stated that "an investigating authority may, depending on the case, rely on all positive evidence relating to the nature of the product or product types at issue, how long the price undercutting has been taking place and to what extent, and, as appropriate, the relative market shares of the product types with respect to which the authority has made a finding of price undercutting." (Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161 (emphasis original))

[203] Panel Report, *US – Upland Cotton*, para. 7.1328.

[204] Panel Report, *US – Upland Cotton*, para. 7.1329. (fn omitted) The panel further stated:

> 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.

(Ibid., para. 7.1330) On appeal in that dispute, the Appellate Body found "no difficulty with the Panel's approach". (Appellate Body Report, *US – Upland Cotton*, para. 427)

[205] Panel Report, para. 7.51.

[206] Panel Report, para. 7.50.

[207] United States' appellee's submission, para. 149.

respect of the *Washers* anti-dumping investigation, in paragraph 8.1.a.ii of its Report[208], to the extent that the Panel found that "a pattern of export prices which differ significantly among purchasers, regions or time periods" can be established "on the basis of purely quantitative criteria". We also reverse the Panel's finding in respect of the DPM, in paragraph 8.1.a.v of its Report[209], to the extent that the Panel found that "a pattern of export prices which differ significantly among purchasers, regions or time periods" can be established "on the basis of purely quantitative criteria".

5.1.7 Whether an explanation needs to be provided with respect to both the W-W and the T-T comparison methodologies

5.67. We turn now to consider Korea's claims regarding the second condition set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, pursuant to which the investigating authority is to 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 issue raised by Korea on appeal is whether this provision requires that an explanation be provided with respect to either the W-W *or* the T-T comparison methodology, or with respect to *both* of these two methodologies when the application of the W-T comparison methodology is considered under the second sentence of Article 2.4.2. We recall that the USDOC's explanation in the *Washers* anti-dumping investigation focused on the W-W comparison methodology and did not make reference to the T-T comparison methodology.[210] Nor does the DPM require the USDOC to provide an explanation with respect to the T-T comparison methodology.[211]

5.68. The Panel observed that, under the second sentence of Article 2.4.2, an explanation is required of why "a" W-W "or" T-T "comparison" cannot take into account appropriately the relevant price differences. The Panel considered that the use of the indefinite article "a", combined with the disjunctive "or" and the term "comparison" in the singular, suggests that the requisite explanation need only be provided in respect of one type of comparison (W-W or T-T), not both.[212] Furthermore, the Panel relied on the Appellate Body's finding in *US – Softwood Lumber V (Article 21.5 – Canada)* 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."[213] The Panel considered that this choice under the first sentence of Article 2.4.2 would likely be made *before* the application of the second sentence is considered. The Panel further considered that, if an authority were to opt for the W-W comparison methodology to avoid an overly burdensome comparison process, it would seem anomalous for that authority to have to incur the burden of reverting to the T-T comparison methodology in the context of the second sentence of Article 2.4.2 before applying the W-T comparison methodology. The Panel added that requiring an explanation with respect to both the W-W and the T-T comparison methodologies would undermine the investigating authority's "initial discretion" to choose between the W-W and T-T comparison methodologies.[214]

5.69. Accordingly, the Panel found that 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 because the USDOC failed to explain why the relevant price differences could not be taken into

[208] See also Panel Report, para. 7.52.
[209] See also Panel Report, para. 7.119.a.
[210] Panel Report, para. 7.56. The explanation provided by the USDOC was based on two factors: the W-W comparison methodology concealed the identified price differences; and there was 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. (See Panel Report, paras. 7.54-7.56 (referring to *Washers* preliminary AD determination (Panel Exhibit KOR-32), p. 46395; *Washers* preliminary AD calculation for LGE memorandum (Panel Exhibit KOR-45), pp. 3-4; *Washers* preliminary AD calculation for Samsung memorandum (Panel Exhibit KOR-46), p. 3; *Washers* AD I&D memorandum (Panel Exhibit KOR-18), p. 20; *Washers* final AD calculation for Samsung memorandum (Panel Exhibit KOR-41 (BCI)), p. 2; and *Washers* final AD calculation for LGE memorandum (Panel Exhibit KOR-42 (BCI)), p. 2))
[211] Panel Report, fn 224 to para. 7.118.b. As explained above, under the DPM, the USDOC applies the meaningful difference test to identify whether the W-W comparison methodology can take into account appropriately the observed price differences.
[212] Panel Report, para. 7.79.
[213] Panel Report, para. 7.80 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93).
[214] Panel Report, para. 7.80.

account appropriately by the T-T comparison methodology.[215] The Panel also found that Korea failed to establish that the DPM is inconsistent with this provision because it does not consider whether the relevant price differences can be taken into account appropriately by the T-T comparison methodology.[216]

5.70. Korea advances a series of arguments that take issue with these findings. Korea submits that the word "a" in the phrase "the use of a weighted average-to-weighted average or transaction-to-transaction comparison" in the second sentence of Article 2.4.2 reflects the fact that the investigating authority will be using "a" single comparison methodology (rather than both at the same time) and that the word "or" reflects this choice between the W-W and T-T comparison methodologies.[217] In addition, Korea disagrees with the Panel that providing an explanation with respect to both methodologies would be burdensome. According to Korea, given that the USDOC uses the T-T comparison methodology in "unusual situations", it could easily explain why this methodology would not work in a particular situation.[218] Korea adds that the Panel created an "artificial distinction that the authority 'would likely' have chosen a preferred method under the first sentence before turning to the second sentence", whereas the authority may consider all three options at once.[219]

5.71. For its part, the United States is of the view that the Panel's interpretation follows a proper application of the customary rules of interpretation of public international law, is logical, and accords with prior Appellate Body guidance concerning Article 2.4.2.[220] In particular, the United States argues that if, as the Appellate Body has found, an authority is free to choose between the W-W and T-T comparison methodologies in the first sentence of Article 2.4.2 and those methodologies yield systematically similar results, there would be no purpose in requiring that an explanation be provided with respect to both methodologies.[221] Furthermore, according to the United States, Article 2.4.2 describes a logical progression, in which the investigating authority first selects whether to use the W-W or T-T comparison methodology, and thereafter examines whether the W-T comparison methodology can be applied.[222] Finally, the United States submits that, under Korea's proposed interpretation, the investigating authority would effectively be required to explain its initial choice between the W-W and T-T comparison methodologies, something that is not required under the first sentence of Article 2.4.2.[223]

5.72. We recall that the second sentence of Article 2.4.2 requires that "an explanation [be] 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." Depending on the context in which it is used, the conjunction "or" can be exclusive or inclusive.[224] We note the United States' argument that the first sentence of Article 2.4.2 provides an option between the W-W and T-T comparison methodologies using the conjunction "or" and that the word "or" thus has the same meaning in the context of the explanation to be provided under the second sentence of Article 2.4.2.[225] However, the mere fact that the conjunction "or" is used in the first and second sentences of Article 2.4.2 does not imply that it has the same meaning in both sentences.[226] We also observe that, if the second sentence of Article 2.4.2 were to include the conjunction "and" instead of the conjunction "or", this would suggest that the authority is required to use the W-W and the T-T comparison methodologies in combination.[227] Therefore, in the context of the second

[215] Panel Report, paras. 7.81 and 8.1.a.iv.
[216] Panel Report, paras. 7.119.b and 8.1.a.viii.
[217] Korea's other appellant's submission, para. 192.
[218] Korea's other appellant's submission, para. 195.
[219] Korea's other appellant's submission, para. 198. (fn omitted)
[220] United States' appellee's submission, paras. 167 and 170.
[221] United States' appellee's submission, paras. 171-172 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93).
[222] United States' appellee's submission, para. 178.
[223] United States' appellee's submission, para. 181.
[224] Appellate Body Report, *US – Line Pipe*, para. 164.
[225] United States' appellee's submission, para. 175.
[226] As the panel found in *EC – Salmon (Norway)*, because of the different functions of the word "or", "its meaning in different provisions of the AD Agreement will very much depend upon the obligations at issue and the specific context in which it appears." (Panel Report, *EC – Salmon (Norway)*, para. 7.171)
[227] This is acknowledged by the United States. According to the United States, replacing the conjunction "or" with the conjunction "and" would mean that the authority is required to use both the W-W and the T-T comparison methodologies "together in the same proceeding". (United States' appellee's submission, para. 174)

sentence of Article 2.4.2, using the conjunction "and" instead of the conjunction "or" was not viable to indicate that both methodologies should be addressed in the investigating authority's explanation.

5.73. Turning to the indefinite article "a" and the singular form of the word "comparison" in this provision, we disagree with the Panel that these suggest that an explanation with regard to one of the two normally applicable methodologies comports with the second sentence of Article 2.4.2. We are particularly mindful of the fact that the equally authentic French version of the second sentence of Article 2.4.2 refers to "*les méthodes de comparaison*", using a definite article ("*les*") and "comparison methods" in the plural form.[228]

5.74. Furthermore, the W-T comparison methodology in the second sentence of Article 2.4.2 is an exception to the comparison methodologies that are set out in the first sentence and are normally to be used.[229] Interpreting the second sentence of Article 2.4.2 as requiring that an explanation be provided with respect to both the W-W and the T-T comparison methodologies gives a proper recognition to the text of that provision and to the distinction between the normally applicable methodologies in the first sentence of Article 2.4.2 and the exceptional W-T comparison methodology in the second sentence. If the W-T comparison methodology were to apply in an instance where an explanation is provided with respect to one of the two normally applicable comparison methodologies, but the other could appropriately take the relevant price differences into account, the W-T comparison methodology would no longer be used as an exception. Although the W-W and T-T comparison methodologies are likely to yield substantially equivalent results, the possibility that, in a particular case, they might yield different results and might impact differently the possible use of the W-T comparison methodology, should not be entirely excluded.

5.75. Finally, we disagree with the Panel's reasoning that the investigating authority's "initial discretion" between the W-W and T-T comparison methodologies under the first sentence of Article 2.4.2 would be undermined by requiring that an explanation be provided with respect to both these methodologies. We recall that the W-W and the T-T comparison methodologies "fulfil the same function" and that there is no "hierarchy between the two".[230] As such, an investigating authority may choose between these two methodologies "depending on which is most suitable for the particular investigation".[231] However, we consider that the investigating authority's option between the W-W and T-T comparison methodologies under the first sentence of Article 2.4.2 is unrelated to the question of whether these two methodologies are not appropriate to unmask "targeted dumping" such that the investigating authority contemplates the application of the W-T comparison methodology. Requiring that an explanation be provided in respect of both the W-W and T-T comparison methodologies, when the application of the W-T comparison methodology is considered under the second sentence of Article 2.4.2, does not mean that the investigating authority is deprived of its discretion should it decide to apply the first sentence of Article 2.4.2 instead of turning to the W-T comparison methodology in the second sentence.[232]

5.76. For these reasons, we consider that an investigating authority has to explain why both the W-W and the T-T comparison methodologies cannot take into account appropriately the differences

[228] Article 33(1) of the Vienna Convention recognizes that treaties authenticated in several languages are equally authoritative in each of these languages, as is the case with the Anti-Dumping Agreement. Moreover, pursuant to Article 33(4) of the Vienna Convention, "when a comparison of the authentic texts discloses a difference of meaning …, the meaning which best reconciles the texts … shall be adopted." For the sake of completeness, the Spanish version of the second sentence of Article 2.4.2 refers to "*una comparación*" in the singular, using the indefinite article "*una*".

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

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

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

[232] The Panel also considered that it would seem anomalous for the investigating authority to have to incur the burden of reverting to the T-T comparison methodology in the context of the second sentence of Article 2.4.2 before applying the W-T comparison methodology, if that authority opts for the W-W comparison methodology under the first sentence of Article 2.4.2. In this context, the Panel noted that "[t]he 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". (Panel Report, para. 7.80 (emphasis original)) However, we are not convinced that the burden that lies on investigating authorities and the sequence in which the various comparison methodologies are likely to be considered are relevant to the interpretation of the second sentence of Article 2.4.2 pursuant to the Vienna Convention. In addition, an investigating authority may consider the application of the three methodologies in no particular order or at the same time, rather than in sequence.

in export prices that form the pattern. In circumstances where the W-W and T-T comparison methodologies would yield substantially equivalent results and where an explanation has been provided with respect to one of these two methodologies, the explanation to be included with respect to the other may not need to be as elaborate.

5.77. Based on the foregoing, we reverse the Panel's finding, in paragraph 8.1.a.iv of its Report[233], that "Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] 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". For the same reasons, we reverse the Panel's finding, in paragraph 8.1.a.viii of its Report[234], that "Korea failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] 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".

5.1.8 "Systemic disregarding"

5.1.8.1 Whether the Panel erred in finding that Korea failed to establish that the United States' use of "systemic disregarding" under the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

5.78. We turn now to consider Korea's appeal of the Panel's findings under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in respect of "systemic disregarding". We begin by recalling that the USDOC applies a "mixed" comparison methodology as part of the DPM. In cases where the value of the transactions that pass the Cohen's *d* test is between 33% and 66% of the value of the total export transactions, the W-T comparison methodology with zeroing is applied to these transactions. For the remaining transactions, i.e. the transactions that do not pass the Cohen's *d* test, the W-W comparison methodology is used.

5.79. In the first administrative review of the *Washers* anti-dumping order, the USDOC applied this "mixed" comparison methodology with respect to LGE.[235] For the transactions to which the W-W comparison methodology was applied, the USDOC took the sum total of the "evidence of dumping" (i.e. the positive comparison results) and "offset" this amount with export sales that were greater than normal value (i.e. the negative comparison results) up to the amount of the sum total of the "evidence of dumping". For the transactions to which the W-T comparison methodology was applied, the USDOC took the sum total of the "evidence of dumping" and made no "offsets" for export sales above normal value (i.e. the USDOC used zeroing).[236] The USDOC then combined the sum total of the comparison results of the W-W and W-T comparison methodologies to determine the margin of dumping for the exporter (LGE) and the product under investigation (LRWs) "as a whole". In aggregating the comparison results, the USDOC did not permit the overall negative comparison result arising from the W-W comparison methodology to "offset" the "evidence of dumping" from the application of the W-T comparison methodology.[237] As we have observed above, it is in this context that the issue of "systemic disregarding" arises under the DPM.

5.80. The Panel noted that the W-T comparison methodology provided in the second sentence of Article 2.4.2 is an exceptional and alternative comparison methodology.[238] The Panel considered

[233] See also Panel Report, para. 7.81.
[234] See also Panel Report, para. 7.119.b.
[235] USDOC [A-580-868] Large Residential Washers From the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014, *United States Federal Register*, Vol. 80, No. 45 (9 March 2015), pp. 12456-12458 / USDOC [A-580-868] Memorandum regarding Large Residential Washers from Korea: Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014 (3 March 2015) / USDOC [A-580-868] Memorandum to File regarding 2012-2014 Administrative Review of Large Residential Washers from Korea – Preliminary Results Margin Calculation for LGE (2 March 2015) (BCI-redacted version) (Panel Exhibit KOR-96); USDOC [A-580-868] Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Large Residential Washers from the Republic of Korea (8 September 2015) (Panel Exhibit KOR-141).
[236] United States' appellee's submission, para. 58.
[237] United States' appellee's submission, para. 59.
[238] Panel Report, para. 7.155.

that, when an investigating authority determines the margin of dumping for an individual exporter or foreign producer under the second sentence of Article 2.4.2, the investigating authority is entitled to have particular regard and, therefore, limit its analysis to the pricing behaviour of that exporter or foreign producer in respect of the transactions that form the "pattern". Furthermore, the Panel noted that, irrespective of the methodology applied, Articles 2.1 and 6.10 of the Anti-Dumping Agreement require that margins of dumping be established for the product under investigation "as a whole" for the individual exporter or foreign producer concerned. Thus, the Panel reasoned 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 that individual exporter or foreign producer.[239]

5.81. The Panel further considered that, consistent with the focus of the second sentence of Article 2.4.2 being on the pricing behaviour in respect of "pattern transactions", one could take the view 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 had not raised a claim to that effect, the Panel did not see the need to rule on this matter.[240]

5.82. Recalling that the second sentence of Article 2.4.2 is designed to enable an investigating authority to focus on "pattern transactions" in order to "unmask targeted dumping", the Panel found that, where an investigating authority applies the W-T comparison methodology to "pattern transactions" and the W-W (or T-T) comparison methodology to "non-pattern transactions", the effect of this approach would be to "zoom in" on the "targeted dumping" identified in respect of "pattern transactions", but subsequently to "zoom out" and "re-mask" the identified "targeted dumping", if the investigating authority had to take into account the result of the W-W (or T-T) comparison methodology applied to "non-pattern transactions" when making its overall determination of dumping.[241] The Panel further found that such an approach would lead to "mathematical equivalence" – the same result that would arise from a straightforward application of the W-W comparison methodology to all transactions.[242] "Systemic disregarding", according to the Panel, "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".[243]

5.83. The Panel rejected Korea's argument that the use of different weighted average normal values could avoid mathematical equivalence. The Panel found that Korea had 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.[244] Neither was the Panel persuaded by Korea's argument that mathematical equivalence could be avoided if the investigating authority undertook a "granular analysis" of the transactions involved in the W-T comparison methodology and a detailed approach to price adjustments, i.e. by rethinking the adjustments that might be necessary to ensure price comparability.[245] The Panel took the view that the second sentence does not envisage that any price adjustments be made in addition to those made pursuant to an investigating authority's general obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement. According to the Panel, "there is nothing in the

[239] Panel Report, para. 7.160.
[240] Panel Report, para. 7.161.
[241] Panel Report, para. 7.162.
[242] Panel Report, para. 7.164. However, the Panel clarified that it was 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". The Panel added that there would be no mathematical equivalence if the application of the W-T comparison methodology to "pattern transactions" were combined with the application of the T-T comparison methodology to "non-pattern transactions". (Ibid., fn 303 to para. 7.164)
[243] Panel Report, para. 7.163.
[244] Panel Report, para. 7.165. However, the Panel, in clarifying that it was not "suggest[ing] that only a single weighted average normal value should be applied", acknowledged 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." (Ibid., fn 306 to para. 7.165)
[245] Panel Report, para. 7.166. (fn omitted)

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."[246]

5.84. In light of the above, the Panel rejected Korea's claim that the USDOC's use of "systemic disregarding" when combining the overall comparison results arising from the W-W and W-T comparison methodologies under the DPM is inconsistent "as such" with the second sentence of Article 2.4.2.[247]

5.85. On appeal, Korea asserts that the Panel's approach essentially creates two margins of dumping, one for the subset to which the W-T comparison methodology is applied, and another for the subset using the W-W comparison methodology. Korea argues that, although the Panel correctly found that zeroing could not apply to either of these two subsets, it allowed the "functional equivalent of zeroing" by combining the two subsets and by refusing to allow any "offsets" from the subset based on the normal comparison methodologies when determining the overall dumping and margin of dumping.[248] Korea argues that, apart from allowing an exception to the normal comparison methodologies, neither the second sentence of Article 2.4.2 nor the whole of Article 2.4.2 creates any exception to the basic concepts of "dumping" and "margin of dumping".[249] Further, Korea asserts that the Panel's reasoning has no basis in the text or context of Article 2.4.2[250] and that "'[d]umping' only exists as a final conclusion based on all export transactions overall for the exporter and for the product as a whole."[251]

5.86. Moreover, Korea argues that, unlike what the Panel found, "[t]he purpose of the second sentence of Article 2.4.2 … is simply to allow the authority to undertake the more careful examination of individual export prices that the W-T comparison method[ology] makes possible."[252] According to Korea, the purpose of the second sentence of Article 2.4.2 is not to "'unmask' so-called 'targeted dumping'", but rather "to 'unmask' individual export prices".[253] Korea further states that the second sentence of Article 2.4.2 is not about end results, but rather about the comparison methodology necessary to ensure that individual export prices are more carefully examined by the investigating authority in specified circumstances.[254]

5.87. For its part, the United States contends that, where an investigating authority applies the W-T comparison methodology to fewer than all export prices, the Anti-Dumping Agreement does not obligate the investigating authority to "offset" or "re-mask" the "evidence of dumping" that has been "unmasked" through the use of the W-T comparison.[255] Therefore, the United States submits that Korea's argument in essence leads to an interpretation of the second sentence of Article 2.4.2 as requiring the mandatory "re-masking" of below-normal value export sales, which is not supported by the text of the Anti-Dumping Agreement, and which would render the second sentence of Article 2.4.2 *inutile*.[256] The United States contends that the Panel was right to interpret the second sentence as being an exception to the first sentence of Article 2.4.2, and as setting forth a special methodology for establishing margins of dumping.[257]

5.88. As regards the function of the second sentence of Article 2.4.2, the United States submits that Korea's position that the purpose of the second sentence is for the investigating authority to undertake a "more careful examination" means nothing if the provision requires "re-masking" of "targeted dumping".[258] Moreover, the United States submits that, under Korea's approach, there would never be any reason for an investigating authority to resort to the alternative, W-T comparison methodology when the T-T comparison methodology already provides the investigating authority with the possibility of undertaking a "granular examination of individual

[246] Panel Report, para. 7.166.
[247] Panel Report, paras. 7.167 and 8.1.a.x.
[248] Korea's other appellant's submission, para. 57.
[249] Korea's other appellant's submission, para. 78.
[250] Korea's other appellant's submission, para. 54.
[251] Korea's other appellant's submission, para. 56.
[252] Korea's other appellant's submission, para. 118.
[253] Korea's other appellant's submission, para. 119.
[254] Korea's appellee's submission, para. 88.
[255] United States' appellee's submission, para. 64.
[256] United States' appellee's submission, para. 56.
[257] United States' appellee's submission, para. 71.
[258] United States' appellee's submission, para. 80.

export prices".[259] Thus, the United States submits that the only logical conclusion is that the second sentence of Article 2.4.2 is intended "to enable investigating authorities to 'unmask' so-called 'targeted dumping'".[260]

5.89. For the purposes of our analysis and in order to address the discrete claims raised by Korea on appeal, we first recall below the relevant jurisprudence that dumping and margins of dumping are established for the product under investigation "as a whole" and for each exporter or foreign producer. Next, in light of this jurisprudence, we turn to consider the establishment of dumping and margins of dumping under the W-T comparison methodology set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

5.1.8.1.1 Dumping and margins of dumping under the first sentence of Article 2.4.2 of the Anti-Dumping Agreement

5.90. The Appellate Body has consistently held that the concepts of "dumping" and "margins of dumping" are the same throughout the Anti-Dumping Agreement. Recalling that Article 2.1 of the Anti-Dumping Agreement defines "dumping" "[f]or the purpose of this Agreement"[261], the Appellate Body found that the definitional content of "dumping" must be capable of application throughout the Anti-Dumping Agreement in a coherent fashion.[262] In *US – Zeroing (Japan)*, the Appellate Body clarified that the terms "dumping" and "dumped imports" have the same meaning in all provisions of the Anti-Dumping Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper reviews, and periodic reviews and that, in each case, "they relate to a *product* because it is the product that is introduced into the commerce of another country at less than its normal value in that country."[263] The Appellate Body further indicated that "[t]he definitions in Article 2.1 [of the Anti-Dumping Agreement] and Article VI:1 [of the GATT 1994] are no doubt central to the interpretation of other provisions of the *Anti-Dumping Agreement*, such as the obligations relating to, *inter alia*, the calculation of margins of dumping, volume of dumped imports, and levy of anti-dumping duties to counteract injurious dumping".[264]

5.91. Moreover, the Appellate Body has considered the Anti-Dumping Agreement to prescribe that "dumping determinations be made in respect of each exporter or foreign producer examined … because dumping is the result of the pricing behaviour of individual exporters or foreign producers."[265] According to the Appellate Body, 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.[266]

5.92. Article 2.4.2 of the Anti-Dumping Agreement explains how investigating authorities must proceed to ascertain margins of dumping. More particularly, Article 2.4.2 contains two sentences, which set out the methodologies that investigating authorities may use to establish margins of dumping.

5.93. The first sentence of Article 2.4.2 states that the existence of margins of dumping "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." The Appellate Body has considered that, in establishing dumping and margins of dumping for each exporter or producer and for the

[259] United States' appellee's submission, para. 81 (quoting Korea's other appellant's submission, para. 197).
[260] United States' appellee's submission, para. 82 (quoting Panel Report, para. 7.26).
[261] Article 2.1 of the Anti-Dumping Agreement provides:
For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.
[262] Appellate Body Report, *US – Continued Zeroing*, para. 280.
[263] Appellate Body Report, *US – Zeroing (Japan)*, para. 109. (emphasis original)
[264] Appellate Body Report, *US – Zeroing (Japan)*, para. 140. (fn omitted)
[265] Appellate Body Report, *US – Zeroing (Japan)*, para. 111.
[266] Appellate Body Report, *US – Zeroing (Japan)*, para. 111.

product under investigation "as a whole" under the first sentence of Article 2.4.2, an investigating authority is under an obligation to take into account the entire "universe of export transactions", that is, *all* the export transactions of the "like" product by a given exporter or foreign producer.

5.94. In the context of the W-W comparison methodology, the Appellate Body has found that there is nothing in Article 2.4.2 or in any other provision of the Anti-Dumping Agreement that provides for the establishment of the existence of margins of dumping for types or models of the product under investigation, and all references to the establishment of the existence of margins of dumping are references to the product under investigation.[267] In particular, the Appellate Body has found that "[w]hatever the method used to calculate the margins of dumping, … these margins must be, and can only be, established for the *product* under investigation as a whole."[268]

5.95. In establishing margins of dumping for the product under investigation under the W-W comparison methodology, the Appellate Body has also recognized that, while the investigating authority may undertake multiple averaging or multiple comparisons at the sub-group level, it is "required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions".[269] Thus, it was in the context of "model zeroing" that the Appellate Body in *EC – Bed Linen* found that, "[b]y 'zeroing' the 'negative dumping margins', the European Communities … did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found."[270] Accordingly, the Appellate Body found that the existence of margins of dumping was not established on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions.[271] The Appellate Body has explained that, for the purposes of the W-W comparison methodology, "the word 'all' in 'all comparable export transactions' makes it clear that Members … 'may only compare those export transactions which are comparable, but [they] must compare *all* such transactions'."[272]

5.96. Moreover, the Appellate Body has emphasized that, although an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation, "the results of the multiple comparisons at the sub-group level are … not 'margins of dumping' within the meaning of Article 2.4.2."[273] In the absence of a textual basis in Article 2.4.2 that would justify taking into account the results of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other results[274], the Appellate Body has stated that "it is only on the basis of aggregating *all* … 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole."[275]

5.97. In respect of the T-T comparison methodology, the Appellate Body has not considered the absence of the phrase "all comparable export transactions" as suggesting that an investigating authority is free to disregard certain export transactions from the applicable "universe of export transactions" in order to establish margins of dumping. According to the Appellate Body, the phrase "all comparable export transactions" is not pertinent for this methodology because "under the T-T comparison methodology, all export transactions are taken into account on an individual basis and matched with the most appropriate transactions in the domestic market."[276] The Appellate Body has, thus, found that the text of Article 2.4.2 implies that the calculation of margins of dumping using the T-T comparison methodology is a multi-step exercise, whereby the results of transaction-specific comparisons are inputs that are aggregated in order to establish the margin of dumping for the product under investigation and for each exporter or foreign producer.[277]

[267] Appellate Body Report, *EC – Bed Linen*, para. 53.
[268] Appellate Body Report, *EC – Bed Linen*, para. 53. (emphasis original)
[269] Appellate Body Report, *EC – Bed Linen*, para. 55. (emphasis original)
[270] Appellate Body Report, *EC – Bed Linen*, para. 55. (emphasis original)
[271] Appellate Body Report, *EC – Bed Linen*, para. 55.
[272] Appellate Body Report, *US – Softwood Lumber V*, para. 86. (emphasis original; fn omitted)
[273] Appellate Body Report, *US – Softwood Lumber V*, para. 97.
[274] Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[275] Appellate Body Report, *US – Softwood Lumber V*, para. 97. (emphasis original)
[276] Appellate Body Report, *US – Zeroing (Japan)*, para. 124.
[277] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87.

5.98. In light of the above, an investigating authority is not allowed to disregard, in establishing dumping and margins of dumping under the W-W or T-T comparison methodology provided in the first sentence of Article 2.4.2 of the Anti-Dumping Agreement, any transactions that make up the "universe of export transactions" to be examined thereunder, that is, *all* the export transactions of the "like" product by a given exporter or foreign producer.

5.1.8.1.2 The W-T comparison methodology in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

5.99. We now turn to address how the W-T comparison methodology works under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. In so doing, we focus on the "universe of export transactions" that needs to be compared with normal value in order to establish dumping and margins of dumping, also keeping in mind the function of this provision. We then consider whether the second sentence of Article 2.4.2 allows combining the W-T comparison methodology with one of the two symmetrical comparison methodologies provided in the first sentence. Finally, we address the participants' arguments in respect of "mathematical equivalence".

5.100. The second sentence of Article 2.4.2 of the Anti-Dumping Agreement provides:

> 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.

5.101. The comparison envisaged under the second sentence of Article 2.4.2 is, thus, an asymmetrical comparison between a normal value "established on a weighted average basis" and prices of "individual export transactions". We have concluded above[278] that these "individual export transactions" refer to the "universe of export transactions" that justify the use of the W-T comparison methodology, namely, the "pattern transactions". We have reached this conclusion based on the text of the second sentence of Article 2.4.2, read in light of its function of allowing an investigating authority to identify and address "targeted dumping", and in keeping with the overall structure of Article 2.4.2 of the Anti-Dumping Agreement.[279]

5.1.8.1.2.1 Dumping and margins of dumping under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

5.102. The Panel considered 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 disciplines' that 'dumping' and 'margins of dumping' pertain to an exporter or foreign producer, and to the product [under investigation] (as a whole), taking into account all export transactions of the exporter or foreign producer concerned."[280] In this regard, both the Panel[281] and Korea[282] referred to the findings of the Appellate Body in *US – Zeroing (Japan)*, where the Appellate Body concluded:

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[278] See para. 5.52 of this Report.

[279] Moreover, our conclusion also accords with the previous statements of the Appellate Body that the W-T comparison methodology applies to a more limited "universe of export transactions". In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body stated that "the universe of export transactions to which the weighted average-to-transaction comparison methodology applies would be different from the universe of transactions examined under the weighted average-to-weighted average methodology". (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, fn 166 to para. 99) The Appellate Body has further explained that the universe of export transactions under the second sentence "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" and 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." (Appellate Body Report, *US – Zeroing (Japan)*, para. 135) These findings suggest that the domain of the second sentence of Article 2.4.2 is this more limited "universe of export transactions", i.e. the "pattern transactions".

[280] Panel Report, para. 7.160. (fn omitted)

[281] Panel Report, para. 7.158.

> Thus, it is evident from the design and architecture of the *Anti-Dumping Agreement* that: (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. These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the *Anti-Dumping Agreement*.[283]

5.103. We observe that these statements in respect of the first sentence of Article 2.4.2, that dumping and margins of dumping have to be established for the product under investigation "as a whole", should be read in the context of the Appellate Body's finding against "model zeroing". "Model zeroing" occurs in situations where the investigating authority divides the product under investigation into product types or models for the purposes of calculating a weighted average normal value and a weighted average export price and sets to zero the negative comparison results arising in respect of certain product types or models. In *EC − Bed Linen*, in addressing "model zeroing", the Appellate Body stated that, "with respect to Article 2.4.2, the European Communities had to establish 'the existence of margins of dumping' for the *product* − cotton-type bed linen − and not for the various types or models of that product" since, "[h]aving defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition."[284] The Appellate Body found that, "[b]y 'zeroing' the 'negative dumping margins', the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found."[285] The Appellate Body concluded that, in so doing, "the European Communities did *not* establish 'the existence of margins of dumping' for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions − that is, for *all* transactions involving *all* models or types of the product under investigation."[286]

5.104. The establishment of dumping and margins of dumping, for the product under investigation "as a whole" and by taking into account all export transactions of a given exporter or foreign producer, is to be carried out in respect of the applicable "universe of export transactions" for each of the comparison methodologies set forth in Article 2.4.2. It is in the context of establishing margins of dumping for the product under investigation "as a whole" under the normally applicable W-W and T-T comparison methodologies that the Appellate Body has consistently found that, under the first sentence of Article 2.4.2, an investigating authority is under an obligation to consider the entire "universe of export transactions" for a given exporter or foreign producer. However, and as the Appellate Body has previously stated, under the W-T comparison methodology set forth in the second sentence of Article 2.4.2, the applicable "universe of export transactions" is more limited than those under the W-W and T-T comparison methodologies.[287]

5.105. Once the applicable "universe of export transactions" has been determined under the second sentence of Article 2.4.2 for the purposes of the application of the W-T comparison methodology, dumping and margins of dumping pertaining to an exporter or foreign producer and to the product under investigation are limited to this identified "universe of export transactions", i.e. the "pattern transactions".

5.106. In light of the above, not only is the application of the W-T comparison methodology limited to "pattern transactions", but also the second sentence of Article 2.4.2 provides for establishing margins of dumping on the basis of the limited "universe of export transactions" to

[282] Korea's other appellant's submission, fn 14 to para. 64.
[283] Appellate Body Report, *US − Zeroing (Japan)*, para. 114. (fn omitted)
[284] Appellate Body Report, *EC − Bed Linen*, para. 53. (emphasis original)
[285] Appellate Body Report, *EC − Bed Linen*, para. 55. (emphasis original)
[286] Appellate Body Report, *EC − Bed Linen*, para. 55. (emphasis original)
[287] Appellate Body Reports, *US − Zeroing (Japan)*, para. 135; *US − Softwood Lumber V (Article 21.5 − Canada)*, fn 166 to para. 99.

which the W-T comparison methodology applies – i.e. the "pattern transactions".[288] While the first sentence of Article 2.4.2 provides for symmetrical comparison methodologies that "shall normally" be used to establish the existence of margins of dumping by considering the universe of *all* export transactions, the second sentence provides for an asymmetrical comparison methodology, which, as we have explained above and as the Appellate Body has stated, "is clearly an exception to the comparison methodologies which normally are to be used".[289]

5.1.8.1.2.2 The function of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

5.107. The function of the second sentence of Article 2.4.2 lends further support to a reading of this provision as providing for the establishment of margins of dumping on the basis of the limited "universe of export transactions" that form the pattern. We have considered above that the function of the second sentence of Article 2.4.2 is to allow an investigating authority to identify and address "targeted dumping". This is supported by the Appellate Body's statement in *EC – Bed Linen* that "[t]his provision 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."[290]

5.108. The second sentence of Article 2.4.2 does not expressly refer to "targeted dumping", but allows the use of the W-T comparison methodology "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods". The notion of "targeted dumping" is implied in the reference in the second sentence of Article 2.4.2 to "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Therefore, it is only certain export transactions, those that constitute the pattern by differing significantly from the remaining export transactions of an exporter or foreign producer, that are aimed at, or "targeted" to, a purchaser, region, or time period within the meaning of the second sentence of Article 2.4.2.

5.109. In keeping with its function of allowing an investigating authority to effectively address "targeted dumping", the second sentence of Article 2.4.2 permits an investigating authority to establish margins of dumping by means of the application of the W-T comparison methodology exclusively to "pattern transactions". The second sentence of Article 2.4.2 says nothing about including transactions that are not part of the pattern in the comparison process that is required to establish margins of dumping. If an investigating authority were required to conduct comparisons with export transactions outside of the pattern – i.e. for "non-pattern transactions" – by applying one of the two normally applicable comparison methodologies, and then aggregate the result of this comparison with the result of the W-T comparison methodology applied to "pattern transactions", the "targeted dumping" identified from the consideration of "pattern transactions" would be "re-masked" by the comparison results arising from "non-pattern transactions", in situations where the latter produces an overall negative comparison result.

5.110. Korea disagrees that the function of the second sentence of Article 2.4.2 is to "unmask targeted dumping" and asserts that its purpose "is simply to allow the authority to undertake the more careful examination of individual export prices that the W-T comparison method[ology] makes possible".[291] We see no textual basis in the second sentence of Article 2.4.2 to conclude, as Korea asserts, that the function of the second sentence is to allow an investigating authority to undertake a more careful and "granular" examination of individual export prices. In any event, we

[288] Under the W-T comparison methodology provided in the second sentence of Article 2.4.2, the margin of dumping, which is expressed as a percentage of the total value of export transactions of an exporter or foreign producer, would be established by considering "pattern transactions", while excluding "non-pattern transactions" in the numerator of the equation. The denominator, however, will reflect all export transactions of an exporter or foreign producer. (See Panel Report, para. 7.160)

[289] Appellate Body Report, *US – Zeroing (Japan)*, para. 131. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body further explained that "[t]he second sentence of Article 2.4.2 sets out a third methodology (weighted average-to-transaction), which involves an asymmetrical comparison and may be used only in exceptional circumstances", whereas the first sentence of Article 2.4.2 "sets out two comparison methodologies (weighted average-to-weighted average and transaction-to-transaction) involving symmetrical comparisons of normal value and export prices". (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 86)

[290] Appellate Body Report, *EC – Bed Linen*, para. 62.

[291] Korea's other appellant's submission, para. 118.

do not see how Korea's proposed interpretation is different from what is already contemplated under the T-T comparison methodology. In this respect, we are not convinced that, under Korea's approach, the W-T comparison methodology would fulfil a function that is not already fulfilled by the T-T comparison methodology.

5.111. Therefore, we do not think that the Panel erred in identifying the function of the second sentence of Article 2.4.2 as addressing or "unmasking targeted dumping" and in considering that this function informs an interpretation of the second sentence of Article 2.4.2 as providing for the establishment of margins of dumping under the W-T comparison methodology by comparing normal value only with "pattern transactions", while excluding from consideration "non-pattern transactions".[292] Even if one were to accept Korea's proposed interpretation that the function of the second sentence is to allow an investigating authority to conduct a more careful or "granular" examination, we do not consider that such an interpretation would be inconsistent with the reading of the second sentence of Article 2.4.2 as establishing margins of dumping based on "pattern transactions" only. Indeed, under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, an investigating authority will carefully consider all export transactions and separate those individual export transactions that form the relevant "pattern" within the meaning of that provision from those that are not part of the identified "pattern". Margins of dumping are then established by comparing the weighted average normal value only with transactions that are included in the identified "pattern".

5.1.8.1.2.3 The composition of numerator and denominator in establishing margins of dumping

5.112. Korea further contends that, in determining the margin of dumping, the numerator should comprise "the net amount of the comparisons of all export prices to normal value"[293] and the denominator should comprise the "total sales by the exporter".[294] According to Korea, "a proper 'margin of dumping' consists of: (i) a numerator that considers all export sales, without pretending that some of the export sales were at lower prices (by denying offsets); and (ii) a denominator that also consists of all export sales."[295]

5.113. For its part, the United States does not disagree with Korea that all of an exporter's export transactions should be "taken into account" in the determination of dumping.[296] The United States adds that the USDOC's approach does, in fact, take account of all export transactions. However, the United States submits that Korea's approach means that the "evidence of 'targeted dumping' must, as a matter of an obligation under the AD Agreement, be re-masked by aggregating all results for all transactions in the numerator of the calculation of the margin of dumping."[297]

5.114. We have explained above that the second sentence of Article 2.4.2 permits the establishment of the existence of margins of dumping for the product under investigation and for each exporter or foreign producer by applying the W-T comparison methodology to "pattern transactions" only. Thus, in calculating the margin of dumping as a percentage of the exports of a given exporter or foreign producer, the numerator comprises only "pattern transactions", while "non-pattern transactions" are excluded. The denominator, however, must reflect the universe of *all* export transactions of a given exporter or foreign producer and comprises the value of all the sales of a given exporter or foreign producer of the "like" product.

5.115. We observe that Article 6.10 of the Anti-Dumping Agreement states that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." The margin of dumping determined under the second sentence of Article 2.4.2 in order to address "targeted dumping" is for each exporter or producer, and not just for the "targeted sales" by that exporter or producer. On the one hand, the existence of a "pattern" within the meaning of the second sentence of Article 2.4.2, and thus "targeting" by exporters or producers, justifies taking the dumping amount from the W-T

[292] Panel Report, para. 7.162.
[293] Korea's other appellant's submission, para. 109.
[294] Korea's other appellant's submission, para. 109.
[295] Korea's other appellant's submission, para. 114.
[296] United States' appellee's submission, para. 75 (quoting Korea's other appellant's submission, para. 98).
[297] United States' appellee's submission, para. 75.

comparison that is applied to the "pattern transactions", while excluding from consideration "non-pattern transactions". On the other hand, this dumping amount that is based on the "targeted" sales must be divided by *all* the export sales of a given exporter or producer in order to determine the margin of dumping and the corresponding anti-dumping duty for that exporter or producer. Therefore, the Panel did not err in finding that "while the net amount of dumping may be established from considering the evidence of dumping in pattern transactions … 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."[298]

5.116. Under the W-T comparison methodology provided in the second sentence of Article 2.4.2, the margin of dumping, which is expressed as a percentage of the total value of export transactions of an exporter or foreign producer, would be established by considering "pattern transactions", while excluding "non-pattern transactions" in the numerator of the equation. The denominator, however, will reflect all export transactions of an exporter or foreign producer. In so doing, while "targeted dumping" is identified and addressed by including in the numerator the "pattern transactions", the denominator, in reflecting the value of *all* export transactions of the "like" product by a given exporter or foreign producer, ensures that, for the universe of "pattern transactions" to which the W-T comparison methodology is applied, the margin of dumping is calculated for that exporter or foreign producer and for the product under investigation "as a whole". This exercise is, therefore, consistent with the concepts of "dumping" and "margins of dumping" as pertaining to an exporter or foreign producer and to the product under investigation "as a whole" and with the function of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement as identifying and addressing "targeted dumping".

5.117. We, therefore, conclude that, in calculating the margin of dumping as a percentage of the exports of a given exporter or foreign producer, the numerator comprises only the "pattern transactions", while excluding "non-pattern transactions". The denominator, however, is composed of *all* export transactions of a given exporter or foreign producer and comprises the value of all the sales of a given exporter or producer of the "like" product.

5.1.8.1.2.4 Combining comparison methodologies

5.118. Korea contends that the Panel erred in permitting the USDOC to establish margins of dumping under the DPM by disregarding an overall negative comparison result arising from the application of the W-W comparison methodology to "non-pattern transactions" when combining it with the overall comparison result of the W-T comparison methodology.[299] We note that Korea's argument on "systemic disregarding" of "non-pattern transactions" is premised on the assumption that the second sentence of Article 2.4.2 of the Anti-Dumping Agreement permits the combining of comparison methodologies in establishing margins of dumping.

5.119. The Panel acknowledged that "[o]ne might take the view … that the combined application of the W-T and W-W (or T-T) comparison methodologies is not envisaged by that provision".[300] However, since Korea had not raised a claim to this effect, the Panel did not see the need to rule on that matter and proceeded with the assumption that a combined application of comparison methodologies was not excluded by the second sentence of Article 2.4.2.

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[298] Panel Report, para. 7.160.

[299] See e.g. Korea's other appellant's submission, para. 72.

[300] Panel Report, para. 7.161. Moreover, the Panel noted that the issue of "systemic disregarding" arises when considering how the results of the combined methodologies should be aggregated. The Panel further added:

> 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.

(Ibid., fn 299 to para. 7.161)

5.120. We have found above that the second sentence of Article 2.4.2, read in the context of the structure of Article 2.4.2 and consistently with its function of allowing an investigating authority to identify and address "targeted dumping", permits the establishment of margins of dumping by the application of the W-T comparison methodology to "pattern transactions", while excluding from consideration "non-pattern transactions", when the conditions stated in that provision have been satisfied. Thus, having concluded that the applicable "universe of export transactions" for the purposes of establishing dumping and margins of dumping under the second sentence of Article 2.4.2 is limited to "pattern transactions", we do not consider that this provision allows the combining of comparison methodologies, that is, the combined application of the W-T comparison methodology applied to "pattern transactions" with either the W-W or the T-T comparison methodology applied to "non-pattern transactions".

5.121. Although the second sentence mentions the W-W and T-T comparison methodologies, this reference appears in the context of the explanation requirement of why neither of these symmetrical comparison methodologies is capable of taking into account the "export prices which differ significantly". The second sentence does not provide for the application of the W-W and T-T comparison methodologies anew. Instead, these two symmetrical comparison methodologies are referenced as they are provided for in, and subject to the requirements of, the first sentence of Article 2.4.2. Consistent with the jurisprudence of the Appellate Body, we have explained above that, under the first sentence of Article 2.4.2, the W-W and T-T comparison methodologies apply to the universe of *all* export transactions, and not to "pattern" or "non-pattern" transactions within the meaning of the second sentence. Thus, we do not see anything in the text of the second sentence, read in the context of the entire Article 2.4.2, that supports a reading of the W-W and T-T comparison methodologies as applying to a reduced "universe of export transactions" (i.e. the "non-pattern transactions") pursuant to the reference to these two comparison methodologies in the second sentence of Article 2.4.2. The text of the second sentence, thus, does not provide for the application of either of the two symmetrical comparison methodologies to "non-pattern transactions".

5.122. Moreover, conducting a separate comparison under one of the two symmetrical comparison methodologies for "non-pattern transactions" not only lacks support in the text of the second sentence of Article 2.4.2, but also undermines the function of the second sentence. In order to enable an investigating authority to identify and address "targeted dumping", the second sentence of Article 2.4.2 defines a more limited "universe of export transactions", which, as we have considered above, coincides with the "pattern transactions" that are targeted to purchasers, regions, or time periods. It is on the basis of these "pattern transactions" that margins of dumping are then established under the second sentence. To aggregate the results of a symmetrical comparison methodology applied to "non-pattern transactions" may either "mask" the "targeted dumping" (if the overall comparison result is negative) or increase the margin of dumping (if the overall comparison result is positive) in a manner that is not provided for in the second sentence of Article 2.4.2 and that would compromise its function of effectively addressing "targeted dumping".

5.123. The second sentence of Article 2.4.2 does not envisage "systemic disregarding" as described by the Panel.[301] This provision does not provide for a mechanism whereby an investigating authority would conduct separate comparisons for "pattern transactions" under the W-T comparison methodology and for "non-pattern transactions" under the W-W or T-T comparison methodology, and exclude from its consideration the result of the latter if it yields an overall negative comparison result, or aggregate it with the W-T comparison results for the "pattern transactions" if it yields an overall positive comparison result. This is further supported by our conclusion above that, if the conditions set forth in the second sentence of Article 2.4.2 are met, an investigating authority is allowed to establish margins of dumping by applying the W-T comparison methodology only to "pattern transactions", while excluding from consideration "non-pattern transactions".

5.124. Hence, we conclude that Article 2.4.2 does not permit the combining of comparison methodologies for the purposes of establishing dumping and margins of dumping in accordance with the second sentence. Instead, the second sentence allows an investigating authority to establish the existence of margins of dumping by comparing a "normal value established on a weighted average basis" with "pattern transactions" only. We have explained above that this is

[301] Panel Report, para. 7.161.

consistent with the function of the second sentence of Article 2.4.2 and that, for the purposes of this provision, dumping and margins of dumping pertaining to an exporter or a foreign producer, and to the product under investigation "as a whole", refer to a more limited "universe of export transactions", that is, the "pattern transactions". In light of the above, we consider the question of whether the second sentence of Article 2.4.2 of the Anti-Dumping Agreement allows "systemic disregarding" as defined by the Panel as moot.

5.1.8.1.2.5 Mathematical equivalence

5.125. In light of the above considerations, comparing normal value with "pattern transactions" only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the W-W comparison methodology to *all* export transactions.[302] Mathematical equivalence or substantial equivalence arises only if one were to take the view that the second sentence of Article 2.4.2 of the Anti-Dumping Agreement envisages the combining of comparison methodologies, thereby requiring an investigating authority to aggregate the results of the W-T comparison methodology applied to "pattern transactions" with the results of the W-W comparison methodology applied to "non-pattern transactions".[303] In contrast, we have rejected an interpretation of the second sentence of Article 2.4.2 as permitting the combination of comparison methodologies.

5.126. Korea submits that the Panel found mathematical equivalence despite the fact that the argument of mathematical equivalence has been considered and rejected by the Appellate Body previously on numerous occasions when considering the second sentence of Article 2.4.2 as context for the permissibility of zeroing under the first sentence.[304] Korea further asserts that there is no necessary mathematical equivalence if the investigating authority changes its assumptions about normal value or makes adjustments for export prices for the subset of sales subjected to the W-T comparison methodology.[305]

5.127. The United States contends that, if zeroing is prohibited under the W-T comparison methodology, and if the result of the W-W comparison is allowed to "offset" the result of the W-T comparison, then the overall result arising from this combination and that derived from the application of the W-W comparison methodology to all export prices will be mathematically

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[302] The participants agreed at the oral hearing that, if the applicable "universe of export transactions" to which the W-T comparison methodology applies under the second sentence of Article 2.4.2 is limited to "pattern transactions", whereas "non-pattern transactions" are not taken into account in establishing the margins of dumping, there will be no mathematical equivalence between the result so obtained and the result derived from the application of the W-W comparison methodology to *all* export transactions.

[303] In previous disputes, the Appellate Body has found that "the 'mathematical equivalence' argument works only under a specific set of assumptions" (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126) and it is based on certain assumptions that "may not hold good in all situations". (Appellate Body Report, *US – Zeroing (Japan)*, para. 133) Moreover, the limited relevance of the mathematical equivalence argument is reflected in Korea's acknowledgment that, even if an investigating authority were to change its assumption about the normal value under the W-T comparison methodology, the margins of dumping obtained from the combined application of the W-W comparison methodology to "non-pattern transactions" and the W-T comparison methodology to "pattern transactions" "may not be different in every case". (Korea's other appellant's submission, para. 143)

[304] Korea's other appellant's submission, para. 137 (referring to Appellate Body Reports, *US – Continued Zeroing*, paras. 297-298; *US – Stainless Steel (Mexico),* paras. 126-127; *US – Zeroing (Japan)*, paras. 132-134; and *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 97-99).

[305] Korea's other appellant's submission, para. 143. See also Korea's appellee's submission, para. 77. Moreover, we recall that, in *US – Stainless Steel (Mexico)*, the Appellate Body, in stating that the mathematical equivalence argument works only under a specific set of assumptions, took into consideration the possibility of determining different weighted average normal values for different time periods. In particular, the Appellate Body stated:

> We note that the United States did not contest before the Panel Mexico's assertion that, if the determination of weighted average normal values was based on *different time periods*, dumping margin calculations under these two methodologies would yield different mathematical results.

(Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126. (emphasis original; fn omitted))

equivalent[306], which would render the second sentence of Article 2.4.2 *inutile*, contrary to the principle of effectiveness.[307]

5.128. The function of the second sentence of Article 2.4.2 should not be addressed by focusing on mathematical equivalence.[308] As the Appellate Body indicated in *US – Softwood Lumber V (Article 21.5 – Canada)*, that the comparison methodologies in the first sentence of Article 2.4.2 and the W-T comparison methodology will not normally produce equivalent results is a consequence of the fact that the third comparison methodology addresses "targeted dumping" by focusing on "pattern transactions".[309] Korea's argument that mathematical equivalence can be avoided by changing normal value or considering adjustments to export prices, thereby leading to different results in some cases, still does not explain how this exercise accords with the function of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement of allowing an investigating authority to identify and address "targeted dumping". We fail to see how "different results" will in themselves address "targeted dumping", unless such results are calculated based on "pattern transactions".

5.1.8.1.2.6 Conclusions

5.129. We have concluded above that the second sentence of Article 2.4.2 of the Anti-Dumping Agreement allows an investigating authority to establish margins of dumping by applying the W-T comparison methodology only to "pattern transactions" to the exclusion of "non-pattern transactions". We have also concluded that the second sentence of Article 2.4.2 does not permit the combining of comparison methodologies. Accordingly, we have found that this provision does not envisage "systemic disregarding", as described by the Panel. We do not consider that the second sentence of Article 2.4.2 envisages a mechanism whereby an investigating authority would conduct separate comparisons for "pattern transactions" under the W-T comparison methodology and for "non-pattern transactions" under the W-W or T-T comparison methodology, and exclude from its consideration the result of the latter if it yields an overall negative comparison result or aggregate it with the W-T comparison result for the "pattern transactions" if it yields an overall positive comparison result. Thus, in circumstances where the requirements of the second sentence of Article 2.4.2 have been fulfilled, an investigating authority is allowed to establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions" and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.

5.130. In light of the above, we, therefore, moot the Panel's finding, in paragraph 8.1.a.x of its Report[310], that "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". Instead, as explained above, when the requirements of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement are fulfilled, an investigating authority may establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.

5.1.8.2 Whether the Panel erred in finding that Korea failed to establish that the United States' use of "systemic disregarding" under the DPM is inconsistent "as such" with Article 2.4 of the Anti-Dumping Agreement

5.131. We turn now to consider Korea's appeal of the Panel's findings under Article 2.4 of the Anti-Dumping Agreement in respect of "systemic disregarding".

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[306] United States' appellee's submission, para. 100 (referring to United States' appellant's submission, paras. 161-164).

[307] United States' appellee's submission, para. 97 (referring to United States' appellant's submission, paras. 115-167).

[308] We recall that the Appellate Body has explained that "[o]ne part of a provision setting forth a methodology is not rendered *inutile* simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision." (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99)

[309] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, fn 166 to para. 99.

[310] See also Panel Report, para. 7.167.

5.132. The Panel recalled its findings that Article 2.4.2 of the Anti-Dumping Agreement enables investigating authorities to establish the existence of margins of dumping by focusing on "pattern transactions" and that, if an investigating authority chooses to combine the application of the W-W comparison methodology to "non-pattern transactions" with the application of the W-T comparison 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, the Panel rejected 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".[311]

5.133. On appeal, Korea argues that the Panel's finding that there is nothing "unfair" about "systemic disregarding" and that, therefore, it is not inconsistent with Article 2.4, repeats the same legal errors that Korea has identified with regard to the Panel's interpretation of the second sentence of Article 2.4.2 that dumping can exist within a subset of the export sales.[312] Korea, therefore, requests the reversal of the Panel's findings under Article 2.4.[313] In addition, Korea requests us to complete the legal analysis based on undisputed facts and on the Panel's findings in respect of the second sentence of Article 2.4.2, and to find that "systemic disregarding" is inconsistent with the "fair comparison" requirement in Article 2.4.[314] Korea asserts that, for a measure to meet the "fair comparison" requirement in Article 2.4, it must be impartial, even-handed, and unbiased, something that "systemic disregarding" is not.[315]

5.134. The United States submits that the Panel was correct in finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent "as such" with Article 2.4 and that Korea's arguments lack merit.[316] The United States contends that, since it is "fair" to take steps to "unmask targeted dumping" by faithfully applying a comparison methodology consistent with the second sentence of Article 2.4.2, when the conditions for its use are met, doing so is entirely consistent with the obligation of an investigating authority under Article 2.4 to be impartial, even-handed, and unbiased.[317] Thus, the United States submits that, since the Panel's findings need not be reversed, there is no need for us to complete the legal analysis.[318]

5.135. We begin by recalling that the first sentence of Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal value." We note that the introductory clause of Article 2.4.2 expressly makes this provision "[s]ubject to the provisions governing fair comparison" in Article 2.4. In this regard, the Appellate Body has explained that "Article 2.4 sets forth a general obligation to make a 'fair comparison' between export price and normal value", adding that "[t]his is a general obligation that ... informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'."[319] Therefore, the application of all three comparison methodologies (i.e. W-W, T-T, and W-T) set out in Article 2.4.2 is expressly made subject to the "fair comparison" requirement in Article 2.4.

5.136. In explaining the "fair comparison" requirement in Article 2.4, the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* stated that "[t]he term 'fair' is generally understood to connote impartiality, even-handedness, or lack of bias."[320] The Appellate Body found in that dispute that "the use of zeroing under the transaction-to-transaction comparison methodology is difficult to reconcile with the notions of impartiality, even-handedness, and lack of bias reflected in the 'fair comparison' requirement in Article 2.4"[321], since "the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of

[311] Panel Report, para. 7.169.
[312] Korea's other appellant's submission, paras. 147-148.
[313] Korea's other appellant's submission, para. 149.
[314] Korea's other appellant's submission, para. 150.
[315] Korea's other appellant's submission, paras. 151-152.
[316] United States' appellee's submission, paras. 106-107.
[317] United States' appellee's submission, para. 111.
[318] United States' appellee's submission, para. 109.
[319] Appellate Body Report, *EC – Bed Linen*, para. 59.
[320] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138. (fn omitted)
[321] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 138.

dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[322]

5.137. We have concluded above that the second sentence of Article 2.4.2 allows an investigating authority to establish dumping and margins of dumping for an exporter or foreign producer and for the product under investigation "as a whole" by applying the W-T comparison methodology to "pattern transactions" only. We have also explained that, in doing so, while the denominator of the equation will comprise all export transactions of an exporter or foreign producer, the numerator is composed of "pattern transactions" only, while excluding "non-pattern transactions". Moreover, we have concluded that the second sentence of Article 2.4.2 does not permit the combining of comparison methodologies.

5.138. The obligation to undertake a "fair comparison" between normal value and export prices arises in respect of the applicable "universe of export transactions" to which each of the three comparison methodologies set out in Article 2.4.2 applies. The exceptional nature of the W-T comparison methodology, consistent with the function of the second sentence of Article 2.4.2 as allowing an investigating authority to identify and address "targeted dumping" by considering a "universe of export transactions … which … would be different from the universe of transactions examined"[323] under the normally applicable comparison methodologies, also confirms that the "fair comparison" requirement in Article 2.4 applies only in respect of "pattern transactions". Accordingly, we consider that Articles 2.4 and 2.4.2 not only inform each other, but must be read together harmoniously. The exclusion of "non-pattern transactions" from the establishment of dumping and margins of dumping under the second sentence of Article 2.4.2, thus, comports with the notions of impartiality, even-handedness, and lack of bias reflected in the "fair comparison" requirement in Article 2.4. Once an investigating authority has identified the "pattern transactions" within the meaning of the second sentence of Article 2.4.2 for the purposes of the application of the W-T comparison methodology in order to address "targeted dumping" to the exclusion of "non-pattern transactions", the investigating authority can be said to have adopted an approach that is impartial, even-handed, and unbiased. Such an approach neither distorts the prices of certain export transactions (i.e. the "non-pattern transactions"), nor inflates the magnitude of dumping, as Korea asserts[324], since there is nothing "to disregard", as the second sentence of Article 2.4.2 does not contemplate, in the first place, a comparison outside of the identified "pattern".

5.139. We recall that the Panel rejected Korea's argument that "systemic disregarding" under the DPM is "unfair and contrary to Article 2.4".[325] Although the Panel considered that an investigating authority could establish the existence of margins of dumping by focusing on "pattern transactions" to the exclusion of "non-pattern transactions"[326], the underlying assumption of the Panel was that the combined application of comparison methodologies is not excluded under the second sentence of Article 2.4.2.[327] We have, however, explained above that, while we agree that the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping based on a comparison between normal value and "pattern transactions" only, we do not consider that the second sentence allows for the combined application of the W-T comparison methodology to "pattern transactions" and the W-W (or T-T) comparison methodology to "non-pattern transactions".

5.140. In light of these considerations, we conclude that the establishment of margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer, is consistent with the "fair comparison" requirement in Article 2.4. Having concluded that the second sentence of Article 2.4.2 does not permit an investigating authority to combine the W-T comparison methodology with the W-W or T-T comparison methodology and, thus, does not provide for "systemic disregarding" as described by the Panel, we moot the Panel's finding, in paragraph 8.1.a.xi of its Report[328], that "Korea failed

[322] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.
[323] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, fn 166 to para. 99.
[324] Korea's other appellant's submission, para. 152.
[325] Panel Report, para. 7.169.
[326] Panel Report, para. 7.169.
[327] Panel Report, para. 7.161.
[328] See also Panel Report, para. 7.169.

to establish that the United States' use of 'systemic disregarding' under the DPM is 'as such' inconsistent with Article 2.4" of the Anti-Dumping Agreement.

5.1.9 Zeroing under the W-T comparison methodology[329]

5.1.9.1 Whether the Panel erred in finding that the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" and "as applied" in the *Washers* anti-dumping investigation with Article 2.4.2 of the Anti-Dumping Agreement

5.141. The Panel found that, since the second sentence of Article 2.4.2 of the Anti-Dumping Agreement puts 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. According to the Panel, the focus of the W-T comparison methodology is on the prices of the "individual" export transactions within the pattern, which suggests 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. Thus, the Panel found that there is no basis in the text of the second sentence of Article 2.4.2 to conclude that the export prices of certain individual transactions (e.g. those below normal value) should be accorded greater significance than the export prices of other individual export transactions (e.g. those above normal value). The Panel took the view that the phrase "individual export transactions" in the first part of the second sentence of Article 2.4.2 suggests 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.[330] The Panel also found that there is "no consideration of whether transactions *within* the pattern are priced at significantly different levels relative to one another"[331] and, thus, 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".[332]

5.142. Accordingly, the Panel concluded that the USDOC's use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with the second sentence of Article 2.4.2.[333] For the same reasons, the Panel concluded that the USDOC acted inconsistently with the second sentence of 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.[334]

5.1.9.1.1 Zeroing under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

5.143. The United States claims that the Panel erred in finding that the use of zeroing in connection with the application of the W-T comparison methodology is inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, when the conditions for the use of the methodology have been fulfilled. According to the United States, an examination of the text and context of Article 2.4.2 leads to the conclusion that zeroing is permissible, and indeed necessary, when applying the W-T comparison methodology, if that "exceptional" comparison methodology is to be given any meaning.[335]

5.144. Korea responds that the United States' argument does not address the Appellate Body's consistent logic that any finding of dumping must reflect all export transactions for each exporter and for the product under investigation "as a whole"[336] and that denying "offsets" improperly

[329] One Member of the Division expressed a separate opinion on the issue of zeroing under the W-T comparison methodology. This separate opinion can be found in sub-section 5.1.10 of this Report.
[330] Panel Report, para. 7.190.
[331] Panel Report, para. 7.191. (emphasis original)
[332] Panel Report, para. 7.191.
[333] Panel Report, paras. 7.192 and 8.1.a.xii.
[334] Panel Report, paras. 7.192 and 8.1.a.xiv.
[335] United States' appellant's submission, para. 195.
[336] Korea's appellee's submission, para. 41 (referring to Appellate Body Reports, *US – Softwood Lumber V*, para. 99; *US – Continued Zeroing*, para. 283; *US – Stainless Steel (Mexico)*, paras. 89-90; and *US – Zeroing (EC)*, para. 128).

disregards the actual prices of some of the export transactions.[337] Moreover, Korea contends that these principles apply consistently throughout the Anti-Dumping Agreement.[338] According to Korea, there is nothing in the text or context of the second sentence of Article 2.4.2 that suggests that dumping or margin of dumping should have any different meaning for the second sentence of Article 2.4.2 than for the rest of the Anti-Dumping Agreement.[339]

5.145. We have recalled above the main Appellate Body findings regarding the use of zeroing under the W-W and T-T comparison methodologies provided in the first sentence of Article 2.4.2. In finding that zeroing is not permitted under either of the two symmetrical comparison methodologies set forth in the first sentence, the Appellate Body considered that the concepts of "dumping" and "margins of dumping" are the same throughout the Anti-Dumping Agreement and that margins of dumping are established for the product under investigation "as a whole", and for each exporter or foreign producer, by including in the comparison *all* the export transactions of the "like" product by that exporter or foreign producer.[340]

5.146. Thus, according to this jurisprudence, in establishing dumping and margins of dumping under the W-W and T-T comparison methodologies provided in the first sentence of Article 2.4.2, an investigating authority needs to take into account all transactions that make up the applicable "universe of export transactions" to be examined thereunder.

5.147. We have also explained above that, under the second sentence of Article 2.4.2, dumping and margins of dumping pertaining to all export transactions of an exporter or foreign producer and to the product under investigation "as a whole" are limited to the applicable "universe of export transactions" for that provision, namely, the more limited universe of "pattern transactions".[341] Thus, dumping and margins of dumping under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 are to be determined by conducting a comparison between normal value and "pattern transactions", without having to take into account "non-pattern transactions".[342]

5.148. We now turn to address the United States' claim on appeal that the Panel erred in finding that the use of zeroing in connection with the application of the W-T comparison methodology is inconsistent with the second sentence of Article 2.4.2. In doing so, the question that we need to address is whether, in the application of the W-T comparison methodology, an investigating authority is required to aggregate the results of all the transaction-specific comparisons that arise from the consideration of "pattern transactions", or whether it can exclude those transactions within the pattern that yield negative intermediate comparison results, i.e. whether zeroing is permitted under the second sentence of Article 2.4.2.

5.149. We recall that the Appellate Body has consistently held that the concepts of "dumping" and "margins of dumping" are the same throughout the Anti-Dumping Agreement. The Appellate Body has considered that "Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 are definitional provisions" that "set out a definition of 'dumping' for the purposes of the *Anti-Dumping Agreement* and the GATT 1994".[343] The Appellate Body has also found that "the terms 'dumping' and 'margins of dumping' in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole and do not apply to sub-group levels."[344]

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[337] Korea's appellee's submission, para. 41 (referring to Appellate Body Reports, *US – Zeroing (Japan)*, para. 146; and *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 139).

[338] Korea's appellee's submission, para. 41 (referring to Appellate Body Reports, *US – Stainless Steel (Mexico)*, paras. 85 and 94; and *US – Zeroing (Japan)*, para. 109).

[339] Korea's appellee's submission, para. 42.

[340] See paras. 5.90-5.98 of this Report.

[341] See paras. 5.105-5.106 of this Report.

[342] Under the W-T comparison methodology provided in the second sentence of Article 2.4.2, the margin of dumping, which is expressed as a percentage of the total value of export transactions of an exporter or foreign producer, would be established by considering "pattern transactions", while excluding "non-pattern transactions" in the numerator of the equation. The denominator, however, will reflect all the export transactions of an exporter or foreign producer. (See Panel Report, para. 7.160)

[343] Appellate Body Report, *US – Zeroing (Japan)*, para. 140.

[344] Appellate Body Report, *US – Softwood Lumber V*, para. 102.

5.150. In *US – Zeroing (EC)*, the Appellate Body found that the use of zeroing by the USDOC 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.[345] These findings by the Appellate Body do not, however, directly address the question of whether the second sentence of Article 2.4.2 permits the use of zeroing in the application of the W-T comparison methodology. Under the second sentence, the application of the W-T comparison methodology serves to allow an investigating authority to identify and address "targeted dumping", which would otherwise be "masked" by the application of the two symmetrical comparison methodologies under the first sentence of Article 2.4.2. In contrast, in the administrative reviews at issue in *US – Zeroing (EC)*, the United States applied the W-T comparison methodology to assess the liability for anti-dumping duties on specific entries of the subject product for each individual importer – i.e. on the basis of the transactions of each individual importer from the exporter, for whom a margin of dumping under Article 2 already existed. Thus, the two provisions fulfil different functions under the Anti-Dumping Agreement.

5.151. In interpreting the second sentence of Article 2.4.2, we have come to the conclusion that the term "individual export transactions" refers to the pattern of export prices identified by the investigating authority which differ significantly from other export prices. These export prices differ significantly because they are significantly lower than other export prices. This conclusion is supported by the text and context of Article 2.4.2, taking into account the function of the second sentence of allowing an investigating authority to identify and address "targeted dumping".[346] We find no such textual and contextual support to conclude that the term "individual export transactions" in the second sentence of Article 2.4.2 refers only to those transactions that form part of the identified "pattern" but are priced below normal value. Rather, we agree with the Panel that the term "individual" suggests 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."[347]

5.152. Under the second sentence of Article 2.4.2, the relevant "pattern" is composed of a set of significantly lower prices to purchasers, regions, or time periods, and margins of dumping are established by conducting a comparison between normal value and those export transactions that are included in the pattern. The second sentence of Article 2.4.2 is "exceptional" because it allows investigating authorities to establish margins of dumping, while excluding from the dumping comparison those transactions that do not form part of the pattern. This exception is spelled out in the text of the second sentence of Article 2.4.2 that uses the terms "individual export transactions" and "a pattern of export prices which differ significantly". We have concluded above that these terms refer to the same set of export prices. Moreover, the reference in the second sentence to the term "individual export transactions" is in the context of highlighting the asymmetrical nature of the W-T comparison methodology, whereby a normal value established on a weighted average basis is compared to prices of individual export transactions as opposed to a comparison between normal value and export price on a W-W or T-T basis. Thus, we do not see any basis to read the term "individual export transactions" as permitting the exclusion of those individual "pattern transactions" that are priced above normal value from the establishment of margins of dumping in the application of the asymmetrical W-T comparison methodology.

5.153. Zeroing within the pattern necessarily amounts to a definition of "pattern" that is limited to those export transactions to one or more particular purchasers, regions, or time periods that are below normal value, as it is only those sales that would be taken into account to establish margins of dumping when using zeroing. However, as we have found above, the second sentence of Article 2.4.2 does not define the pattern in reference to normal value. Rather, the reference to purchasers, regions, or time periods indicates that, while export prices within a pattern must differ significantly from other export prices, the pattern is composed of *all* the export prices to one or more particular purchasers, regions, or time periods, not just those that are below normal value. To allow zeroing within an identified "pattern" would disconnect the notion of pattern that is identified under the second sentence (as all export sales to one or more particular purchasers, regions, or time periods) from the pattern to which the W-T comparison methodology is applied for establishing margins of dumping in order to address "targeted dumping" (by considering only those sales to one or more purchasers, regions, or time periods that are below normal value).

[345] Appellate Body Report, *US – Zeroing (EC)*, para. 133.
[346] See paras. 5.29 and 5.52 of this Report.
[347] Panel Report, para. 7.190.

However, the text of the second sentence of Article 2.4.2 does not support an interpretation according to which the pattern to which the W-T comparison methodology applies for establishing margins of dumping is different from the pattern that triggers the application of the second sentence and that reveals the existence of "targeted dumping".

5.154. We also recall that, in examining the permissibility of zeroing in the context of the T-T comparison methodology, the Appellate Body stated in *US – Softwood Lumber V (Article 21.5 – Canada)* that "the reference to 'export prices' in the plural, without further qualification, suggests that all of the results of the transaction-specific comparisons should be included in the aggregation for purposes of calculating the margins of dumping."[348] The Appellate Body, thus, concluded that "zeroing in the transaction-to-transaction methodology does not conform to the requirement of Article 2.4.2 in that it results in the real values of certain export transactions being altered or disregarded."[349] While this finding concerned the permissibility of zeroing under the T-T comparison methodology, similar considerations apply to the reference to "prices of individual export transactions" in the plural in the second sentence of Article 2.4.2, which as noted above is not qualified by any reference to normal value.

5.155. Turning to the function of the second sentence of Article 2.4.2, we observe that the second sentence provides for an exception to the normally applicable symmetrical comparison methodologies of the first sentence in order to allow investigating authorities to identify and address "targeted dumping", whereby the "targeted dumping" coincides with the identified "pattern" of significantly different export prices. By conducting a comparison between normal value and all transactions included in the identified "pattern", an investigating authority is able to address the "targeted dumping" that is identified and that corresponds to that particular "pattern". Indeed, the second sentence of Article 2.4.2 allows an investigating authority to identify and address "targeted dumping" that corresponds to a properly defined pattern, which includes sales that are both above and below normal value, and not to a pattern composed exclusively of sales that are below normal value. We are, therefore, of the view that there is nothing more that needs to be "unmasked" once the dumping comparison has been conducted between normal value and "pattern transactions" to the exclusion of "non-pattern transactions". In this respect, while zeroing within a pattern that includes sales above normal value increases the margin of dumping, it does not "unmask" the "targeted dumping" that corresponds to the properly identified "pattern" of significantly lower sales, whereby such pattern includes sales below and above normal value.

5.156. The United States' argument that, if zeroing is not allowed, the second sentence of Article 2.4.2 "would no longer be 'exceptional' and would no longer provide a means to 'unmask targeted dumping'"[350], does not take into account that under the W-T comparison methodology provided in the second sentence of Article 2.4.2 an investigating authority is allowed to establish margins of dumping by taking into account only "pattern transactions" to the exclusion of all other transactions that fall outside of the pattern. The use of the W-T comparison methodology under the second sentence of Article 2.4.2 allows an investigating authority to "unmask" and address "targeted dumping" in keeping with its function and, accordingly, it does not deprive the second sentence of its *effet utile*. The second sentence of Article 2.4.2 has meaning and effect because it allows for the identification of the relevant "pattern" within the meaning of that provision and it allows an investigating authority to address "targeted dumping" by applying the W-T comparison methodology to the limited universe of "individual export transactions" that form the identified "pattern". As noted above, however, the "targeted dumping" to be "unmasked" corresponds to the properly identified "pattern", and not to a set of sales below normal value within that pattern for which there exists neither a textual nor a contextual basis in the second sentence. Therefore, when the W-T comparison methodology is applied to "pattern transactions", zeroing is neither necessary to "unmask targeted dumping", nor permitted under the second sentence of Article 2.4.2.

5.157. The United States recalls the Appellate Body's observation in *US – Softwood Lumber V (Article 21.5 – Canada)* that "[i]t could be argued … that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third

[348] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 88. (fn omitted)
[349] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 88.
[350] United States' appellant's submission, para. 108.

methodology *inutile.*"[351] According to the United States, an implication of this observation by the Appellate Body is that "it is possible to use zeroing 'to capture pricing patterns constituting "targeted dumping"'."[352] Moreover, the United States observes that "the Appellate Body has never found that it is permissible to use zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2, when the conditions for use of that methodology have been established, just as it has never found that it is impermissible to do so, because it has never had occasion to examine that issue."[353]

5.158. We have found above that under the second sentence of Article 2.4.2 an investigating authority may focus exclusively on "pattern transactions", while excluding from its consideration "non-pattern transactions". This enables an investigating authority to "capture pricing patterns constituting 'targeted dumping'"[354] without any need to resort to the use of zeroing in the application of the W-T comparison methodology.

5.159. We note that the application of the W-T comparison methodology provided for in the second sentence of Article 2.4.2 was not at issue before the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)*. In that dispute, the Appellate Body was addressing the second sentence of Article 2.4.2 in view of the Panel's contextual reliance on that provision. The Appellate Body focused on the *effet utile* of the second sentence of Article 2.4.2. The Appellate Body considered that to use zeroing under the comparison methodologies provided in the first sentence to "unmask targeted dumping" would have deprived the second sentence, whose function is to address "targeted dumping", of its *effet utile*. The Appellate Body, however, did not pronounce on *how* "targeted dumping" should be addressed under the second sentence of Article 2.4.2. In particular, the Appellate Body did not suggest that giving effect to the second sentence of Article 2.4.2 would require an investigating authority to establish margins of dumping by applying the W-T comparison methodology with zeroing to the applicable "universe of export transactions", i.e. the "pattern transactions".

5.160. We have concluded above that, under the second sentence of Article 2.4.2, dumping and margins of dumping pertaining to all export transactions of an exporter or foreign producer and to the product under investigation are limited to "pattern transactions". The exceptional W-T comparison methodology in the second sentence of Article 2.4.2 requires a comparison between a weighted average normal value and the entire universe of export transactions that fall within the pattern as properly identified[355] under that provision, irrespective of whether the export price of individual "pattern transactions" is above or below normal value. While the results of the transaction-specific comparisons of weighted average normal value and each individual export price falling within the pattern will be intermediate results, the aggregation of *all* these results is required and will determine dumping and margins of dumping for the product under investigation as it relates to the identified "pattern". Zeroing the negative intermediate comparison results within the pattern is neither necessary to address "targeted dumping", nor is it consistent with the establishment of dumping and margins of dumping as pertaining to the "universe of export transactions" identified under the second sentence of Article 2.4.2.

5.1.9.1.2 Mathematical equivalence

5.161. The United States further submits that, assuming that under both the W-W and W-T comparison methodologies the calculation of the margins of dumping is based on the same normal value and export sales data, if zeroing is prohibited under both comparison methodologies, then the results of the W-W comparison methodology and the W-T comparison methodology will be mathematically equivalent with respect to the total amount of all comparison results, the total amount of dumping, and the weighted average dumping margin for each exporter for the product under investigation.[356] Korea, for its part, contends that the United States' argument on mathematical equivalence starts with the false assumption that the method of determining normal

[351] United States' appellant's submission, para. 110 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100).
[352] United States' appellant's submission, para. 110 (quoting Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100). (emphasis original; fn omitted)
[353] United States' appellant's submission, fn 139 to para. 110 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127).
[354] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 100.
[355] See paras. 5.29 and 5.36 of this Report.
[356] United States' appellant's submission, para. 115.

value must remain the same.[357] According to Korea, the possibility of changing the normal value or the adjustments to the export prices breaks mathematical equivalence.[358] Korea asserts that "[a]ny equivalence reflects assumptions about how the authority is making the comparison."[359]

5.162. We note that the United States' argument on mathematical equivalence is premised on its understanding of what constitutes the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. The United States submits that, "[o]n its face", the second sentence of Article 2.4.2 "contemplates a pattern of export prices that would transcend multiple purchasers, regions, or time periods"[360] and that "[s]uch a 'pattern' necessarily includes both lower and higher export prices that 'differ significantly' from each other."[361]

5.163. We have concluded above that the "pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2 comprises only a subset of all the export transactions and that these significantly different export prices are significantly lower export prices, which would be used by an exporter or producer to "target" purchasers, regions, or time periods. In this respect, the W-W and W-T comparison methodologies are designed to operate based on different "universes of export transactions": the first, based on *all* export transactions; and the second, based on individual export transactions that form the relevant "pattern". Accordingly, the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping by comparing "pattern transactions" with normal value, while excluding from its consideration "non-pattern transactions". Comparing normal value with "pattern transactions" only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the W-W comparison methodology to *all* export transactions.[362]

5.164. The United States further submits that the Panel's approach of applying the W-T comparison methodology to a subset of transactions without zeroing is in essence equivalent to the application of the W-W comparison methodology to the same subset of transactions without zeroing. According to the United States, the Panel, in doing so, "effectively rewrote the second sentence of Article 2.4.2, changing it from allowing the application of the average-to-transaction comparison methodology under certain circumstances to allowing the application of the average-to-average comparison methodology to a subset of transactions under certain circumstances."[363] Thus, the United States contends that the Panel "invented a new methodology" and "read the average-to-transaction comparison methodology out of the second sentence of Article 2.4.2 of the AD Agreement altogether, contrary to the principle of effectiveness."[364]

5.165. The mere fact that the result of the application of the W-T comparison methodology to "pattern transactions" may be equivalent to the result of comparing the weighted average normal value with the weighted average export price of all "pattern transactions", is neither relevant under the second sentence that provides for the application of the W-T comparison methodology to "pattern transactions" only, nor does it read the W-T comparison methodology out of the second sentence of Article 2.4.2. As we have explained above, the function of the second sentence of Article 2.4.2 is to allow an investigating authority to address "targeted dumping" by identifying a

[357] Korea's appellee's submission, para. 73.
[358] Korea's appellee's submission, para. 74.
[359] Korea's appellee's submission, para. 77.
[360] United States' appellant's submission, para. 52.
[361] United States' appellant's submission, para. 53. (emphasis original)
[362] Our conclusion also accords with the Appellate Body's statement in *US – Softwood Lumber V (Article 21.5 – Canada)* that "the universe of export transactions to which the weighted average-to-transaction comparison methodology applies would be different from the universe of transactions examined under the weighted average-to-weighted average methodology" and in these circumstances "the two methodologies would not yield equivalent results, except by coincidence." (Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, fn 166 to para. 99) Moreover, and as we have considered above with regard to Korea's appeal of the Panel's findings on "systemic disregarding", the function of the second sentence of Article 2.4.2 should not be addressed by focusing on mathematical equivalence. We further recall the Appellate Body's findings in previous disputes that the "'mathematical equivalence' argument works only under a specific set of assumptions" (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126) and that "the mathematical equivalence argument is based on certain assumptions that may not hold good in all situations." (Appellate Body Report, *US – Zeroing (Japan)*, para. 133)
[363] United States' appellant's submission, para. 189. (emphasis original)
[364] United States' appellant's submission, para. 189 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:1, p. 106).

"pattern of export prices which differ significantly" and to which the W-T comparison methodology is applied. Once the pattern of export prices within the meaning of the second sentence has been identified by the investigating authority, the fact that the application of the W-T comparison methodology to that pattern of export prices leads to equivalent results as the application of the W-W comparison methodology to the same pattern, neither undermines the *effet utile* of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, nor does it lead to equivalent results between the application of the symmetrical comparison methodologies normally used under the first sentence to the universe of *all* export transactions and the application of the W-T comparison methodology used under the second sentence of Article 2.4.2 to the limited universe of "pattern transactions".

5.1.9.1.3 Negotiating history

5.166. The United States also argues that the negotiating history of the Anti-Dumping Agreement confirms that zeroing is permissible when applying the asymmetrical and exceptional W-T comparison methodology set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.[365] The United States refers to four documents in support of its arguments and submits that certain proposals from GATT Contracting Parties seeking changes to the Tokyo Round Anti-Dumping Code addressed concerns about the use of an asymmetrical comparison methodology, in which negative dumping margins would be treated as zero instead of being added to the other transactions to "offset" the dumping margin.[366] The United States considers that such proposals reveal that those GATT Contracting Parties viewed asymmetry and zeroing as one and the same problem.

5.167. We have found above that under the second sentence of Article 2.4.2, an investigating authority can use the W-T comparison methodology to identify and address "targeted dumping" by establishing margins of dumping based on the pattern of export prices which differ significantly and which are "targeted" at purchasers, regions, or time periods. We have also concluded that this exercise would allow an investigating authority not only to identify but also address "targeted dumping" without the need to have recourse to zeroing. We have, thus, reached the conclusion that zeroing under the W-T comparison methodology is not allowed based on the text and context of Article 2.4.2 read in light of the object and purpose of the Anti-Dumping Agreement. We, therefore, consider that it is not necessary to have recourse to the negotiating history of the Anti-Dumping Agreement in order to confirm the meaning of the second sentence of Article 2.4.2.

5.168. Nonetheless, we address here the United States' arguments regarding the negotiating history of the Anti-Dumping Agreement. We observe, first, that the negotiating proposals referred to by the United States reflect the positions of only some of the GATT Contracting Parties and not all.[367] Second, the Appellate Body has already considered some of the exhibited materials to conclude that these materials did not resolve the issue of whether the negotiators of the

[365] United States' appellant's submission, para. 197.

[366] United States' appellant's submission, paras. 200-203 (referring to Negotiating Group on MTN Agreements and Arrangements, Amendments to the Anti-Dumping Code, Communication from the Delegation of Hong Kong, Addendum, GATT Document MTN.GNG/NG8/W/51/Add.1, 22 December 1989 (Panel Exhibit USA-15), Negotiating Group on MTN Agreements and Arrangements, Communication from Japan, GATT Document MTN.GNG/NG8/W/30, 20 June 1988 (Panel Exhibit USA-16); Negotiating Group on MTN Agreements and Arrangements, Communication from Japan Concerning the Anti-Dumping Code, GATT Document MTN.GNG/NG8/W/81, 9 July 1990 (Panel Exhibit USA-17); and Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989, MTN.GNG/NG8/13 (Panel Exhibit USA-18)).

[367] In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body had similar considerations in mind. In considering that the historical materials referred to by the panel and the United States were of limited relevance, the Appellate Body found:

> Finally, the negotiating proposals referred to by the United States are inconclusive and, in any event, reflected the positions of some, but not all, of the negotiating parties. In sum, the historical materials do not provide any additional guidance for the question whether zeroing under the transaction-to-transaction comparison methodology is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

(Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 121 (fn omitted)) Moreover, we recall that, in *US – Softwood Lumber V*, the United States acknowledged that the "historical background" (consisting of prior GATT panel reports and certain proposals submitted by various delegations in the context of the negotiations on the Anti-Dumping Agreement) it invoked as support for its position on asymmetry and zeroing did not constitute *travaux préparatoires*. (Appellate Body Report, *US – Softwood Lumber V*, fn 168 to para. 107)

Anti-Dumping Agreement intended to prohibit zeroing.[368] Finally, we observe that, even if these GATT Contracting Parties associated the asymmetrical comparison methodology with zeroing, this does not necessarily support a reading of the asymmetrical comparison methodology in the finally agreed version of the second sentence of Article 2.4.2 as permitting zeroing. Zeroing may have been considered by some GATT Contracting Parties as a possible way to "unmask" and address "targeted dumping". We note, however, from a reading of these documents that these GATT Contracting Parties were opposed to both zeroing and the inclusion of an asymmetrical methodology (with zeroing) in the Anti-Dumping Agreement.

5.169. We, thus, consider that these documents do not support a reading of the second sentence of Article 2.4.2 as permitting zeroing. On the one hand, they could be read, as the United States suggests, as supporting the view that the asymmetrical comparison methodology was associated with zeroing. On the other hand, they also could be read as explaining why the final version of the Anti-Dumping Agreement included the second sentence of Article 2.4.2 as a compromise provision addressing "targeted dumping" by means of an asymmetrical comparison methodology, but without zeroing.

5.170. While the text of the second sentence of Article 2.4.2 allows an investigating authority to focus on "pattern transactions" and exclude from its consideration "non-pattern transactions" in establishing dumping and margins of dumping under the W-T comparison methodology, it does not allow an investigating authority to exclude certain transaction-specific comparison results within the pattern, when the export price is above normal value. As we have considered above, the second sentence of Article 2.4.2 allows an investigating authority to exclude from its consideration "non-pattern transactions" and to establish dumping and margins of dumping based exclusively on a comparison of a weighted average normal value with all the identified "pattern transactions", in order to identify and address "targeted dumping". In so doing, however, the second sentence of Article 2.4.2 does not allow an investigating authority to exclude from the applicable "universe of export transactions" individual transactions that form part of the pattern, but that are priced above normal value.

5.171. In light of these considerations, we uphold the Panel's findings, in paragraphs 8.1.a.xii and 8.1.a.xiv of its Report[369], that "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" and that "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".

5.1.9.2 Whether the Panel erred in finding that the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" and "as applied" in the *Washers* anti-dumping investigation with Article 2.4 of the Anti-Dumping Agreement

5.172. We turn now to consider the United States' appeal of the Panel's findings under Article 2.4 of the Anti-Dumping Agreement in respect of zeroing.

5.173. The Panel recalled that the Appellate Body had previously upheld claims under Article 2.4 against the use of zeroing after finding that zeroing is inconsistent with the first sentence of Article 2.4.2 of the Anti-Dumping Agreement. In particular, the Panel cited the Appellate Body's findings 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."[370]

5.174. The Panel considered 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. Thus, the Panel found that

[368] Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 130-131 (referring to Appellate Body Report, *US – Softwood Lumber V*, para. 108).
[369] See also Panel Report, para. 7.192.
[370] Panel Report, para. 7.206 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 168).

the use of zeroing in the context of the W-T comparison methodology is inconsistent "as such" with Article 2.4 and, for the same reasons, the USDOC acted inconsistently with Article 2.4 by using zeroing in the *Washers* anti-dumping investigation.[371]

5.175. Having found the use of zeroing to be inconsistent with both Article 2.4 and the second sentence of Article 2.4.2, the Panel exercised judicial economy with regard to Korea's dependent claims under Articles 1 and 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.[372]

5.176. On appeal, the United States asserts that the Panel's findings of inconsistency regarding the use of zeroing in the application of the W-T comparison methodology under Article 2.4 rest on its earlier findings of inconsistency under the second sentence of Article 2.4.2.[373] Thus, the United States submits that, since the Panel's findings under Article 2.4.2 "are erroneous and should be reversed, the Panel's findings under Article 2.4, which are based on those … flawed findings, likewise are erroneous and should be reversed."[374] Moreover, the United States submits that the second sentence of Article 2.4.2 provides means to "unmask targeted dumping" in exceptional situations and it is, thus, "fair" to take steps to "unmask targeted dumping" by faithfully applying the W-T comparison methodology, when the conditions for its use are met. According to the United States, doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased.[375]

5.177. In our analysis of Korea's appeal in respect of "systemic disregarding" under Article 2.4, we have noted that the introductory clause of Article 2.4.2 expressly makes this provision "[s]ubject to the provisions governing fair comparison" in Article 2.4. In that context, we have explained that, in respect of the second sentence of Article 2.4.2, the "fair comparison" requirement in Article 2.4 applies only in relation to "pattern transactions", which is also consistent with the function of the second sentence of Article 2.4.2 of allowing an investigating authority to identify and address "targeted dumping". We have considered that Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement not only inform each other, but must be read together harmoniously. Accordingly, we have found that the exclusion of "non-pattern transactions" from the establishment of dumping and margins of dumping under the second sentence of Article 2.4.2 is consistent with the notions of impartiality, even-handedness, and lack of bias reflected in the "fair comparison" requirement in Article 2.4.

5.178. Bearing in mind the above considerations, we now turn to analyse the consistency of zeroing in the application of the W-T comparison methodology with the "fair comparison" requirement in Article 2.4. We have concluded above that the second sentence of Article 2.4.2 allows an investigating authority to establish dumping and margins of dumping by applying the W-T comparison methodology to "pattern transactions", while excluding from its consideration "non-pattern transactions". We have also concluded that, in doing so, an investigating authority is not allowed to use zeroing within the identified "pattern" and, accordingly, we have upheld the Panel's findings in this regard.

5.179. In *EC – Bed Linen*, the Appellate Body explained that "a comparison … that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' … – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2."[376] Additionally, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body considered that, since "the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping", it "cannot be described as impartial, even-handed, or unbiased" and, accordingly, it does not "satisf[y] the 'fair comparison' requirement within the meaning of Article 2.4".[377]

[371] Panel Report, paras. 7.206, 8.1.a.xiii, and 8.1.a.xv.
[372] Panel Report, para. 7.207. We note that Korea has not appealed this finding of the Panel. Accordingly, we are not called upon to rule on this matter.
[373] United States' appellant's submission, para. 210.
[374] United States' appellant's submission, para. 211.
[375] United States' appellant's submission, para. 213.
[376] Appellate Body Report, *EC – Bed Linen*, para. 55. (emphasis original)
[377] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142.

5.180. Setting to zero the intermediate negative comparison results has the effect of not only inflating the magnitude of dumping, thus resulting in higher margins of dumping, but it also makes a positive determination of dumping more likely in circumstances where the export prices above normal value exceed those that are below normal value. Moreover, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare *all* comparable export transactions that form the applicable "universe of export transactions" as required under the second sentence of Article 2.4.2, thus failing to make a "fair comparison" within the meaning of Article 2.4.

5.181. We disagree with the United States' contention that, given that the function of the second sentence of Article 2.4.2 is to "unmask targeted dumping" and that zeroing is necessary in the application of the exceptional W-T comparison methodology to give effect to the second sentence, such an approach is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased. We have considered above that the *effet utile* of the second sentence in addressing "targeted dumping" is fulfilled once an investigating authority has identified the relevant "pattern" within the meaning of the second sentence of Article 2.4.2 and has established dumping and margins of dumping by applying the W-T comparison methodology exclusively to "pattern transactions". In this respect, we have explained above that zeroing under the W-T comparison methodology is not required in order for the second sentence of Article 2.4.2 to fulfil its function of allowing an investigating authority to identify and address "targeted dumping".

5.182. In light of the above and given that we have upheld the Panel's findings on zeroing under the second sentence of Article 2.4.2, we also uphold the Panel's findings, in paragraphs 8.1.a.xiii and 8.1.a.xv of its Report[378], that "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" and that "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".

5.1.9.3 Whether the Panel erred in finding that 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

5.183. We turn now to consider the United States' appeal of the Panel's finding under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in respect of zeroing in administrative reviews.

5.184. The Panel found 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.[379] The Panel recalled that the United States' defence was based exclusively on its argument that zeroing is not inconsistent with Article 2 of the Anti-Dumping Agreement, and stated that it had already rejected this argument in the context of its findings that the use of zeroing is inconsistent with Article 2.4 and the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Accordingly, the Panel considered that, 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 and thus inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[380]

5.185. In *US – Zeroing (EC)*, the Appellate Body considered the USDOC's practice of zeroing in the application of the W-T comparison methodology in administrative reviews. The Appellate Body found that "the zeroing methodology, as applied by the USDOC in the administrative reviews at issue [was] inconsistent with Article 9.3 of *the Anti-Dumping Agreement* and Article VI:2 of the GATT 1994"[381] because the Appellate Body considered that this methodology resulted in amounts of assessed anti-dumping duties that exceeded the foreign exporters' or producers' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the

[378] See also Panel Report, para. 7.206.
[379] Panel Report, paras. 7.208 and 8.1.a.xvi.
[380] Panel Report, para. 7.208.
[381] Appellate Body Report, *US – Zeroing (EC)*, para. 133.

Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[382] Moreover, in *US – Stainless Steel (Mexico)*, the Appellate Body stated that, "under Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter."[383]

5.186. On appeal, the United States submits that, like its findings under Article 2.4, the Panel's findings under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are based on the Panel's earlier flawed findings under Article 2.4.2.[384] The United States adds that a margin of dumping established by the use of the W-T comparison methodology when the conditions for its use have been fulfilled is a margin of dumping properly determined under Article 2 and, consequently, any anti-dumping duty levied pursuant to such a margin of dumping would not breach either Article 9.3 of the Anti-Dumping Agreement, or Article VI:2 of the GATT 1994.[385] Accordingly, the United States requests that the Panel's findings be reversed.[386]

5.187. We have concluded above that, while the second sentence of Article 2.4.2 allows an investigating authority to exclude from its consideration "non-pattern transactions" and to establish dumping and margins of dumping based exclusively on a comparison of a weighted average normal value with "pattern transactions", it does not allow an investigating authority to use zeroing when applying the W-T comparison methodology to "pattern transactions". We, therefore, also conclude that, in levying anti-dumping duties under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, an investigating authority cannot exceed the margin of dumping that would be established under the second sentence of Article 2.4.2 without having recourse to zeroing.

5.188. Article 9.3 refers to the "margin of dumping" as established under Article 2. This "margin of dumping" represents the ceiling for anti-dumping duties levied pursuant to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Accordingly, if margins of dumping are established inconsistently with Article 2.4.2 by using zeroing under the W-T comparison methodology, the corresponding anti-dumping duties that are levied will also be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, as they will exceed the margin of dumping that should have been established under Article 2. We, therefore, agree with the Panel that, 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.[387]

5.189. We further note that, if zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 in original anti-dumping investigations, it also cannot be permitted in respect of administrative reviews. In this respect, we recall that, in *US – Stainless Steel (Mexico)*, the Appellate Body stated that it did not consider that there was "a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as 'dumped' for purposes of determining the existence and magnitude of dumping in the original investigation and as 'non-dumped' for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review."[388]

5.190. In light of the above, we uphold the Panel's finding, in paragraph 8.1.a.xvi of its Report[389], that "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".

[382] Appellate Body Report, *US – Zeroing (EC)*, para. 133.
[383] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102. (emphasis original)
[384] United States' appellant's submission, para. 216.
[385] United States' appellant's submission, para. 217.
[386] United States' appellant's submission, para. 218.
[387] Panel Report, para. 7.208.
[388] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 107.
[389] See also Panel Report, para. 7.208.

5.1.10 Separate opinion of one Appellate Body Member regarding zeroing under the W-T comparison methodology

5.191. This dissent is limited to whether zeroing is permitted for "pattern transactions". My agreement with the other sections of this Report is subject to my views as expressed in this separate opinion.

5.192. The second sentence of Article 2.4.2 of the Anti-Dumping Agreement says that "[a] normal value established on a weighted average basis may be compared to *prices of individual export transactions*"[390] if an investigating authority finds the requisite "pattern" and provides the requisite explanation. This text has no qualifier, and it does not specify *how* the investigating authority is to do the comparison between a weighted average normal value and prices of individual export transactions.

5.193. The second sentence of Article 2.4.2 is an exception and has the function of "unmasking targeted dumping" and addressing it. Since the text of the second sentence does not say how that is to be done, the question before the Appellate Body in this appeal − the first to confront squarely the meaning of the second sentence − should be, what are the limits, if any, that the Anti-Dumping Agreement places on what an investigating authority may do to "unmask" and deal with "targeted dumping".

5.194. My distinguished colleagues of the majority have developed an interpretation that would allow investigating authorities to base W-T analyses solely on all "pattern transactions", but that would prohibit them from zeroing when doing so. In effect, investigating authorities may confine their examination to "pattern transactions", but, in doing so, they must combine the comparison results of all sales prices within the "pattern", that is, combine the comparison results of those prices above normal value with the comparison results of those below normal value within the "pattern".

5.195. The majority's interpretation would permit investigating authorities to deal with "targeted dumping" only partially, and possibly ineffectively. Within the "pattern", prices above normal value will cancel out − or "re-mask" − partly or completely, the "targeted dumping" that results from prices below normal value.

5.196. In my view, such an incomplete approach is not required by the text of the second sentence read in the context of the entire Article 2.4.2 and in light of the object and purpose of the Anti-Dumping Agreement, and it unduly restricts the regulatory leeway that should be accorded to investigating authorities to deal with "targeted dumping". Accepting that, when applying the second sentence of Article 2.4.2, investigating authorities are to focus only on "pattern transactions", I would permit investigating authorities also to zero those "pattern transactions" that are priced above normal value, and to calculate dumping only on the basis of "pattern transactions" priced below normal value. Doing so would deal fully with "targeted dumping" by dividing the full amount of such dumping − instead of an amount diminished by non-dumped prices − by the full value of an exporter's sales.

5.197. Let us test this. Are the "in-pattern", below-normal-value sales "dumped", so that they can properly be identified as the relevant "targeted dumping"? Article 2.1 of the Anti-Dumping Agreement defines "dumping" as occurring when a product is "introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." The second sentence of Article 2.4.2 says 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 …".[391] That is, literally, what "in-pattern" zeroing, as I am proposing it, would do.

5.198. Does the proposal of allowing "in-pattern" zeroing under the second sentence of Article 2.4.2 accord with the context of Article 2.4.2 and the function of the second sentence? The majority has said that: (i) "the *effet utile* of the second sentence in addressing 'targeted dumping' is fulfilled once an investigating authority has identified the relevant 'pattern' … and has

[390] Emphasis added.
[391] Emphasis added.

established dumping and margins of dumping by applying the W-T comparison methodology exclusively to 'pattern transactions'"[392]; (ii) "[z]eroing the negative intermediate comparison results within the pattern is neither necessary to address 'targeted dumping', nor is it consistent with the establishment of dumping and margins of dumping as pertaining to the 'universe of export transactions' identified under the second sentence of Article 2.4.2"[393]; and (iii) the majority's interpretation — but not the allowance of in-pattern zeroing — is consistent with the "fair comparison" requirement in Article 2.4 of the Anti-Dumping Agreement.[394] In my view, none of these statements is backed by convincing authority or is self-evident.

5.199. Does previous Appellate Body jurisprudence prohibit "in-pattern" zeroing under the second sentence of Article 2.4.2? On the contrary, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body emphasized the exceptional nature of the W-T comparison methodology.[395] In *US – Zeroing (Japan),* the Appellate Body stated that "[t]he asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which normally are to be used."[396] Also in *US – Softwood Lumber V (Article 21.5 – Canada)*, in finding that a prohibition on the use of zeroing under the T-T comparison methodology would not render the second sentence of Article 2.4.2 meaningless, the Appellate Body stated that, "on the contrary, … the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology *inutile.*"[397] In the same case, the Appellate Body, in discussing the interpretation of the T-T comparison methodology in the first sentence of Article 2.4.2, further stated that "the reference to 'export *prices*' in the plural, without further qualification, suggests that all of the results of the transaction-specific comparisons should be included in the aggregation for purposes of calculating the margins of dumping."[398] In my view, the fact that the second sentence, unlike the first sentence of Article 2.4.2, uses the phrase "prices of *individual* export transactions"[399] indicates that not all the transaction-specific comparisons arising from the export prices that form part of the "pattern" need to be aggregated in order to calculate dumping. In *US – Stainless Steel (Mexico)*, the Appellate Body emphasized that "[t]he Appellate Body 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."[400] The Appellate Body made this statement after having recalled the *US – Softwood Lumber V (Article 21.5 – Canada)* jurisprudence about the exceptional nature of the second sentence, the application of the W-T comparison methodology to individual export transactions falling within the "pattern", and the relationship between zeroing and the *effet utile* of the second sentence.

5.200. Regarding the text of the second sentence of Article 2.4.2 in other official languages, the French version reads:

> *Une valeur normale établie sur la base d'une moyenne pondérée pourra être comparée* aux prix de transactions à l'exportation prises individuellement *si les autorités constatent que, d'après leur configuration, les prix à l'exportation diffèrent notablement entre différents acheteurs, régions ou périodes, et si une explication est donnée quant à la raison pour laquelle il n'est pas possible de prendre dûment en compte de telles différences en utilisant les méthodes de comparaison moyenne pondérée à moyenne pondérée ou transaction par transaction.*[401]

5.201. By referring to "[*les*] *prix de transactions à l'exportation prises individuellement*", which translates literally in English as "the prices of export transactions taken individually", the French text of the second sentence of Article 2.4.2 puts emphasis on the selection of individual transactions.

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[392] See para. 5.181 of this Report.
[393] See para. 5.160 of this Report.
[394] See para. 5.180 of this Report.
[395] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[396] Appellate Body Report, *US – Zeroing (Japan)*, para. 131.
[397] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada),* para. 100.
[398] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 88. (fn omitted; emphasis added)
[399] Emphasis added.
[400] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.
[401] Emphasis added.

5.202. Thus, I believe that allowing an investigating authority to zero within the "pattern" under the second sentence of Article 2.4.2 not only is a permissible interpretation within the meaning of the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement, but that it is a more defensible interpretation within the meaning of the first sentence of that provision.

5.203. For these reasons, I disagree with the finding of the majority that zeroing within the "pattern" under the W-T comparison methodology of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is not permissible. Consequently, I also disagree with the findings of the majority on zeroing under Article 2.4 of the Anti-Dumping Agreement and under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

5.2 Claims under the SCM Agreement and related claims under the GATT 1994

5.2.1 Background

5.204. Korea raises a number of claims on appeal in respect of the USDOC's determinations in the *Washers* countervailing duty investigation concerning two tax credit programmes adopted by the Korean government as part of the RSTA. Under both programmes, Korean companies can claim tax credits, i.e. reductions in the amount of corporate income tax otherwise owed, in their tax returns filed with the National Tax Service upon showing that they have made certain eligible expenditures.[402]

5.205. The first programme, established under Article 10(1)(3) of the RSTA (RSTA Article 10(1)(3) tax credit programme), is entitled "Tax Deduction for Research and Manpower Development".[403] It forms part of a broader tax credit regime, set forth in Article 10 of the RSTA, which 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".[404] Articles 10(1)(1) and 10(1)(2) of the RSTA provide tax credits equivalent to 20% of the yearly amount of R&D expenditures made by Korean companies in respect of "new growth engine industries" and "core technology", respectively.[405] Article 10(1)(3) provides two residual tax credit options available to Korean companies whose activities do not qualify under either Article 10(1)(1) or Article 10(1)(2). The first option is a tax credit equal to 40% (50% for small and medium enterprises (SMEs)) of the amount by which a company's R&D and human resources development (HRD) expenditures during the tax year have exceeded the average of its R&D and HRD expenditures in the four previous years. The second option is a tax credit of up to 6% (25% for SMEs) of the total R&D and HRD expenditures for the applicable taxable year.[406] Access to tax credits under Article 10(1)(3) of the RSTA is automatic for any Korean company that satisfies the statutory requirements.[407]

5.206. The second programme, established under Article 26 of the RSTA (RSTA Article 26 tax credit programme), was entitled "Tax Deduction for Facilities Investment" and provided an economic incentive for "Korean companies to invest in a wide variety of business assets".[408] It

[402] For tax purposes, a company with its head or main office in Korea is deemed to be a domestic company and is liable to pay tax on its worldwide income. Otherwise, it is considered to be a foreign company, and its tax liability is limited to its Korea-sourced income. (See e.g. Response dated 9 April 2012 of the Government of Korea to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (GOK *Washers* CVD questionnaire response) (Panel Exhibit KOR-75 (BCI), at p. 4))

[403] See Korea's other appellant's submission, para. 299.

[404] GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at p. 37).

[405] Korea's first written submission to the Panel, para. 245; Response dated 9 April 2012 of the Government of Korea to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (including excerpts of Article 10 of the RSTA and Article 9 of the RSTA Enforcement Decree) (GOK *Washers* CVD questionnaire response) (Panel Exhibit KOR-76); GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at pp. 11 and 25-26).

[406] Korea's first written submission to the Panel, para. 245; Korea's other appellant's submission, para. 331; GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at pp. 37 and 47). These formulae are further detailed in Articles 9(3)-9(5) of the RSTA Enforcement Decree in GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-76).

[407] Korea's first written submission to the Panel, paras. 245 and 248; Korea's other appellant submission, para. 299; Panel Report, para. 7.211; GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at pp. 41-42).

[408] Korea's first written submission to the Panel, para. 252. (fn omitted) See also Korea's other appellant's submission, para. 206.

lapsed on 31 December 2011.[409] Under the version of the programme in force for tax year 2010, any Korean company could receive a corporate income tax credit equal to 7% of the value of all qualifying business assets investments.[410] However, pursuant to Article 23 of the RSTA Enforcement Decree[411], investments made in business assets located in the "overcrowding control region" of the Seoul Metropolitan Area (Seoul overcrowding area) would be excluded from eligibility for this tax credit.[412] As Korea observed, the policy rationale behind such exclusion was to "address overcrowding and urban sprawl by discouraging investments in the Seoul overcrowding region"[413] while, at the same time, allowing for "equal development throughout the country, except in the overcrowded areas".[414] The Seoul overcrowding area accounts for roughly 2% of Korea's landmass and concentrates a significant portion of the country's population and economic activity.[415] Its boundaries are defined in Article 9 and Table 1 of the Enforcement Decree of the Seoul Metropolitan Area Readjustment Planning Act.[416] Access to tax credits under Article 26 of the RSTA was automatic, as long as the applicant company satisfied the statutory requirements.[417]

5.207. Both tax credit programmes require applicant companies to indicate the amount of eligible expenditures for every tax year in their tax filings with the National Tax Service, which are submitted during the first quarter of the following year.[418] Thus, the tax credits are granted after the underlying eligible expenditures have been made, in an amount determined by reference to the total of such expenditures.[419] If a company is in a tax loss situation in a particular tax year, it may carry forward the applicable tax credits for the five following years.[420] Similarly, if the corporate income tax, after all tax credits, is less than a specified minimum amount in a given year, then the company would have to pay that minimum tax amount, and the unapplied tax credits would be carried forward to the five following years.[421]

[409] GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at pp. 73-74); USDOC [C-580-869] Memorandum to File regarding Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea − Verification of the Questionnaire Responses Submitted by the Government of the Republic of Korea (22 October 2012) (*Washers* CVD GOK questionnaire verification memorandum) (Panel Exhibit KOR-78 (BCI)), p. 7.

[410] Korea's first written submission to the Panel, para. 252; Korea's other appellant's submission, para. 206; GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at pp. 66-69). The specific types of business assets eligible for tax credits under Article 26 of the RSTA were listed in Article 23 of the RSTA Enforcement Decree in Response dated 9 April 2012 of the Government of Korea to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (BCI-redacted version) (GOK *Washers* CVD questionnaire response) (Panel Exhibit KOR-81).

[411] Presidential Decree No. 22037 enforcing the RSTA, issued on 18 February 2010.

[412] Korea's first written submission to the Panel, paras. 253-254; Korea's other appellant's submission, para. 207; Article 26 of the RSTA and Article 23 of the RSTA Enforcement Decree in GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-81).

[413] Korea's other appellant's submission, para. 288.

[414] Korea's first written submission to the Panel, para. 319. See also Korea's other appellant's submission, para. 277; and Panel Report, para. 7.273.

[415] See e.g. Korea's first written submission to the Panel, para. 253; and Case Brief of the Government of Korea, Large Residential Washers from the Republic of Korea [C-580-869] (31 October 2012) (excerpt) (GOK *Washers* CVD case brief) (Panel Exhibit KOR-82 (BCI), at pp. 6-7).

[416] Korea's first written submission to the Panel, fn 223 to para. 253 and fn 316 to para. 320; Response of the Government of Korea to the USDOC's first supplemental questionnaire in the *Washers* CVD investigation [C-580-869] (containing exhibit S-25, "Excerpts from Seoul Metropolitan Area Readjustment Planning Act (with its Enforcement Decree)" (Korean/English)) (GOK *Washers* CVD supplemental questionnaire response) (Panel Exhibit KOR-91); *Washers* CVD GOK questionnaire verification memorandum (Panel Exhibit KOR-78 (BCI), at p. 26); Article 26 of the RSTA and Article 23 of the RSTA Enforcement Decree in GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-81).

[417] Korea's first written submission to the Panel, para. 335; GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at pp. 71-72).

[418] In their tax returns, applicant companies need not specify the products, if any, in respect of which the eligible R&D expenditures were made, or the facilities where such R&D activities were carried out. (Panel Report, para. 7.303)

[419] Panel Report, para. 7.303.

[420] GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at pp. 48 and 75).

[421] Korea's first written submission to the Panel, para. 251; Response dated 9 April 2012 of Samsung Electronics Co., Ltd to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (Samsung *Washers* CVD questionnaire response) (Panel Exhibit KOR-72 (BCI), at pp. 41 and 48).

5.208. In the *Washers* countervailing duty investigation, the USDOC determined that the RSTA Article 10(1)(3) tax credit programme is *de facto* specific because, during the period of investigation, subsidies had been provided to Samsung under that programme in disproportionately large amounts.[422] The USDOC also determined that the RSTA Article 26 tax credit programme was regionally specific because it was limited to certain enterprises located in a designated geographical region.[423] Based on these determinations of specificity, the USDOC imposed a countervailing duty on LRWs from Korea. In calculating the *ad valorem* subsidization rate for Samsung, the USDOC found that the tax credits bestowed on Samsung pursuant to Articles 10(1)(3) and 26 of the RSTA were not tied to any particular products. It, therefore, allocated those subsidies across all products manufactured by Samsung in Korea during the period of investigation.[424] The USDOC further rejected Samsung's argument that the denominator of Samsung's subsidization ratio should be adjusted to encompass Samsung's worldwide production, and decided instead to limit the denominator to the sales value of Samsung's production within Korea.[425]

5.209. The Panel found the USDOC's determinations that the RSTA Article 10(1)(3) tax credit programme is *de facto* specific to be inconsistent with Article 2.1(c) of the SCM Agreement[426], and the United States has not challenged the Panel's finding on appeal.

5.210. Conversely, the Panel upheld the other determinations by the USDOC. In particular, the Panel concluded that: (i) the USDOC's determination that the RSTA Article 26 tax credit programme was regionally specific is not inconsistent with Article 2.2 of the SCM Agreement[427]; (ii) the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA were not tied to particular products is not inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994[428]; and (iii) the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA to the sales value of Samsung's production in Korea is not inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.[429]

5.211. On appeal, Korea requests us to find that the Panel erred in upholding the above-mentioned determinations by the USDOC. We, therefore, examine each of those determinations and the related claims in turn.

5.2.2 Whether the Panel erred in its interpretation and application of Article 2.2 of the SCM Agreement by upholding the USDOC's determination that the RSTA Article 26 tax credit programme was regionally specific

5.212. In its preliminary countervailing duty determination, the USDOC observed that subsidies under the RSTA Article 26 tax credit programme were "limited by law to enterprises or industries

[422] Panel Report, para. 7.215; USDOC [C-580-869] 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) (*Washers* final CVD I&D memorandum) (Panel Exhibit KOR-77), pp. 11-13 and 31-37; USDOC [C-580-869] Large Residential Washers From the Republic of Korea: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Determination, *United States Federal Register*, Vol. 77, No. 108 (5 June 2012) (*Washers* preliminary CVD determination) (Panel Exhibit KOR-85), pp. 33187-33188. The USDOC's assessment was incorporated by reference in the *Washers* final CVD determination. See USDOC [C-580-869] Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 77, No. 247 (26 December 2012) (*Washers* final CVD determination) (Panel Exhibit KOR-2), p. 75976. See also USDOC [C-580-869] Remand Redetermination, *Samsung Electronics Co., Ltd v. United States*, Final Results of Redetermination Pursuant to Court Order, USCIT, Court No. 13-00099, Slip Op. 14-39 (11 April 2014) (Panel Exhibit KOR-44 (BCI)), pp. 3-18.

[423] Panel Report, para. 7.256; *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 14 and 46; *Washers* preliminary CVD determination (Panel Exhibit KOR-85), p. 33188; *Washers* final CVD determination (Panel Exhibit KOR-2), p. 75976.

[424] Panel Report, para. 7.301; *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 41-42; *Washers* preliminary CVD determination (Panel Exhibit KOR-85), pp. 33187-33188; *Washers* final CVD determination (Panel Exhibit KOR-2), p. 75976.

[425] Panel Report, para. 7.317; *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 52-53.

[426] Panel Report, paras. 7.244, 7.250, 7.255, 8.1.b.i, and 8.1.b.ii.

[427] Panel Report, paras. 7.289 and 8.1.b.iii.

[428] Panel Report, paras. 7.307 and 8.1.b.iv.

[429] Panel Report, paras. 7.320 and 8.1.b.v.

within a designated geographical region within the jurisdiction of the authority providing the subsidy", and, therefore, concluded that the programme in question was regionally specific.[430] The USDOC reaffirmed its conclusion in its final countervailing duty determination.[431] Before the Panel, Korea claimed that, in reaching such conclusions, the USDOC acted inconsistently with Article 2.2 of the SCM Agreement. As mentioned above[432], the Panel found that the USDOC's determination is not inconsistent with Article 2.2. Korea requests us to reverse the Panel's finding, complete the legal analysis, and find that the USDOC's determination is inconsistent with the United States' obligations under Article 2.2.[433]

5.213. Article 2 of the SCM Agreement sets forth the disciplines for determining whether a subsidy is specific, i.e. "limited *inter alia* by reason of the eligible recipients ... or by reason of the geographical location of beneficiaries".[434] Article 2.1 lays down the principles for determining the specificity of a subsidy to "certain enterprises" within the jurisdiction of the granting authority. Article 2.2, in turn, is concerned with limitations on the geographical region(s) where the eligible enterprises are located.

5.214. The text of Article 2.2 reads:

> 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.

5.215. The Panel took the view, which the participants have not challenged on appeal, that the rationale 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 [a] Member."[435] For purposes of this Report, we use the shorthand phrase "regionally specific" to designate a subsidy that is specific pursuant to Article 2.2.

5.216. Korea requests us to find that the Panel erred in its interpretation and application of Article 2.2 of the SCM Agreement. In particular, Korea's claims focus on certain terms contained in the first sentence of Article 2.2, namely: (i) "certain enterprises"; (ii) "designated"; and (iii) "geographical region".[436] Hence, in reviewing the Panel's findings in light of Korea's claims, we find it useful to structure our analysis along each of these terms.

5.2.2.1 Whether the term "certain enterprises" in Article 2.2 of the SCM Agreement is limited to entities with legal personality

5.217. Before the Panel, Korea argued that the term "certain enterprises" in Article 2.2 of the SCM Agreement designates companies or businesses with legal personality, while it does not cover a company's facilities that do not have legal personality. Under Korea's interpretation, the RSTA Article 26 tax credit programme would not be regionally specific because, being available to all companies incorporated anywhere in Korea, it did not impose any geographical limitations on the location of the subsidy recipients, but only on the location of the subsidized activities.[437] The Panel rejected Korea's argument. It observed that nothing in the text of Article 2.2 justifies such a narrow reading of the term "enterprise", and stated that an enterprise's "commercial activities" should rather be interpreted broadly.[438] The Panel also noted that, as defined in the chapeau of

[430] *Washers* preliminary CVD determination (Panel Exhibit KOR-85), p. 33188.
[431] See *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 14; and *Washers* final CVD determination (Panel Exhibit KOR-2), p. 75976.
[432] See para. 5.210 of this Report.
[433] Korea's other appellant's submission, paras. 294-295.
[434] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 413.
[435] Panel Report, para. 7.273.
[436] Korea does not take issue with the Panel's interpretation and application of the phrase "within the jurisdiction of the granting authority" in Article 2.2. Both participants agree that the authority granting subsidies under Article 26 of the RSTA is the Government of Korea and that the scope of application of those subsidies is within the Government's jurisdiction.
[437] Panel Report, para. 7.266.
[438] Panel Report, para. 7.267.

Article 2.1 of the SCM Agreement, the term "certain enterprises" includes an "industry or group of enterprises or industries", i.e. "entities [that] are not companies or businesses with legal personality".[439] Thus, the Panel held that an enterprise is located within a designated region if a constituent part of that enterprise, including a manufacturing facility belonging to that enterprise, is located in that region.[440] Even assuming that Korea's reading of the term "enterprise" were correct, the Panel stated that a business or company may be located "in a variety of places", including the sites of its head office, branches, manufacturing facilities, or other assets, and that a subsidy programme that limits the geographic location of any of these elements would be regionally specific.[441]

5.218. On appeal, Korea reiterates that regional specificity has to be established based on the geographical location of the recipient of a subsidy.[442] Such recipient must be a "natural or legal person"[443] – i.e. an entity with legal personality.[444] Conversely, an enterprise's facility does not qualify as a subsidy recipient because it does not have legal personality.[445] According to Korea, regional specificity cannot be deemed to exist "when a subsidy is merely contingent on considerations regarding the geographical location of any activity of any sort regarding the recipient", such as the location of its investments or facilities.[446] In Korea's opinion, the Panel unduly conflated the concepts of "enterprise" and "commercial activities"[447] and, therefore, provided an overly expansive interpretation of the scope of application of Article 2.2.[448] Korea maintains that, under a correct interpretation, the Panel should have found that the RSTA Article 26 tax credit programme was not specific under Article 2.2, because it automatically bestowed subsidies on any enterprise, located anywhere in the Korean territory, that made eligible investments outside the Seoul overcrowding area, thereby not imposing any limitations on the geographical location of the subsidy recipients.[449]

5.219. The United States disagrees with Korea that Article 2.2 applies only to entities with legal personality.[450] Rather, in the United States' view, the concept of "certain enterprises" covers a "wide variety of economic structures and activities".[451] The United States notes that the term "enterprise" encompasses the notion of "business", which in turn includes that of "commercial activity". Therefore, the United States argues, the Panel did not unduly conflate the concepts of "enterprise" and "commercial activity", but simply stressed the linkage between them.[452] For the United States, the location of an industry cannot be determined by the legal personality of individual producers[453] because legal personality "is a fiction, and may not imply a particular fixed location".[454] Rather, an enterprise "takes up business", and is, therefore, "situated" and "established", both at its headquarters and at the facilities in which it conducts manufacturing operations.[455] According to the United States, Korea's argument that only a natural legal person can receive a subsidy unduly borrows from the notion of "benefit" under Article 1.1(b) of the SCM Agreement, which is "qualitatively different" from the notion of "limitations on access" to a subsidy under Article 2.2.[456] The United States observes that Korea's interpretation would yield the absurd result that subsidy programmes that limit access to facilities in a designated region, but

[439] Panel Report, para. 7.268.
[440] Panel Report, para. 7.269.
[441] Panel Report, para. 7.270.
[442] Korea's other appellant's submission, para. 238.
[443] Korea's other appellant's submission, para. 236 (referring to Appellate Body Reports, *US – Lead and Bismuth II*, para. 58; and *Canada – Aircraft*, para. 154); and para. 238.
[444] See e.g. Korea's other appellant's submission, para. 259 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373); and para. 262 (referring to Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 110).
[445] Korea's other appellant's submission, paras. 238 and 263.
[446] Korea's other appellant's submission, para. 273.
[447] Korea's other appellant's submission, para. 253.
[448] Korea's other appellant's submission, para. 271.
[449] Korea's other appellant's submission, para. 240.
[450] United States' appellee's submission, para. 210.
[451] United States' appellee's submission, para. 219. (fn omitted)
[452] United States' appellee's submission, paras. 214-215.
[453] United States' appellee's submission, para. 222.
[454] United States' appellee's submission, para. 223.
[455] United States' appellee's submission, para. 228 (quoting the definition of the verb "locate" in Panel Report, para. 7.270).
[456] United States' appellee's submission, para. 236.

permit recipients to maintain their headquarters outside that region, would not be regionally specific.[457]

5.220. We note that the term "certain enterprises" is a key component of the first sentence of Article 2.2. Indeed, a finding of regional specificity depends on whether a subsidy programme limits availability to "enterprises" that are located in a designated geographical region within the jurisdiction of the subsidizing Member. As observed by the Appellate Body, the word "certain" is defined as "[k]nown and particularized but not explicitly identified: (with sing. noun) a particular, (with pl. noun) some particular, some definite".[458] Thus, in order for a subsidy to be specific, the group of eligible enterprises must be something less than the whole of the economy of a Member. The Appellate Body, however, has cautioned that any determination of what constitutes "certain enterprises" can only be made "on a case-by-case basis".[459] Further, the term "certain enterprises" is expressly defined in the chapeau of Article 2.1 as "an enterprise or industry or group of enterprises or industries".[460] As that provision stipulates, this definition applies throughout the whole SCM Agreement, including Article 2.2.[461] In *US – Anti-Dumping and Countervailing Duties (China*), the Appellate Body noted that the word "enterprise" means "[a] business firm, a company"[462], whereas the word "industry" signifies "[a] particular form or branch of productive labour; a trade, a manufacture".[463] Based on these definitions, the Appellate Body considered that the term "certain enterprises" refers to some particular business firms or companies that are known and particularized, but need not be explicitly identified.[464] In turn, we observe that the term "business" encompasses "[t]rade and all activity relating to it … ; commercial transactions, engagements, and undertakings regarded collectively".[465] The term is "[u]sually taken to include [a company's] premises, staff, trade, profit, liabilities, etc."[466]

5.221. Read together, these definitions do not indicate that the term "certain enterprises" is limited to entities with legal personality. To the contrary, they suggest a broader reading of such term. In particular, the text of Article 2.2 does not exclude that a sub-unit or a constituent part of a company − including, but not limited to, its branch offices or the facilities where it conducts manufacturing operations − may fall within the scope of the term "certain enterprises" despite not necessarily having distinct legal personality. In this respect, we find it significant that the definition of that term in the chapeau of Article 2.1 encompasses an "industry", a "group of enterprises" or a "group of industries". As the Panel correctly pointed out, an "industry" or a "group of industries" are entities that, by their nature, may or may not have a distinct legal personality. Yet, they are included in the definition of "certain enterprises".[467] Thus, we consider that the textual reference in the chapeau of Article 2.1 to such entities confirms that the notion of "certain enterprises" does not depend on the legal personality of the subsidy recipients.

5.222. This finding is further supported by the term "located", which qualifies the term "certain enterprises" and connects it to the phrase "within a designated geographical region". A holistic reading of these terms sheds light on the core function of Article 2.2 − i.e. to address limitations

[457] United States' appellee's submission, para. 211. See also para. 237.

[458] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China*), para. 373 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 375).

[459] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373. (fn omitted)

[460] See para. 5.217 of this Report.

[461] Indeed, the chapeau of Article 2.1 "offers interpretative guidance" with regard to the scope and meaning of the rest of Article 2. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366)

[462] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China*), para. 373 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 841).

[463] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1371). The Appellate Body also noted that the word "group" denotes "[a] number of … things regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose, or classed together because of a degree of similarity". (Ibid. (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1167))

[464] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China*), para. 373.

[465] Oxford English Dictionary online, definition of "business" <http://www.oed.com/view/Entry/25229?redirectedFrom=business#eid>, accessed 5 July 2016.

[466] Oxford English Dictionary online, definition of "business" <http://www.oed.com/view/Entry/25229?redirectedFrom=business#eid>, accessed 5 July 2016.

[467] Panel Report, paras. 7.268-7.269.

on access to a subsidy by virtue of the *geographical location* of the enterprises eligible for that subsidy. As the Panel observed, the verb "locate" signifies "tak[ing] up business in a place", "establish[ing] oneself … in a place", or "be[ing] situated".[468] Under this definition, not *every* activity conducted by a company in a given place would suffice for that company to be "located" there.[469] However, an enterprise may well "take up business" – and, therefore, be "situated" – in a certain region if it effectively establishes its commercial presence in that region, including by setting up a sub-unit such as a branch office or a facility for manufacturing operations.[470] Depending on the circumstances, a business or company may be commercially established in more than one location. Therefore, we agree with the Panel that an enterprise may be "located" in a variety of places, including the sites of its headquarters, branch offices, and manufacturing facilities. When a measure limits eligibility for a subsidy based on the geographical location of any of these sub-units or constituent parts of an enterprise, as is the case for the RSTA Article 26 tax credit programme, that measure will fall within the scope of Article 2.2.[471]

5.223. In support of its argument that the term "certain enterprises" is limited to entities with legal personality, Korea relies on the Appellate Body's statements that the recipient of the benefit must be a "natural or legal person"[472] and that the focus of the analysis of whether a benefit exists "should be on 'legal' or natural persons instead of on productive operations".[473] We observe that those statements relate to Article 1.1(b) of the SCM Agreement, which addresses the notion of "benefit" as one of the elements necessary to establish the existence of a subsidy. The text of Articles 1 and 2 of the SCM Agreement does not suggest that the identification of the recipient of a subsidy should prejudge the assessment of whether that subsidy is regionally specific. Indeed, a specificity analysis under Article 2 "*presupposes* that the subsidy has already been found to exist".[474] Thus, the notions of financial contribution, benefit, and specificity are distinct and independent concepts, which must be separately assessed in order to ascertain the applicability of the relevant disciplines of the SCM Agreement.[475] An inquiry under Article 1.1(b) focuses, in essence, on whether a financial contribution makes the recipient better off than it otherwise would have been on the marketplace.[476] In this sense, stating that the recipient can be a "natural or legal person" recognizes that a subsidy may be conferred to a wide variety of economic actors, including individuals, groups of persons, or companies. Conversely, the inquiry under Article 2 hinges on limitations on "*eligibility* for a subsidy" in respect of certain recipients.[477] Eligibility may be limited in "many different ways"[478], e.g. by virtue of the type of activities conducted by the recipients or the region where the recipients run those activities. Given these important differences between the analyses under Articles 1.1(b) and 2, we do not see that the Appellate Body's statements invoked by Korea are relevant to its argument that the term "certain enterprises" in Article 2.2 refers only to entities with legal personality.

5.224. Moreover, if accepted, Korea's interpretation of the term "certain enterprises" would entail that a regional specificity analysis should focus solely on the place(s) where the recipient companies are incorporated, without regard to the place(s) where those companies effectively establish their commercial presence by, for instance, setting up sub-units such as branch offices or manufacturing facilities. We agree with the United States that this interpretation could open the

[468] Panel Report, para. 7.270 (quoting *The New Shorter Oxford English Dictionary on Historical Principles*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1614 (Panel Exhibit USA-48)).

[469] Korea's other appellant's submission, para. 273.

[470] In making this finding, we are also informed by the broader context found in Article XXVIII(d) of the General Agreement on Trade in Services, which defines "commercial presence" as "any type of business or professional establishment" through: (i) the "constitution, acquisition or maintenance of a juridical person"; *or* (ii) the "creation or maintenance of a branch or a representative office".

[471] Panel Report, para. 7.270.

[472] Korea's other appellant's submission, para. 236 (referring to Appellate Body Reports, *US – Lead and Bismuth II*, para. 58; and *Canada – Aircraft*, para. 154).

[473] Korea's other appellant's submission, para. 262 (quoting Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 110 (emphasis omitted)).

[474] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 739. (emphasis added)

[475] Panel Report, *Korea – Commercial Vessels*, para. 7.411. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 413.

[476] See e.g. Appellate Body Reports, *Canada – Aircraft*, para. 157; *US – Lead and Bismuth II*, para. 68; *EC and certain member States – Large Civil Aircraft*, paras. 705-706; and *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.208.

[477] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 368. (emphasis original) See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 943.

[478] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 413.

door to circumvention of the disciplines of Article 2.2.[479] For example, the recipient companies may be incorporated or headquartered outside the relevant geographical region designated by a subsidy programme, but manufacture their *entire* production within that region at facilities that do not enjoy distinct legal personality. Under Korea's interpretation, the subsidy programme in question would not be considered regionally specific, thereby escaping scrutiny under the SCM Agreement and frustrating the function of Article 2.2.

5.225. In sum, we agree with the Panel that the term "certain enterprises" in Article 2.2 of the SCM Agreement is not limited to entities with legal personality.[480] Rather, an "enterprise" may be located in a certain region for purposes of Article 2.2 if it effectively establishes its commercial presence in that region, including by setting up a sub-unit, such as a branch office or manufacturing facility, which may or may not have distinct legal personality.[481]

5.2.2.2 Whether the "designation" of a region for the purposes of Article 2.2 of the SCM Agreement must be affirmative and explicit, or may also be carried out by implication

5.226. Before the Panel, Korea contended that the RSTA Article 26 tax credit programme was not specific under Article 2.2 of the SCM Agreement because it did not explicitly "designate" the geographical region for subsidization, but rather covered the entire Korean territory except for the Seoul overcrowding area.[482] The Panel observed that there is no requirement in Article 2.2 that the designation of the relevant region for subsidization be "explicit". Rather, as one of the definitions of the verb "designate" is "indicate"[483], the Panel took the view that the designation of a region for purposes of Article 2.2 "might also be accomplished through less direct means that nevertheless make the region known".[484] The Panel thus held that, by granting subsidies in connection with certain investments outside the Seoul overcrowding area, the RSTA Article 26 tax credit programme effectively designated the geographical region where the eligible investments were located.[485]

5.227. On appeal, Korea maintains that, by allowing for the indirect designation of a geographical region, the Panel selectively relied on one of the possible definitions of the term "designate", and effectively replaced that term with the term "indicate".[486] In Korea's view, the designation of a region must be "an act of identification by the granting authority that is done affirmatively, not by implication or suggestion", lest the term "designated" in Article 2.2 be rendered meaningless.[487] For Korea, the RSTA Article 26 tax credit programme could not be said to affirmatively designate a geographical region, as it merely disqualified certain investments made in the Seoul overcrowding area from eligibility for subsidies that would otherwise be available.[488]

5.228. The United States agrees with the Panel that the meaning of the verb "designate" encompasses definitions such as "indicate", which suggests that the designation of a geographical region for purposes of Article 2.2 need not be affirmative or explicit, as long as the region in question is made known.[489] According to the United States, it is irrelevant that the language of a subsidy programme designates a geographical region in terms of inclusion or exclusion, for the operational effect is the same.[490] Similarly, the United States disagrees with Korea's characterization of the RSTA Article 26 tax credit programme as "discouraging" investments in the Seoul overcrowding area, as opposed to "encouraging" investments in the rest of the Korean territory. According to the United States, framing the policy goal of the programme in negative

[479] United States' appellee's submission, para. 211.
[480] Panel Report, para. 7.267.
[481] Panel Report, paras. 7.269-7.270.
[482] Panel Report, para. 7.276.
[483] Panel Report, para. 7.280 (quoting United States' first written submission to the Panel, fn 502 to para. 407, in turn quoting *The New Shorter Oxford English Dictionary on Historical Principles*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 645 (Panel Exhibit USA-31, at p. 5)).
[484] Panel Report, para. 7.280. (fn omitted)
[485] Panel Report, para. 7.280.
[486] Korea's other appellant's submission, para. 280.
[487] Korea's other appellant's submission, para. 215. (fn omitted)
[488] Korea's other appellant's submission, paras. 218 and 240-241.
[489] United States' appellee's submission, paras. 246-248.
[490] United States' appellee's submission, para. 253. See also para. 264.

terms does not detract from the fact that the programme in question directed resources to particular geographical regions, thereby interfering with the market's allocation of resources.[491]

5.229. We note that, as the Panel observed, the verb "designate" means "[p]oint out, indicate, specify … [c]all by name or distinctive term; name, identify, describe, characterize".[492] As the Panel correctly stated, certain aspects of this definition − such as "specify" and "[c]all by name" − point to an act of explicit or affirmative identification, whereas other aspects − such as "indicate" and "describe" − suggest that identification may *also* be carried out through indirect means.[493] Thus, we agree with the Panel that the identification of a region for purposes of Article 2.2 may be explicit *or* implicit, provided that the relevant region is clearly discernible from the text, design, structure, and operation of the subsidy measure at issue.

5.230. Korea posits that, if the drafters of Article 2.2 had not intended to require an affirmative and explicit identification of the relevant region, they could have simply omitted the term "designated" from the text of the provision.[494] Contrary to Korea's assertion, we do not believe that allowing for the implicit identification of a region would deprive the term "designated" of meaning. Rather, the inclusion of that term in the text of Article 2.2 serves to ensure that the relevant region is sufficiently demarcated and that its borders and territorial coverage are clear. We note that the Seoul overcrowding area is expressly delineated in Article 9 and Table 1 of the Enforcement Degree of the Seoul Metropolitan Area Readjustment Planning Act[495], which specifically list the cities and municipalities constituting that area. Thus, we do not see any uncertainty as to the boundaries of the area outside the scope of the RSTA Article 26 tax credit programme and, by exclusion, of the area that was indeed covered by the programme.

5.231. Similarly, we do not find it relevant that the coverage of the RSTA Article 26 tax credit programme was couched in negative terms − i.e. it excluded investments made in the Seoul overcrowding area from eligibility for subsidies otherwise available. As the United States points out[496], the result would have been the same if the language of the relevant regulation had affirmatively limited eligibility for that programme to investments made outside the Seoul overcrowding area. In both cases, the programme had the effect of discouraging certain investments in one portion of the Korean territory and, at the same time, encouraging those investments in another portion of the Korean territory.[497] As observed above, limitations on access to a subsidy may be expressed in "many different ways".[498] One way in which access to a subsidy may be limited on a geographical basis is by excluding portions of the territory of a Member's jurisdiction from that subsidy's scope of application. To draw the formalistic distinction proposed by Korea could enable Members to circumvent the disciplines of Article 2.2 by framing their regionally focused subsidy schemes in negative or exclusionary terms.

5.232. Based on the foregoing, we agree with the Panel that, by identifying the relevant geographical region by exclusion or implication, the RSTA Article 26 tax credit programme effectively "designated" that region for purposes of Article 2.2 of the SCM Agreement.[499]

5.2.2.3 Whether the concept of "geographical region" for the purposes of Article 2.2 of the SCM Agreement depends on the territorial size of the area covered by a subsidy

5.233. During the course of the Panel proceedings, Korea stressed that, since the Seoul overcrowding area accounts for only 2% of Korea's landmass, the RSTA Article 26 tax credit programme applied to virtually the entirety of the national territory.[500] The Panel observed that

[491] United States' appellee's submission, paras. 275-280.
[492] Panel Report, para. 7.280 (quoting United States' first written submission to the Panel, fn 502 to para. 407, in turn quoting *The New Shorter Oxford English Dictionary on Historical Principles*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 645 (Panel Exhibit USA-31, at p. 5)).
[493] Panel Report, para. 7.280.
[494] Korea's other appellant's submission, para. 280.
[495] GOK *Washers* CVD supplemental questionnaire response (Panel Exhibit KOR-91).
[496] United States' appellee's submission, para. 253.
[497] Korea acknowledges that the RSTA Article 26 tax credit programme aimed at correcting imbalances between the Seoul overcrowding area and the rest of the country. (Korea's other appellant's submission, paras. 277 and 288)
[498] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 413.
[499] Panel Report, para. 7.280.
[500] Panel Report, para. 7.282.

Article 2.2 of the SCM Agreement refers simply to a "geographical region" without qualifying such concept in any way, and therefore held that "*any* geographical region − no matter how small or how large − would suffice to trigger the application of Article 2.2".[501]

5.234. On appeal, Korea reiterates that, since the Seoul overcrowding area accounts for only 2% of the national territory, the area covered by the RSTA Article 26 tax credit programme − i.e. the remainder of the country − was too large, too unbounded, and insufficiently demarcated or cohesive to be considered as a "designated geographical region".[502] In Korea's opinion, "a subsidy that is available for investments made in 98% of the granting authority's jurisdiction is effectively as broadly available as if it were available in 100% of the jurisdiction."[503] In support of its argument that the RSTA Article 26 tax credit programme was broadly available, Korea stresses that the subsidy programme was based on neutral and objective eligibility criteria, consistently with Article 2.1(b) of the SCM Agreement. In its view, this "lends further support" to the conclusion that the programme was non-specific pursuant to Article 2.2.[504] For Korea, the RSTA Article 26 tax credit programme was an "efficient and effective policy tool" to "address overcrowding and urban sprawl", and the Panel's interpretation of Article 2.2 would "improperly constrain" Members' ability to take corrective measures.[505]

5.235. The United States disagrees with Korea that the geographical area covered by the RSTA Article 26 tax credit programme was too large and too diffuse to qualify as a "designated geographical region". The United States takes the view that "any identified tract of land within the jurisdiction of a granting authority" may qualify as a region[506], and notes that the boundaries of the area covered by Korea's subsidy scheme were not "diffuse", but were rather well defined under the RSTA Article 26 tax credit programme.[507] Moreover, in the United States' opinion, the Seoul overcrowding area could not constitute a mere "exception" to an otherwise non-specific subsidy as the area in question encompasses a significant portion of the country's population and economic activity. For the United States, by excluding that region from the coverage of the RSTA Article 26 tax credit programme, Korea limited access to its subsidy scheme "in a fundamental way".[508] The United States also takes issue with Korea's contention that Members should be allowed to "curb urban sprawl" through zoning regulations.[509] According to the United States, Members enjoy considerable leeway to adopt zoning laws and similar measures; however, when they employ subsidies, they are subject to the disciplines of the SCM Agreement.[510]

5.236. Like the Panel, we observe that the term "geographical region" in the text of Article 2.2 is not qualified.[511] We also note that the panel in *US − Anti-Dumping and Countervailing Duties (China)* took the view that "*any* identified tract of land within the jurisdiction of a granting authority" may qualify as a "geographic region".[512] We agree with the Panel that, given the absence of any textual qualification to the term "geographical region", the territorial size of a region does not constitute a criterion relevant to the applicability of Article 2.2. This comports with the function of the provision at hand, which is to address subsidy schemes by which Members direct resources to certain geographical regions within their jurisdictions, thereby interfering with the market's allocation of resources. Indeed, a subsidy programme that excludes from its coverage an area that, albeit territorially small, is nevertheless important from an economic standpoint, could in fact limit eligibility in a significant way. In this respect, we note the United States' argument that, although the Seoul overcrowding area only occupies 2% of Korea's landmass, such area accounts for a large proportion of the country's population and concentrates a substantial portion of its economy.[513] As noted above, the boundaries of the area falling within the scope of

[501] Panel Report, para. 7.282. (emphasis original; fn omitted)
[502] Korea's other appellant's submission, paras. 214, 241-243, and 284.
[503] Korea's other appellant's submission, para. 284.
[504] Korea's other appellant's submission, para. 246.
[505] Korea's other appellant's submission, para. 288.
[506] United States' appellee's submission, para. 256 (quoting Panel Report, para. 7.282, in turn quoting Panel Report, *US − Anti-Dumping and Countervailing Duties (China)*, paras. 9.140 and 9.144).
[507] United States' appellee's submission, para. 263.
[508] United States' appellee's submission, para. 265.
[509] United States' appellee's submission, para. 288 (referring to Korea's first written submission to the Panel, paras. 317-318 and 321).
[510] United States' appellee's submission, para. 293.
[511] Panel Report, para. 7.282.
[512] Panel Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 9.144. (emphasis added)
[513] See United States' appellee's submission, para. 265. See also European Union's third participant's submission, para. 130; and GOK *Washers* CVD case brief (Panel Exhibit KOR-82 (BCI), at pp. 6-7).

the RSTA Article 26 tax credit programme were clearly delineated in the relevant regulations. Thus, we see no reason why such "identified tract of land" would not qualify as a "designated geographical region".

5.237. In support of its argument that the RSTA Article 26 tax credit programme was broadly available and, therefore, not trade distortive, Korea further stresses that the subsidy programme set out neutral and objective eligibility criteria, consistently with Article 2.1(b).[514] Confronted with a similar argument, the Panel stated that nothing in the SCM Agreement suggests that "a finding of specificity under Article 2.2 is somehow subject to further examination under Article 2.1(b)".[515] Like the Panel, we observe that the text of these provisions does not suggest any hierarchy between them. Rather, Articles 2.1 and 2.2 set forth two distinct and independent ways in which a subsidy may be specific. While the former provision addresses limitations "by reason of the eligible recipients", the latter focuses on limitations "by reason of the geographical location of beneficiaries".[516] Therefore, the fact that a subsidy may set out neutral and objective eligibility criteria with respect to a given region does not, in and of itself, exclude the possibility that that subsidy is regionally specific.

5.238. Finally, we note Korea's argument that the Panel's interpretation of the term "geographical region" would unduly constrain Members' ability to adopt measures that "pursue legitimate objectives and introduce minimal trade distortions".[517] As an example in support of its argument, Korea posits that a subsidy programme that excludes industrial investments in national parks from eligibility for subsidies otherwise available for like investments in the rest of a Member's territory would be deemed regionally specific.[518] We consider that Members are, in principle, free to preserve portions of their territories from industrial exploitation through measures other than subsidy programmes, such as zoning regulations or prohibitions to build in certain areas. However, when Members choose to do so through the bestowal of subsidies, the disciplines of the SCM Agreement apply. Pursuant to such disciplines, Members have the discretion to grant subsidies − other than those prohibited under Article 3 of the SCM Agreement − that pursue legitimate policy goals, provided that, by doing so, they do not cause injury[519] to other Members' domestic industries. If the bestowal of subsidies does, indeed, cause injury to the domestic industries of other Members, those subsidies may be subject to remedial action, such as the imposition of countervailing duties.

5.239. Based on the foregoing, we consider that the Panel was correct in finding that the area covered by the RSTA Article 26 tax credit programme constituted a "geographical region" within the meaning of Article 2.2 of the SCM Agreement.[520]

5.2.2.4 Conclusions

5.240. In light of all the above, we agree with the Panel that: (i) the term "certain enterprises" in Article 2.2 of the SCM Agreement is not limited to entities with legal personality, but also encompasses sub-units or constituent parts of a company − including, but not limited to, its branch offices and the facilities in which it conducts manufacturing operations − that may or may not have distinct legal personality; (ii) the "designation" of a region for purposes of Article 2.2 need not be affirmative or explicit, but may also be carried out by exclusion or implication, provided that the region in question is clearly discernible from the text, design, structure, and operation of the subsidy at issue; and (iii) the concept of "geographical region" in Article 2.2 does not depend on the territorial size of the area covered by a subsidy. The Panel correctly found that the RSTA Article 26 tax credit programme effectively designated the region where the relevant eligible investments were to be made in order to qualify for the subsidy at issue, thereby being "limited to certain enterprises located within a designated geographical region" within Korea's jurisdiction.

[514] Korea's other appellant's submission, para. 246.
[515] Panel Report, para. 7.261 (quoting Panel Report, *EC and certain member States − Large Civil Aircraft*, para. 7.1233).
[516] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 413.
[517] Korea's other appellant's submission, para. 289.
[518] Korea's other appellant's submission, para. 289.
[519] Footnote 45 to Article 15 of the SCM Agreement defines "injury" as "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry".
[520] Panel Report, paras. 7.282-7.283.

5.241. We, therefore, uphold the Panel's finding, in paragraph 8.1.b.iii of its Report[521], that "Korea failed to establish that the USDOC's determination of regional specificity in respect of the RSTA Article 26 tax scheme is inconsistent with Article 2.2 of the SCM Agreement".

5.2.3 Whether the Panel failed to conduct an objective assessment of the matter before it in articulating its findings on regional specificity

5.242. Korea claims that, in articulating its findings on regional specificity, the Panel failed to conduct an objective assessment of the matter before it, thereby acting inconsistently with its duties under Article 11 of the DSU. In particular, Korea claims that the Panel did not adequately review the USDOC's determination of regional specificity.[522] The United States responds that the Panel did evaluate the "key piece of evidence" on which the USDOC relied, namely, Article 23 of the RSTA Enforcement Decree.[523] In any event, the United States argues that Article 11 of the DSU did not require the Panel to cite explicitly the USDOC's determination in assessing Korea's claims.[524]

5.243. We note that the Panel's only description of the USDOC's determination is contained in paragraph 7.212 of its Report, where the Panel observed that, with respect of the RSTA Article 26 tax credit programme, "[t]he USDOC found specificity under Article 2.2 of the SCM Agreement, on the basis … that the programme was limited to certain enterprises located within a designated geographical region."

5.244. However, the extent to which the Panel was required, in order to comply with its duties under Article 11 of the DSU, to examine the USDOC's determination depended on the nature and scope of the claims raised by Korea under Article 2.2. Those claims were not directed at the USDOC's handling of the evidence before it, nor did they require the Panel to delve deeply into the specifics of the USDOC's determination or the facts on the record of the investigation. Indeed, the text, design, structure, and operation of the RSTA Article 26 tax credit programme were not disputed. Rather, the thrust of Korea's argumentation touched, essentially, on the interpretation of Articles 2.1(b) and 2.2 of the SCM Agreement. In particular, Korea claimed that the USDOC erred by: (i) failing to take into account that the programme was non-specific pursuant to Article 2.1(b)[525]; (ii) improperly expanding the scope of Article 2.2 to cover not only "enterprises", but also investments in facilities[526]; (iii) finding the area covered by the programme to be a "designated geographical region" within the meaning of Article 2.2[527]; (iv) holding that the programme was regionally specific although the tax credits were available to all enterprises investing in the designated area[528]; and (v) disregarding the fact that the programme was essentially a "zoning measure" aimed at relieving over-congestion in the Seoul overcrowding region.[529]

5.245. The Panel did address all the interpretative arguments put forward by Korea. In particular, it analysed the relationship between Article 2.1(b) and Article 2.2[530], the meaning of the term "certain enterprises" in Article 2.2[531], the meaning of the term "designated geographical region" in Article 2.2[532], and the propriety of the "double-specificity" test proposed by Korea.[533] At several

[521] See also Panel Report, para. 7.289.
[522] Korea's other appellant's submission, para. 229. Korea further states that the Panel "only provided disjointed, negative responses to Korea's allegations", thus failing to "develop a positive, coherent interpretation of Article 2.2". (Ibid., para. 228) At the oral hearing, however, Korea clarified that it is not raising a claim under Article 11 of the DSU in respect of this aspect of the Panel's findings.
[523] United States' appellee's submission, para. 303 (referring to Panel Report, para. 7.280).
[524] United States' appellee's submission, para. 304.
[525] Korea's first written submission to the Panel, paras. 322-327.
[526] Korea's first written submission to the Panel, paras. 328-330; second written submission to the Panel, paras. 345-359.
[527] Korea's first written submission to the Panel, paras. 335-343; second written submission to the Panel, paras. 360-366.
[528] Korea's first written submission to the Panel, paras. 331-334.
[529] Korea's first written submission to the Panel, paras. 317-321; second written submission to the Panel, paras. 367-371.
[530] Panel Report, section 7.6.3.1.
[531] Panel Report, section 7.6.3.2.
[532] Panel Report, section 7.6.3.3.
[533] Panel Report, section 7.6.3.4.

points in its reasoning, the Panel addressed Korea's policy arguments, and rejected them based on the overall purpose of Article 2.2.[534]

5.246. Based on the above, we consider that the Panel's omission to provide a comprehensive discussion of the USDOC's determination of regional specificity does not undermine the objectivity of the Panel's assessment of the matter before it in light of the nature of Korea's claims under Article 2.2 of the SCM Agreement. We, therefore, find that the Panel did not act inconsistently with its duties under Article 11 of the DSU in articulating its findings on regional specificity.

5.2.4 Whether the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by upholding the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA were not tied to particular products

5.247. We now turn to Korea's first claim under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 with respect to the USDOC's calculation of the *ad valorem* subsidization rate for Samsung in the *Washers* countervailing duty investigation.

5.248. During the tax year 2010, Samsung made certain expenditures that qualified for access to the RSTA Article 10(1)(3) and Article 26 tax credit programmes. It then calculated the tax credits that resulted from those expenditures and reported the aggregated resulting tax credits in its annual tax return, which it filed with the National Tax Service in March 2011.[535] Samsung is internally organized into different business units, several of which made eligible expenditures during the relevant period. Its digital appliance business unit produces the LRWs that were subject to the USDOC's *Washers* anti-dumping and countervailing duty investigations.

5.249. To recall[536], in the *Washers* countervailing duty investigation, the USDOC determined that the RSTA Article 10(1)(3) and Article 26 tax credit programmes are specific subsidies, and, therefore, imposed a countervailing duty on LRWs from Korea. In calculating the *ad valorem* subsidization rate for Samsung, the USDOC was faced with the issue of whether the subsidies granted to the company were tied to the investigated products or, conversely, may be attributed also to non-investigated merchandise.[537] Samsung argued that the majority of the tax credits it received under Articles 10(1)(3) and 26 of the RSTA related to expenditures that were attributable to non-investigated products. Therefore, Samsung requested that the USDOC calculate the amount of the *ad valorem* tax credit attributable to the investigated products by dividing the amount of tax credits earned by the digital appliance business unit by the sales value of the products manufactured by that unit.[538] To this effect, Samsung submitted a document breaking down the eligible expenditures incurred by each of its business units during the relevant period, as well as the amount of tax credits generated by those expenditures.[539] In support of that document, Samsung also submitted excerpts of its corporate books and records allegedly showing the individual eligible expenditures incurred by the digital appliance business unit and the resulting tax credit calculations.[540]

5.250. The USDOC rejected Samsung's argument and found that the tax credits Samsung received under Articles 10(1)(3) and 26 of the RSTA were not tied to any particular products. Therefore, the USDOC attributed the subsidies received by Samsung under those programmes across all products – i.e. it divided the total amount of tax credits received by all of Samsung's

[534] Panel Report, paras. 7.273-7.274 and 7.281.
[535] Korea's other appellant's submission, para. 300.
[536] See para. 5.208 of this Report.
[537] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 37-42. The USDOC's assessment was incorporated by reference in the *Washers* final CVD determination (Panel Exhibit KOR-2), p. 75976.
[538] Korea's other appellant's submission, para. 307; *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 37-39.
[539] Samsung *Washers* CVD questionnaire response, exhibit 25 (Panel Exhibit KOR-72 (BCI), at p. 51); Korea's other appellant's submission, paras. 303-304.
[540] Excerpts of exhibit 10 provided by Samsung to the USDOC in the *Washers* CVD GOK questionnaire verification (*Washers* CVD GOK questionnaire verification exhibit 10) (Panel Exhibit KOR-115 (BCI)); Excerpts of exhibit 12 provided by Samsung to the USDOC in the *Washers* CVD GOK questionnaire verification (*Washers* CVD GOK questionnaire verification exhibit 12) (Panel Exhibit KOR-126 (BCI)). See also Korea's other appellant's submission, para. 305.

business units by the total value of all of Samsung's production in Korea during the period of investigation.[541]

5.251. The USDOC's conclusions were based on two main tenets. First, the USDOC stated that a determination of whether a subsidy is tied to a specific product focuses on "the purpose of the subsidy based on information available at the time of bestowal".[542] Conversely, the USDOC will not examine the subsequent "use or effect of subsidies" – i.e. how benefits are used by companies.[543] According to the USDOC, a subsidy is tied to a product "only when the intended use is known to the subsidy giver … and so acknowledged prior to or concurrent with the bestowal of the subsidy."[544] Applying this test to the RSTA Article 10(1)(3) and Article 26 tax credit programmes, the USDOC found that the Government of Korea "had no way to know the intended use" of the subsidy at the time Samsung was authorized to claim the tax credits under those programmes; nor could Samsung "acknowledge receipt of the subsidy prior to or concurrent with its bestowal".[545]

5.252. Second, the USDOC observed that the tax credits Samsung received under the RSTA Article 10(1)(3) and Article 26 tax credit programmes "reduce[d] Samsung's overall tax burden", and found no evidence in Samsung's tax return to the National Tax Service showing that those tax credits were being claimed in connection to any particular product.[546] The USDOC also acknowledged that Samsung had submitted a document allegedly showing the amount of the eligible expenditures and the related tax credits pertaining to the digital appliance business unit. The USDOC, however, dismissed the relevance of that document on the ground that Samsung's tax return did not evince that the tax credits provided under the RSTA were tied to any specific product or facility.[547] Similarly, the USDOC did not find it necessary to "examine or discuss" the excerpts from Samsung's books and records[548], because that documentation did not "form the basis for bestowal and [was] not included in the annual tax returns that the company file[d] with the Korean tax authority".[549]

5.253. Before the Panel, Korea claimed that the USDOC's calculation of Samsung's *ad valorem* subsidization rate resulted in the imposition of a countervailing duty in excess of the amount of the subsidy found to exist, inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. According to Korea, the USDOC applied an inappropriate standard by focusing on the intended use of a subsidy at the time of bestowal.[550] Further, in Korea's view, the documentation submitted by Samsung to the USDOC would have allowed the investigating authority to identify readily the tax credits that Samsung earned pursuant to Articles 10(1)(3) and 26 of the RSTA based on the eligible expenditures of its digital appliance business unit.[551]

5.254. Similar to the USDOC, the Panel articulated its reasoning along two main steps. First, the Panel took the view that, contrary to Korea's assertion, the tax credits granted under Article 10(1)(3) of the RSTA "are not R&D subsidies".[552] The Panel observed that those tax credits are provided after the underlying R&D activities have been undertaken, in an amount determined by reference to the total R&D activities. However, in the Panel's opinion, this does not mean that

[541] Panel Report, para. 7.301; *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 41-42; *Washers* final CVD determination (Panel Exhibit KOR-2), p. 75976.
[542] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 41 (referring to USDOC, Countervailing Duties: Final Rule, *United States Federal Register*, Vol. 63, No. 227 (25 November 1998), pp. 65348-65418 (CVD preamble regulations) (Panel Exhibit USA-25), p. 65403).
[543] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 41. (fn omitted)
[544] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 41. (fn omitted)
[545] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 41-42.
[546] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 42.
[547] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 42.
[548] USDOC [C-580-869] Memorandum to File regarding Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea – Verification of the Questionnaire Responses Submitted by Samsung Electronics Co., Ltd, Samsung Electronics [Logitech], and Samsung Electronics Service (22 October 2012) (*Washers* CVD Samsung questionnaire verification memorandum) (Panel Exhibit KOR-79 (BCI)), p. 16.
[549] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 42.
[550] Korea's first written submission to the Panel, paras. 299-302; second written submission to the Panel, paras. 304-316.
[551] Korea's first written submission to the Panel, paras. 292-298; second written submission to the Panel, paras. 281-283.
[552] Panel Report, para. 7.303.

the tax credits are tied to those R&D activities or to the products in respect of which those activities were undertaken. Indeed, according to the Panel, the subsidy conferred under Article 10(1)(3) of the RSTA consists of the "proceeds of the tax credit[s]", which are conceptually distinct from the underlying activities.[553] The Panel stressed that Samsung is not required, pursuant to Article 10(1)(3) of the RSTA, to spend the proceeds of the tax credits on the future production of digital appliance products. Rather, it may spend the proceeds of those tax credits on any product, or not spend them at all. For the Panel, Samsung's discretion regarding the use of the cash resulting from the tax credit "justifies the USDOC's treatment of that subsidy as untied, and therefore the allocation of that subsidy across the sales value of all products".[554] On this ground, the Panel rejected Korea's argument that the tax credits conferred under Article 10(1)(3) of the RSTA serve to spur retroactively the particular investments that result in those tax credits.[555]

5.255. Second, the Panel addressed Korea's argument that, during the course of the *Washers* countervailing duty investigation, Samsung had submitted documents singling out the tax credits that Samsung earned based on eligible expenditures of its digital appliance business unit. Since there was "no necessary correlation" between Samsung's R&D activities in respect of digital appliance products and the amount of tax credit cash used by Samsung for future manufacturing of such products, the Panel considered it "irrelevant" that Samsung might have been able to identify the R&D expenditures made by each of its business units.[556] Similarly, the Panel dismissed the relevance of the fact that the USDOC did verify the R&D costs specific to Samsung's digital appliance business unit in the *Washers* anti-dumping investigation. In the Panel's opinion, even if the R&D costs relating to the production of LRWs can be determined for the purpose of constructing a normal value in an anti-dumping investigation, "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."[557]

5.256. In the Panel's view, the above analysis applied *mutatis mutandis* to the tax credits received by Samsung under Article 26 of the RSTA.[558] Therefore, the Panel found that the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA were not tied to particular products is not inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.[559]

5.257. On appeal, Korea requests us to find that the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by upholding the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA were not tied to particular products. In essence, Korea contends that the Panel's focus on the recipient's intended use of the proceeds of the tax credits prevented it from applying the correct tying test under Article 19.4 and Article VI:3.[560] Moreover, Korea maintains that the Panel erred by failing to examine the specific issue of whether Samsung had submitted positive evidence that allowed the USDOC to tie the tax credits that Samsung received on its development, production, and sale of digital appliance products to the R&D and other investment activities that generated those tax credits.[561]

5.258. Before assessing the merits of Korea's claims, we recall the standard of review that applies to a panel assessing the WTO-consistency of a determination by a Member's investigating authority. In conducting such an assessment, a panel is not permitted to conduct a *de novo* review of the facts of the case "or substitute its judgement for that of the … authorit[y]".[562] Rather, the panel must examine "whether, in the light of the evidence on the record, the conclusions reached

[553] Panel Report, para. 7.304.
[554] Panel Report, para. 7.303.
[555] Panel Report, para. 7.304.
[556] Panel Report, para. 7.304.
[557] Panel Report, para. 7.305.
[558] Panel Report, para. 7.306.
[559] Panel Report, para. 7.307.
[560] Korea's other appellant's submission, paras. 38-40.
[561] Korea's other appellant's submission, para. 39.
[562] Appellate Body Report, *US – Steel Safeguards*, para. 299 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 121). See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 379.

by the investigating authority are reasoned and adequate".[563] What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but some relevant "lines of inquiry" can be identified.[564] First, a panel must ascertain whether the investigating authority has "evaluated all of the relevant evidence in an objective and unbiased manner", including by "tak[ing] sufficient account of conflicting evidence and respond[ing] to competing plausible explanations of that evidence".[565] Second, the panel must "test[] the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning".[566] Finally, the adequacy of an investigating authority's explanations "is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute".[567]

5.259. Based on the above, the Panel was tasked with assessing whether the explanations provided in the USDOC's determination were "reasoned and adequate" in light of the evidence on the investigation record, so as to ascertain whether, by reaching such a determination, the USDOC acted consistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.[568] Our overview of the Panel's findings shows that, indeed, the Panel considered that the USDOC's two-step reasoning constituted reasoned and adequate explanations. First, the Panel appears to have affirmed the test applied by the USDOC in the *Washers* countervailing duty investigation, whereby a subsidy is tied to a product only if the intended use of that subsidy is known to the granting authority and so acknowledged prior to or concurrent with its bestowal. Second, in light of that test, the Panel agreed with the USDOC's dismissal of the relevance of certain evidence submitted by Samsung, which purportedly showed the amount of eligible expenditures made by the digital appliance business unit, as well as the tax credits that those expenses generated under Articles 10(1)(3) and 26 of the RSTA.

5.260. Therefore, we find it useful to structure our assessment along the two analytical steps followed by both the USDOC and the Panel. First, we will examine whether the test applied by the USDOC and upheld by the Panel constitutes the appropriate standard to ascertain whether the tax credits claimed by Samsung under Articles 10(1)(3) and 26 of the RSTA were tied to any particular products. Second, we will turn to the question of whether the Panel appropriately upheld the USDOC's dismissal of evidence that, allegedly, would have enabled it to single out the tax credits generated by Samsung's digital appliance business unit.

5.2.4.1 The Panel's affirmation of the USDOC's test for ascertaining whether the RSTA Article 10(1)(3) and Article 26 tax credits were tied to particular products

5.261. As noted above[569], in the first portion of its determination, the USDOC set forth what it saw as the appropriate test to assess the existence of a product-specific tie with respect to the subsidies received by Samsung. The USDOC took the view that a subsidy is tied to a product "only when the intended use is known to the subsidy giver" − in this case, the Government of Korea − and "so acknowledged prior to or concurrent with the bestowal of the subsidy".[570] Applying this test to the RSTA Article 10(1)(3) and Article 26 tax credit programmes, the USDOC found that the Government of Korea "had no way to know the intended use" of the subsidy at the time Samsung was authorized to claim the tax credits under those programmes, nor could Samsung "acknowledge receipt of the subsidy prior to or concurrent with its bestowal".[571]

5.262. The Panel appears to have considered that, by applying such a test, the USDOC provided "reasoned and adequate" explanations for its determination.[572] The thrust of the Panel's reasoning is that, although tax credits under Article 10(1)(3) of the RSTA are conferred in an amount

[563] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 93.
[564] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 93.
[565] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 97. See also Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 443.
[566] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 97.
[567] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 95 (referring to Appellate Body Reports, *US − Countervailing Duty Investigation on DRAMS*, para. 184; *US − Cotton Yarn*, paras. 75-78; and *US − Lamb*, para. 105).
[568] See Appellate Body Report, *US − Lamb*, para. 105.
[569] See paras. 5.251 and 5.254 of this Report.
[570] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 41. (fn omitted)
[571] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 41-42.
[572] See Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 93.

determined by reference to prior R&D expenditures, they cannot be said to be tied to those R&D expenditures or to the products in respect of which those expenditures were made. In particular, the Panel observed that, since the subsidy under Article 10(1)(3) of the RSTA "is only provided at the time that the tax credit is provided", that subsidy cannot retroactively "spur" any product-specific "investment that results in the earning of the [tax] credit".[573] Moreover, according to the Panel, Samsung's discretion to spend the proceeds of the tax credits on products other than those for which it received such tax credits − or on no products at all − "justifies the USDOC's treatment of that subsidy as untied, and therefore the allocation of that subsidy across the sales value of all products".[574]

5.263. In Korea's view, by focusing on the recipient's intended use of the proceeds of a subsidy, the Panel articulated an erroneous standard, as neither Article 19.4 of the SCM Agreement nor Article VI:3 of the GATT 1994 requires the "tracing back" of the proceeds of a tax credit to the eligible expenditures.[575] Korea contends that, since money is fungible, the proceeds of *every* subsidy can be used in any way that the recipient sees fit, because it has the ability to use other funds to carry out the eligible activities.[576] Korea stresses that the Panel's approach would create an irrebuttable presumption that a tax credit that is bestowed after the eligible activity has occurred could never be tied to a particular product.[577] Korea also asserts that the Panel's reasoning runs counter to normal commercial behaviour, as any rational business entity would necessarily take into account the availability of tax credits in deciding whether and to what extent to undertake qualifying expenditures.[578] In this respect, Korea posits that there is no practical difference between tying a tax credit and tying a grant to a particular product: in both cases, the proceeds of the subsidy are known to be available for use to conduct the eligible activities.[579] Finally, for Korea, the Panel unduly disregarded the fact that, according to the USDOC's own regulations, the investigating authority may "attribute subsidies to particular portions of a firm's activities" even if a recipient may use the proceeds of those subsidies as it sees fit.[580] By doing so, Korea argues, the Panel impermissibly "substituted its own rationale as its legal basis for finding that tying had not been shown".[581]

5.264. The United States, for its part, stresses that the circumstances relating to the "bestowal of the subsidy" are a "key consideration" in the context of a tying inquiry under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.[582] In the United States' view, the Panel appropriately found that the tax credits received under Article 10(1)(3) of the RSTA were not tied to Samsung's prior R&D expenditures[583], for no subsidy had yet been "provided" or "bestowed" when such expenditures were made.[584] The United States also disagrees with Korea that the RSTA Article 10(1)(3) tax credit programme operates to "spur" R&D investments in certain products.[585] For the United States, the calculation of a subsidy ratio based on "speculation regarding whether the *possibility* of eventually receiving a subsidy had an effect *ex ante*" would be excessively onerous on investigating authorities and "fraught with uncertainty".[586] Indeed, according to the United States, the prospect of receiving a tax credit under Article 10(1)(3) of the RSTA may or may not affect a company's decision to make certain expenditures.[587] Finally, the United States contends that the Panel did not declare an all-purpose rule that a subsidy "can never be tied … merely because the cash proceeds of the subsidy may be used in any way that the recipient sees fit."[588] Nor did the Panel base that statement on a "pure fungibility theory", for under such a

[573] Panel Report, para. 7.304. (fn omitted)
[574] Panel Report, para. 7.303.
[575] Korea's other appellant's submission, para. 322.
[576] Korea's other appellant's submission, para. 322.
[577] Korea's other appellant's submission, paras. 318, 345, and 351.
[578] Korea's other appellant's submission, para. 334.
[579] Korea's other appellant's submission, para. 340.
[580] Korea's other appellant's submission, para. 325 (quoting CVD preamble regulations (Panel Exhibit USA-25), p. 65403).
[581] Korea's other appellant's submission, para. 327. See also para. 344.
[582] United States' appellee's submission, para. 322.
[583] United States' appellee's submission, para. 346.
[584] United States' appellee's submission, paras. 347-348. See also para. 370.
[585] United States' appellee's submission, para. 372.
[586] United States' appellee's submission, para. 373. (emphasis original)
[587] United States' appellee's submission, paras. 373-374.
[588] United States' appellee's submission, para. 391 (quoting Korea's other appellant's submission, para. 321).

theory a recipient's discretion to use a subsidy would make all subsidies untied.[589] Rather, in the United States' view, the Panel grounded its conclusions on the "nature of the subsidies" at issue.[590]

5.265. We begin our assessment by examining the requirements of the provisions invoked by Korea, namely, Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Article 19.4 and footnote 51 of the SCM Agreement read:

> No countervailing duty shall be levied**[*]** on any 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.
>
> _____
>
> **[*fn original]**[51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

5.266. Article VI:3 of the GATT 1994 reads:

> No countervailing duty shall be levied on any product of the territory of any Member imported into the territory of another Member 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, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

5.267. Under both provisions, Members must not levy countervailing duties in an amount greater than the amount of the subsidy found to exist.[591] Thus, in order to determine the proper amount of a countervailing duty, an investigating authority must first "ascertain the precise amount of [the] subsidy" to be offset.[592] Article 19.4 further requires that the amount of the subsidy be calculated "in terms of subsidization per unit of the subsidized and exported product". The term "per unit" indicates that an investigating authority is permitted to calculate the rate of subsidization "on an aggregate basis"[593], i.e. by dividing the total amount of the subsidy by the total sales value of the product to which the subsidy is attributable. The Appellate Body, however, has cautioned that, in an aggregate investigation, the correct calculation of a countervailing duty rate requires "*matching* the elements taken into account in the numerator with the elements taken into account in the denominator".[594] In turn, the product to which the subsidy is attributable for purposes of calculating per unit subsidization is defined in Article VI:3 as the product for whose "manufacture, production or export" a subsidy has been "granted, directly or indirectly" in "the country of origin or exportation".

5.268. The per unit subsidization rate of the subsidized product constitutes the benchmark against which to establish the proper amount of the related countervailing duty. As the Appellate Body has noted, the subsidies that justify the imposition of a countervailing duty are those pertaining to "the imported products *under investigation*".[595] Thus, Article 19.4 and Article VI:3 establish the rule that investigating authorities must, in principle, ascertain as accurately as possible the amount of

[589] United States' appellee's submission, paras. 386 and 393.
[590] United States' appellee's submission, para. 391.
[591] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 554; *US – Upland Cotton*, para. 464.
[592] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 601.
[593] Appellate Body Report, *US – Softwood Lumber IV*, para. 153.
[594] Appellate Body Report, *US – Softwood Lumber IV*, fn 196 to para. 164. (emphasis original) Thus, for instance, the panel in *China – Broiler Products* faulted the Chinese investigating authority for failing to match the numerator and the denominator. The authority had taken into account data pertaining to products falling outside the scope of the investigation in its allocation of the subsidy, but then divided this result by the sales volume of investigated products only. (See Panel Report, *China – Broiler Products*, paras. 7.255-7.266)
[595] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139. (emphasis added) See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 601; and Panel Report, *US – Lead and Bismuth II*, para. 6.57.

subsidization bestowed on the investigated products.[596] It is only with respect to those products that a countervailing duty may be imposed, and only within the limits of the amount of subsidization that those products received. This rule finds further support in Article 10 of the SCM Agreement, according to which "Members shall take all necessary steps to ensure that the imposition of a countervailing duty" on any imported product "is in accordance with the provisions of Article VI of [the] GATT 1994 and the terms of [the SCM] Agreement". The wording of Article 10 − and especially the phrase "take all necessary steps to ensure" − indicates that the obligation to establish precisely the amount of subsidization requires a proactive attitude on the part of the investigating authority. Indeed, the Appellate Body has held that authorities charged with conducting an investigation "must actively seek out pertinent information"[597], and may not remain "passive in the face of possible shortcomings in the evidence submitted".[598]

5.269. Within these confines, the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, and does not specify explicitly which elements should be taken into account in the numerator and the denominator. Thus, an investigating authority has the discretion to choose the most appropriate methodology for carrying out its calculations, provided that such methodology allows for a sufficiently precise determination of the amount of subsidization bestowed on the investigated products, as required under Article 19.4 and Article VI:3. In particular, no provision in the SCM Agreement expressly sets forth a specific method for assessing whether a given subsidy is, or is not, tied to a specific product.

5.270. The relevant definitions of the verb "tie" include: "join closely or firmly; to connect, attach, unite"[599]; "limit or restrict as to … conditions".[600] Further, paragraph 3 of Annex IV to the SCM Agreement − now lapsed[601] − provided that, "[w]here the subsidy is tied to the production or sale of a given product", the value of the product shall be calculated as the total value of the recipient firm's sales of that product.[602] In light of the above, we consider that a subsidy is "tied" to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the

[596] We note that, pursuant to Article VI:3, a subsidy may be granted "indirectly" to the product under investigation. Based on this term, the Appellate Body has held, for instance, that subsidies for the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*, provided that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product. (Appellate Body Report, *US − Softwood Lumber IV*, paras. 140-143)

[597] Appellate Body Report, *US − Wheat Gluten*, para. 53. See also Appellate Body Reports, *US − Corrosion-Resistant Steel Sunset Review*, para. 199; and *US − Anti-Dumping and Countervailing Duties (China)*, para. 344; and Panel Report, *China − Broiler Products*, para. 7.261.

[598] Appellate Body Report, *US − Wheat Gluten*, para. 55. See also Panel Report, *China − Broiler Products*, para. 7.261.

[599] Oxford English Dictionary online, definition of the verb "tie" <http://www.oed.com/view/Entry/201844#eid18396565>, accessed 22 May 2016.

[600] Appellate Body Report, *Canada − Aircraft*, para. 171 (quoting *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. II, p. 3307; and referring to *The Concise Oxford English Dictionary*, (Clarendon Press, 1995), p. 1457).

[601] Annex IV sets forth disciplines for calculating the total *ad valorem* subsidization pursuant to Article 6.1(a) of the SCM Agreement. Article 31 of the SCM Agreement provided that Article 6.1 would apply for a period of five years from the date of entry into force of the Marrakesh Agreement Establishing the World Trade Organization, after which the Committee on Subsidies and Countervailing Measures (SCM Committee) would determine whether to extend its application. The SCM Committee held a special meeting to this effect on 20 December 1999. At that meeting, no consensus was reached to extend Article 6.1 either as drafted or in modified form. (See SCM Committee, Minutes of the Special Meeting held on 20 December 1999, G/SCM/M/22. See also Panel Report, *US − Upland Cotton*, para. 7.1187)

[602] That being said, Annex IV offers no other indications on the nature of the tie. Indeed, the Informal Group of Experts (IGE), established by the SCM Committee to develop recommendations on how to calculate *ad valorem* subsidization under Annex IV to the SCM Agreement (Decision of the Committee, G/SCM/5, 22 June 1995), observed that paragraph 3 left open the question of "how closely related to a product a subsidy must be to be 'tied' to that product". (Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures, Note from the Informal Group of Experts (revision), G/SCM/W/415/Rev.2, 15 May 1998 (IGE Report) (Panel Exhibit USA-29), para. 62) The IGE further noted that R&D activities are future-oriented and, therefore, "it might be difficult to allocate the related subsidies to products not yet in production". (Ibid., para. 118) However, the IGE also acknowledged that, in certain circumstances, it might be appropriate to tie R&D subsidies to a product. (Ibid., Recommendation 20.2).

production or sale of the product concerned.[603] An assessment of whether this connection or conditional relationship exists will inevitably depend on the specific circumstances of each case.[604] In conducting such an assessment, an investigating authority must examine the design, structure, and operation of the measure granting the subsidy at issue and take into account all the relevant facts surrounding the granting of that subsidy. In certain cases, an assessment of such factors may reveal that a subsidy is indeed connected to, or conditioned upon, the production or sale or a specific product. A proper assessment of the existence of a product-specific tie is not necessarily based on whether the subsidy *actually* results in increased production or sale of the product in question, but rather on whether the subsidy operates in a manner that can be *expected* to foster or incentivize the production or sale of the product concerned.[605]

5.271. Applying these considerations to the Panel's review of the USDOC's determination, we note that the Panel briefly referred to certain features of Article 10(1)(3) of the RSTA. The Panel observed, for instance, that tax credits under the RSTA Article 10(1)(3) tax credit programme "are provided after the underlying R&D activities have been undertaken, in an amount determined by reference to total R&D activities."[606] It also noted that Samsung's tax return "did not specify the merchandise for which [the tax credits were] to be provided".[607] However, despite those references, the Panel ultimately grounded its affirmation of the USDOC's test on the fact that, under Article 10(1)(3) of the RSTA, Samsung: (i) was able to claim the tax credits only after it had undertaken the eligible activities; and (ii) was not required to spend the proceeds of those tax credits on the same type of activities as those that had given rise to eligibility for the subsidy. Based on this understanding, the Panel did not find it necessary to engage in *any* analysis of the RSTA Article 26 tax credit programme, for it considered that the same understanding applied "*mutatis mutandis*" to that programme as well.[608] In light of the above, we consider that the Panel's analysis falls short of a proper examination of the design, structure, and operation of the RSTA Article 10(1)(3) and Article 26 tax credit programmes, as well as all other relevant facts surrounding the bestowal of tax credits under those programmes. Instead of conducting such an examination, the Panel relied on a proposition that a subsidy cannot be tied to a product if: (i) the financial contribution is conferred on the recipient after the eligible activities have occurred; and (ii) the recipient is not required to spend the proceeds of the subsidy on the same type of activities that gave rise to eligibility. This closely mirrors the USDOC's finding that the Government of Korea

[603] This reading is informed by the broader context found in the Appellate Body's jurisprudence concerning Article 3.1(a) of the SCM Agreement. Article 3.1(a) prohibits "subsidies contingent, in law or in fact … upon export performance". Footnote 4 to Article 3.1(a), in turn, specifies that a subsidy is *de facto* contingent on export performance when the granting of that subsidy, "without having been made legally contingent upon export performance, is in fact *tied to* actual or anticipated exportation or export earnings". (emphasis added) The Appellate Body has noted that the term "tied to" in footnote 4 points to "a relationship of conditionality or dependence". (Appellate Body Report, *Canada – Aircraft*, para. 171; see also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1037) In light of this definition, the Appellate Body has held, for instance, that a subsidy is "tied" to anticipated exportation within the meaning of footnote 4 "if it is geared to induce the promotion of future export performance by the recipient". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1056)

[604] Indeed, the Appellate Body has emphasized the case-specific nature of similar inquiries in the context of other SCM provisions. For instance, it has held that ascertaining whether a subsidy is *de facto* "tied" to anticipated exportation within the meaning of footnote 4 to Article 3.1(a) of the SCM Agreement requires "an examination of the measure granting the subsidy and the facts surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1056)

[605] In this respect, the IGE relied on the GATT panel report in *US – Lead and Bismuth I* to recommend that a subsidy be deemed to be tied "if its intended use was known to the giver of the subsidy, and so acknowledged, prior to or concurrent with the subsidy's bestowal". (IGE Report (Panel Exhibit USA-29), para. 63 and Recommendation 6.F.10) The IGE recognized, however, that other possible approaches may be appropriate depending on the circumstances of a particular case. (Ibid., para. 63 and Recommendation 6.F.11) We note that the GATT panel report in *US – Lead and Bismuth I* was not adopted, and that the panel's articulation of the standard referred to by the IGE merely recited the United States' regulations and practice. (GATT Panel Report, *US – Lead and Bismuth I* (unadopted), fn 137 to para. 415) Moreover, the panel found that the fact that certain subsidies, initially bestowed on an industrial group as a whole, subsequently passed through to a specific business unit of that industrial group was, at the least, "relevant" to an assessment of whether those subsidies were tied to the products manufactured by that business unit. (Ibid., para. 425)

[606] Panel Report, para. 7.303.

[607] Panel Report, para. 7.303 (referring to *Washers* CVD questionnaire response, exhibits 24 and 22 (Panel Exhibit KOR-72 (BCI), at pp. 45 and 38, respectively)).

[608] Panel Report, para. 7.306.

"had no way to know the intended use at the time [Samsung] was authorized to claim the tax credits".[609]

5.272. The fact that the recipient obtains the proceeds of a subsidy before, at the same time as, or after conducting the eligible activities is not, in and of itself, dispositive of whether that subsidy is tied to a particular product. The proceeds deriving from certain types of financial contribution, such as grants or loans, are usually paid before the recipient undertakes a certain activity. By contrast, the proceeds of other types of financial contribution, such as the cash that the recipient may keep in its accounts as a result of tax credits and other forms of revenue forgone, are normally obtained after the recipient has become entitled to receive them or has carried out the eligible activity. However, in both cases, the bestowal of a subsidy may be connected to, or conditioned on, the production or sale of a particular product. Indeed, even when that subsidy operates in a manner whereby the recipient will obtain the proceeds after the eligible activity has occurred, the expectation to obtain those proceeds may induce the recipient to engage in the production or sale of the product giving rise to eligibility.[610] In this respect, the Appellate Body has observed that the inclusion of "foregone or not collected" government revenue among the types of financial contribution under Article 1.1(a)(1) of the SCM Agreement "recognizes that tax regimes may be used to achieve outcomes *equivalent* to the results that are achieved where a government provides a direct payment".[611] Excluding the existence of a product-specific tie whenever the recipient obtains the proceeds of a subsidy after it has carried out the eligible activities could result in an unwarranted distinction between different types of financial contribution. Indeed, this would enable Members to choose between different types of financial contribution with a view to creating or avoiding such a product-specific tie. In sum, we consider that a subsidy may be tied to the production or sale of a given product even if the recipient obtains the proceeds of that subsidy after the eligible activity has taken place.[612]

5.273. For similar reasons, we find the Panel's affirmation of the USDOC's reliance on the recipient's "intended use" of the proceeds of a subsidy to be misplaced. The fact that a financial contribution, once collected by the recipient, may be spent on activities different from those for which it was bestowed is not, in and of itself, sufficient to exclude the existence of a product-specific tie. As Korea points out, money is fungible.[613] Hence, unless a subsidy programme expressly determines the way in which the recipient has to spend the proceeds of the subsidy, the recipient will always be free, in principle, to finance product-specific activities with resources other than those provided by the granting authority. Indeed, if the recipient's use of the proceeds of a subsidy for the same kind of activity that gave rise to eligibility were a condition for finding the existence of a product-specific tie, then hardly any subsidy would ever be considered tied to a particular product, for the recipient would be able to escape such tie by spending the proceeds on different activities.[614] Rather than focusing on the recipient's use of the proceeds of a subsidy, the appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product. Based on this assessment, a subsidy that does not restrict the recipient's use of the proceeds of the financial contribution may, nonetheless, be found to be tied to a particular product if it induces the recipient to engage in activities connected to that product.

[609] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 41-42.

[610] In this sense, we are not persuaded by the United States' contention that, at the time the recipient conducts eligible activities with a view to obtaining a tax credit, no subsidy has yet been "bestowed". (United States' appellee's submission, paras. 347-348. See also para. 370) Indeed, depending on the specifics of the measure at issue, it may be the case that the subsidy is "bestowed" at the time the recipient becomes entitled to, or conducts the activity giving rise to eligibility for that subsidy.

[611] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 811. (emphasis added)

[612] This is further confirmed by paragraph 3 of Annex IV to the SCM Agreement, which provides that, if a subsidy is tied to a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product "in the most recent 12-month period, for which sales data is available, *preceding the period in which the subsidy is granted*". (emphasis added)

[613] Korea's other appellant's submission, paras. 322 and 342.

[614] We note, in this respect, that the panel in *EC and certain member States – Large Civil Aircraft* found that certain subsidies were "tied to … anticipated exportation" within the meaning of footnote 4 to Article 3.1 of the SCM Agreement regardless of – and without inquiring into – the activities for which the proceeds of those subsidies were used. (See Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.689-7.690)

5.274. In sum, based on the foregoing, the Panel applied a flawed test in reviewing the USDOC's determination and, in particular, in evaluating whether a portion of the tax credits that Samsung received under Articles 10(1)(3) and 26 of the RSTA was tied to the products manufactured by its digital appliance business unit. Instead of reviewing the design, structure, and operation of the two tax credit programmes at issue, as well as other relevant facts surrounding the granting of those tax credits, the Panel unduly relied on the fact that the tax credits were conferred after Samsung conducted the eligible activities, and that Samsung was not required to spend the proceeds of those tax credits on the same type of activities. We understand that, by so doing, the Panel affirmed the standard applied by the USDOC in the *Washers* countervailing duty investigation, whereby a subsidy is tied to a specific product "only when the intended use is known to the subsidy giver … and so acknowledged prior to or concurrent with the bestowal of the subsidy".[615] Thus, we believe that the Panel erred in concluding that these explanations in the USDOC's determination concerning the calculation of the *ad valorem* subsidization rate for Samsung were "reasoned and adequate" in light of the evidence on the investigation record.[616]

5.2.4.2 The Panel's affirmation of the USDOC's dismissal of certain evidence submitted by Samsung

5.275. In the latter portion of its determination, the USDOC stated that there was no evidence in Samsung's tax return to the National Tax Service showing that the tax credits it received under Articles 10(1)(3) and 26 of the RSTA were being claimed in connection with any particular products.[617] The USDOC observed that Samsung had submitted a document allegedly showing the amount of the eligible expenditures and the related tax credits pertaining to each of its business units, including the digital appliance business unit. However, the USDOC dismissed the relevance of that document on the ground that Samsung's tax return did not evince that the tax credits provided under the RSTA were tied to any specific product or facility.[618] Further, the USDOC noted that Samsung had submitted some excerpts from its books and records, which purportedly proved the accuracy of Samsung's unit-specific breakdown of eligible expenditures and the related tax credits.[619] Nevertheless, the USDOC declined to "examine or discuss"[620] those books and records because they did not "form the basis for bestowal and [were] not included in the annual tax returns that the company file[d] with the Korean tax authority".[621]

5.276. According to the Panel, since there was "no necessary correlation" between Samsung's R&D expenditures in digital appliance products and the amount of tax credit cash used by Samsung for future manufacturing of such products, it was "irrelevant" that Samsung might have been able to identify the R&D expenditures made by each of its business units.[622] In other words, based on the test examined in section 5.2.3.1 above, the Panel affirmed the USDOC's view that the evidence submitted by Samsung was not relevant to the calculation of the amount of tax credits that were tied to the products manufactured by Samsung's digital appliance business unit.

5.277. On appeal, Korea submits that the documents submitted by Samsung to the USDOC showed a tie between a portion of the tax credits received under Articles 10(1)(3) and 26 of the RSTA and the products manufactured by Samsung's digital appliance business unit.[623] Indeed, according to Korea, those documents showed an exact correlation between the eligible expenditures made by the digital appliance business unit and the tax credits that accrued to Samsung pursuant to those expenditures, such that the USDOC's calculation would have been "easy to perform".[624] Korea further highlights that, while the relevant excerpts from Samsung's books and records needed not be filed with the Korean tax authorities together with Samsung's tax return for 2010, they were nonetheless available for inspection at all times.[625] For Korea, the USDOC's refusal to consider the above-mentioned documents was inconsistent with the fact that, in determining normal value in the *Washers* anti-dumping investigation, the USDOC did tie the

[615] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 41. (fn omitted)
[616] See Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[617] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 42.
[618] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 42.
[619] *Washers* CVD Samsung questionnaire verification memorandum (Panel Exhibit KOR-79 (BCI)), p. 16.
[620] *Washers* CVD Samsung questionnaire verification memorandum (Panel Exhibit KOR-79 (BCI)), p. 16.
[621] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 42.
[622] Panel Report, para. 7.304.
[623] Korea's other appellant's submission, para. 319.
[624] Korea's other appellant's submission, para. 351.
[625] Korea's other appellant's submission, paras. 306 and 319.

R&D expenditures of Samsung's digital appliance business unit to the products manufactured by that unit.[626]

5.278. The United States contends that Articles 10(1)(3) and 26 of the RSTA set forth "undifferentiated, broadly applicable" tax credit programmes, which do not require recipients to specify the products in respect of which the eligible expenditures were made in their tax returns.[627] For the United States, the fact that Samsung was subject to "record-keeping requirements" under Korean law is not sufficient to establish a product-specific tie, because those requirements are "not a part of the RSTA legislation".[628] Thus, the United States contends that the USDOC was not required to look at Samsung's documents referred to by Korea[629] – documents that the Korean authorities themselves "never saw".[630] In any event, according to the United States, the features of Korea's tax credit programmes do not establish an exact correlation between the amount of eligible expenditures made by each business unit and the amount of tax credits generated by those expenditures.[631] The United States also considers it irrelevant that the USDOC reviewed certain R&D expenditures incurred by Samsung's digital appliance business unit in the *Washers* anti-dumping investigation.[632] The United States agrees with the Panel that inquiring into certain costs "associated with" a product for purposes of constructing normal value is qualitatively different from assessing whether and how a Member has bestowed a subsidy on that product.[633] Moreover, in the United States' view, considering documents pertaining to an anti-dumping investigation in a countervailing duty investigation would have blurred the evidentiary barriers between the two records.[634]

5.279. We recall that, pursuant to Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, the USDOC was required to ascertain the "precise amount of [the] subsidy"[635] bestowed on the LRWs manufactured by Samsung. In conducting such an assessment, the USDOC had to take into account the design, structure, and operation of Korea's subsidy programmes, as well as any other relevant facts surrounding the granting of those subsidies.[636] Which facts were relevant for the purposes of the USDOC's calculation depended, necessarily, on the specific circumstances of the investigation. In reviewing the USDOC's calculation, the Panel was tasked with assessing whether, having "evaluated all of the relevant evidence"[637], the USDOC had provided "reasoned and adequate"[638] explanations for its determination.[639]

[626] Korea's other appellant's submission, paras. 310 and 319 (referring to USDOC [A-580-865] Issues and Decision Memorandum for the Antidumping Duty Investigation of Bottom Mount Refrigerator-Freezers from the Republic of Korea (16 March 2012) (excerpts) (*Refrigerators* AD I&D memorandum) / USDOC [A-580-865] Memorandum to File regarding Verification of the Cost Response of Samsung Electronics Co., Ltd and Samsung Gwangju Electronics Co., Ltd in the Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea (21 December 2011) (excerpts) (*Refrigerators* AD Samsung cost verification memorandum) (Panel Exhibit KOR-98 (BCI)); and USDOC [A-580-868] Memorandum to File regarding Verification of the Cost Response of Samsung Electronics Co., Ltd in the Less-Than-Fair-Value Investigation of Large Residential Washers from the Republic of Korea (17 October 2012) (*Washers* AD Samsung cost verification memorandum) (Panel Exhibit KOR-99 (BCI))).

[627] United States' appellee's submission, para. 350. See also paras. 308, 355, 365, 375, and 388.

[628] United States' appellee's submission, para. 354.

[629] United States' appellee's submission, paras. 357-358 (referring to Korea's other appellant's submission, para. 304, in turn referring to Samsung *Washers* CVD questionnaire response, exhibit 25 (Panel Exhibit KOR-72 (BCI), at pp. 50-51); and Korea's other appellant's submission, in turn referring to *Washers* CVD GOK questionnaire verification exhibit 10 (Panel Exhibit KOR-115 (BCI)); and *Washers* CVD GOK questionnaire verification exhibit 12 (Panel Exhibit KOR-126 (BCI))).

[630] United States' appellee's submission, para. 359. (fn omitted)

[631] United States' appellee's submission, para. 353. For instance, the United States observes that, in its tax return for 2010, Samsung carried forward credits that it had earned during the 2009 tax year (which, in turn, might have included deferrals from previous years), while deferring until the 2011 tax year a substantial amount of the credits that it earned during the 2010 tax year. (Ibid.)

[632] United States' appellee's submission, paras. 351-352 (referring to Panel Report, para. 7.304); para. 394 (referring to Panel Report, para. 7.305); and paras. 395-409.

[633] United States' appellee's submission, para. 399.

[634] United States' appellee's submission, paras. 400-401 (referring to Panel Report, *Japan – DRAMS (Korea)*, para. 7.152).

[635] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139.

[636] See para. 5.270 of this Report.

[637] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

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

[639] See para. 5.258 of this Report.

5.280. Applying this standard to the Panel's review of the USDOC's determination, we observe that the USDOC did examine certain relevant features of the RSTA Article 10(1)(3) and Article 26 tax credit programmes. In particular, the USDOC noted that neither programme expressly conditions access to the tax credit on product-specific activities. Article 10(1)(3) of the RSTA conditions the bestowal of tax credits upon a showing that the applicant company has undertaken R&D and HRD expenditures during the course of the relevant tax year[640], without specifying any product in connection to which those expenditures are to be made. Likewise, Article 26 of the RSTA bestowed tax credits on certain qualifying investments made outside the Seoul overcrowding area, without linking those investments to any particular products. Further, it is uncontested that, in order to claim tax credits under either programme, applicant companies only need to provide the Korean tax authorities with an aggregate calculation of the qualifying expenditures they have incurred, without being required to break down those expenses by product, production line, or facility.[641]

5.281. However, based on those features of the tax credit programmes at issue, the USDOC appears to have disregarded other pieces of evidence on the investigation record submitted by Samsung, namely: (i) the one-page, unit-specific breakdown of eligible expenditures and related tax credits[642]; and (ii) the excerpts from Samsung's books and records purportedly proving the accuracy of that unit-specific breakdown.[643] During the course of the investigation, Samsung emphasized that the documents in question were key to the USDOC's ability to tie a portion of the tax credits received under Articles 10(1)(3) and 26 of the RSTA to the products manufactured by the digital appliance business unit (including LRWs).[644] Hence, we are of the view that, in order to "evaluate[] all of the relevant evidence in an objective and unbiased manner"[645], the USDOC was required to examine the content of those documents, so as to weigh their probative value for its calculation of Samsung's *ad valorem* subsidization rate. The fact that the evidence submitted by Samsung was created *ad hoc* for the purposes of the *Washers* countervailing duty investigation, and was not expressly required under Articles 10(1)(3) and 26 of the RSTA does not suffice to relieve the USDOC of its duty to review it. Indeed, while that evidence did not form part of the design, structure, and operation of Korea's subsidy programmes, it could nonetheless constitute relevant evidence surrounding the bestowal of those subsidies in light of the particular circumstances of the investigation.

5.282. We note the United States' argument that, even assuming that the USDOC was required to take into account the documents submitted by Samsung, those documents would not have allowed a precise determination of the amount of subsidy attributable to the products manufactured by the digital appliance business unit. Given the limits of our standard of review, we do not take a view as to whether, based on the documents in question, the USDOC should, in fact, have *concluded* that a portion of the tax credits Samsung received under Articles 10(1)(3) and 26 of the RSTA was tied to the products manufactured by its digital appliance business unit. However, it was the USDOC's responsibility to review all the evidence available, as appropriate, with a view to ascertaining the amount of subsidies bestowed on the investigated products and to probe the existence of a product-specific tie.

5.283. In sum, by too readily dismissing the relevance of the documents submitted by Samsung, the USDOC failed to "evaluate[] all of the relevant evidence in an objective and unbiased manner".[646] Thus, by upholding the USDOC's finding that those documents were "irrelevant" to the calculation of Samsung's *ad valorem* subsidization rate[647], the Panel erroneously concluded that

[640] See Korea's first written submission to the Panel, para. 245; Korea's other appellant's submission, para. 331; and GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-75 (BCI), at pp. 37 and 47). These formulae are further detailed in Articles 9(3)-9(5) of the RSTA Enforcement Decree in GOK *Washers* CVD questionnaire response (Panel Exhibit KOR-76).

[641] Korea's other appellant's submission, paras. 306 and 319; United States' appellee's submission, para. 355.

[642] Samsung *Washers* CVD questionnaire response, exhibit 25 (Panel Exhibit KOR-72 (BCI), at pp. 50-51).

[643] *Washers* CVD GOK questionnaire verification exhibit 10 (Panel Exhibit KOR-115 (BCI)); *Washers* CVD GOK questionnaire verification exhibit 12 (Panel Exhibit KOR-126 (BCI)).

[644] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 38-39.

[645] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

[646] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

[647] Panel Report, para. 7.304.

the explanations provided by the USDOC were "reasoned and adequate"[648] in light of the evidence placed on the investigation record.

5.2.4.3 Conclusions

5.284. In light of the above, we conclude that the Panel: (i) improperly endorsed a flawed test applied by the USDOC in the *Washers* countervailing duty investigation for ascertaining whether the tax credits bestowed under Articles 10(1)(3) and 26 of the RSTA were tied to particular products; and (ii) improperly upheld the USDOC's dismissal of certain evidence submitted by Samsung that was potentially relevant to the assessment of whether a portion of the tax credits Samsung claimed under such provisions was tied to the products manufactured by its digital appliance business unit.

5.285. Therefore, we reverse the Panel's finding, in paragraph 8.1.b.iv of its Report[649], that "the USDOC's failure to tie the RSTA Article[s] 10(1)(3) and 26 tax credit subsidies to [d]igital [a]ppliance products is [not] inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994"; and find, instead, that the USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by applying a flawed test for ascertaining whether the tax credits bestowed under Articles 10(1)(3) and 26 of the RSTA were tied to particular products, and by dismissing certain evidence submitted by Samsung that was potentially relevant to the assessment of whether a portion of the tax credits Samsung claimed under such provisions was tied to the products manufactured by its digital appliance business unit.

5.286. Korea claims that, in articulating its analysis, the Panel also failed to comply with its duties under Article 11 of the DSU by stating that the tax credits available under the RSTA Article 10(1)(3) tax credit programme "are not R&D subsidies".[650] Having reversed the Panel's finding under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, we do not find it necessary to address Korea's claim under Article 11 of the DSU.

5.2.5 Whether the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by upholding the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production only

5.287. We now turn to the second claim raised by Korea under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 with respect to the USDOC's calculation of the *ad valorem* subsidization rate for Samsung in the *Washers* countervailing duty investigation.

5.288. During the course of the *Washers* countervailing duty investigation, the USDOC was confronted with the issue of whether it should attribute the tax credits that Samsung received under Article 10(1)(3) of the RSTA to Samsung's products manufactured worldwide or only to those manufactured in the territory of Korea.[651] Although Samsung produced digital appliance products (including LRWs) in Korea only, a number of Samsung's wholly owned subsidiaries produced digital appliance products (including LRWs) in the jurisdictions of other Members.[652] Thus, Samsung argued that the denominator of its per unit subsidization rate should encompass its worldwide production, including the production of its overseas subsidiaries. In support of this argument, Samsung highlighted that subsidies such as R&D tax credits are, by nature, tied to an activity that benefits a company's domestic and overseas production alike.[653] It also stressed that,

[648] See Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[649] See also Panel Report, para. 7.307.
[650] Korea's other appellant's submission, para. 331 (quoting Panel Report, para. 7.303).
[651] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 50.
[652] For instance, Samsung's Mexican affiliate, Samsung Electronics Mexico S.A. de C.V., produced LRWs in Mexico. Samsung Electronics America, Inc. sold those LRWs in the United States during the period of investigation. (See Response dated 10 April 2012 of Samsung Electronics Co., Ltd to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (BCI-redacted version) (Panel Exhibit USA-100, at p. 3))
[653] Case Brief of Samsung Electronics Co., Ltd, Large Residential Washers from the Republic of Korea [C-580-869] (2 November 2012) (excerpt) (Samsung *Washers* CVD case brief) (Panel Exhibit KOR-90, at pp. 4-5); Korea's other appellant's submission, para. 357.

in the *Washers* and *Refrigerators* anti-dumping investigations[654], the USDOC determined that Samsung's R&D activities in Korea benefitted all of its digital appliance subsidiaries.[655] Finally, Samsung pointed to the royalties and sales commissions paid by Samsung's overseas subsidiaries in order to compensate their parent company for its R&D activities in Korea.[656]

5.289. The USDOC observed that its own regulations set forth "a very high threshold" to find that subsidies provided by a government can benefit the production of merchandise produced in another country.[657] Indeed, according to those regulations, the USDOC applies a "presumption that government subsidies benefit domestic production", and, therefore, normally attributes those subsidies solely to "products produced … within the country of the government that granted the subsidy".[658] In order to rebut this presumption, the USDOC explained, the subsidizing government must have "'explicitly stated that the subsidy was being provided for more than domestic production' in the application and/or approval documents".[659] Such documents "must show that, at the point of bestowal, one of the express purposes of the subsidy was to provide assistance to the firm's foreign subsidiaries."[660] Applying this presumption to the RSTA Article 10(1)(3) tax credit programme, the USDOC found that Samsung had not submitted any statements by the Government of Korea indicating that tax credits under that programme were meant to benefit production occurring outside of Korea. For instance, the USDOC observed that there is no indication in the statutory provisions that a company could claim a tax credit on R&D activities conducted outside of Korea, and the tax returns themselves do not evince that the design of the programme includes the subsidization of foreign production.[661] In light of the above, the USDOC decided not to extend the denominator of Samsung's per unit subsidization rate to Samsung's overseas production.[662]

5.290. Before the Panel, Korea claimed that the USDOC's decision resulted in the imposition of a countervailing duty in excess of the amount of the subsidy found to exist in respect of Samsung's LRWs under investigation inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. In Korea's view, the denominator calculated by the USDOC did not match the numerator, which included the total amount of tax credits received by Samsung under Article 10(1)(3) of the RSTA.[663] Korea submitted that, since the R&D tax credits claimed by Samsung benefitted Samsung's worldwide production of digital appliances[664], the denominator should have encompassed the total value of Samsung's sales of those products, regardless of where they were produced, manufactured, or sold.[665] Moreover, according to Korea, the USDOC's presumption of attribution of a subsidy to domestic production only was impermissible.[666]

5.291. The Panel recalled that the subsidies Samsung received under Article 10(1)(3) of the RSTA are "the tax credits provided to Samsung in Korea", and that the "benefit" of those subsidies is the "tax credit cash".[667] In turn, according to the Panel, this "benefit" is not "tied" to the underlying

[654] USDOC [A-580-865] Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea.

[655] See e.g. Samsung *Washers* CVD case brief (Panel Exhibit KOR-90, at pp. 4-5); Korea's other appellant's submission, paras. 357-358 (referring to *Refrigerators* AD I&D memorandum and *Refrigerators* AD Samsung cost verification memorandum (Panel Exhibit KOR-98 (BCI), at p. 8 and p. 12, respectively); and *Washers* AD Samsung cost verification memorandum (Panel Exhibit KOR-99 (BCI)), p. 42).

[656] Samsung *Washers* CVD case brief (Panel Exhibit KOR-90, at pp. 4-5); Korea's other appellant's submission, para. 357.

[657] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52.

[658] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52 (referring to CVD preamble regulations (Panel Exhibit USA-25), p. 65403).

[659] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52 (quoting CVD preamble regulations (Panel Exhibit USA-25), p. 65403).

[660] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52 (quoting CVD preamble regulations (Panel Exhibit USA-25), p. 65404).

[661] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52.

[662] Panel Report, para. 7.317; *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), pp. 52-53. The USDOC's decision was incorporated by reference in the *Washers* final CVD determination (Panel Exhibit KOR-2), p. 75976.

[663] Korea's first written submission to the Panel, para. 307 (referring to Appellate Body Report, *US – Softwood Lumber IV*, fn 196 to para. 164).

[664] Korea's first written submission to the Panel, para. 308 (referring to Samsung *Washers* CVD case brief (Panel Exhibit KOR-90, at pp. 4-5)). See also Korea's second written submission to the Panel, para. 323.

[665] Korea's first written submission to the Panel, para. 306.

[666] Korea's first written submission to the Panel, paras. 310-315.

[667] Panel Report, para. 7.318.

R&D activities, since Samsung is free to spend the tax credit cash as it sees fit.[668] Therefore, the Panel found that, even assuming that Samsung's R&D activities in Korea may have a "positive effect" on the overseas production of digital appliances by Samsung's subsidiaries, this does not mean that the tax credits conferred in connection with those activities have to be allocated across revenue from Samsung's overseas production. Indeed, in the Panel's opinion, such "positive effect" does not constitute a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement[669], and there is no evidence that the benefit conferred by the tax credits claimed by Samsung "passed through" to Samsung's overseas production operations.[670] The Panel further observed that the USDOC's presumption of attribution of subsidies to domestic production is rebuttable, in the sense that it allows respondents to show that a government expressly intends to subsidize overseas production. The Panel also noted that, while Samsung's subsidiaries may produce digital appliance products overseas, the parent company – i.e. the recipient of the subsidy – produces those products within Korea only. On these grounds, the Panel held that the USDOC was entitled to presume that the tax credits Samsung received under Article 10(1)(3) of the RSTA did not benefit Samsung's overseas production and that Samsung had not effectively rebutted that presumption.[671]

5.292. Korea requests us to find that the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by upholding the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production only. Korea maintains, first, that, by grounding its reasoning on Samsung's discretion as to the use of the tax credit cash, the Panel repeated the same error it had made with respect to the "tying issue".[672] Second, Korea contends that the Panel improperly upheld the USDOC's presumption that "government subsidies benefit domestic production".[673] For Korea, Samsung's arguments and evidence submitted during the course of the *Washers* countervailing duty investigation effectively rebutted this presumption[674] and required the USDOC to allocate the tax credits Samsung received under Article 10(1)(3) of the RSTA "to the products that Samsung produced worldwide".[675] Thus, Korea submits that, in calculating the *ad valorem* subsidization rate for Samsung, the USDOC should have extended the denominator to the sales value of Samsung's worldwide production.[676]

5.293. According to the United States, Korea's contention that subsidies may be attributed based on the indirect overseas effect of R&D activities has no grounding in the text of Article 19.4 and Article VI:3.[677] In the United States' view, those provisions focus on domestic production[678] without addressing "possible overseas knock-on effects" of subsidies.[679] In the United States' view, such cross-border effects "may not materialize for years (if ever)"[680] and, therefore, tracing such effects would be excessively onerous on investigating authorities.[681] The United States also stresses that Article 10(1)(3) of the RSTA limits eligibility to Korean companies and to their R&D and HRD activities in Korea[682] and maintains that the royalties paid by Samsung's overseas subsidiaries to their parent company in Korea testify to the fact that the benefit received by Samsung did not automatically "pass through" to those subsidiaries.[683] Finally, the United States considers the USDOC's statement, in the *Washers* and *Refrigerators* anti-dumping investigations,

[668] Panel Report, para. 7.318.
[669] Panel Report, para. 7.318.
[670] Panel Report, para. 7.319.
[671] Panel Report, para. 7.319.
[672] Korea's other appellant's submission, para. 360 (referring to Panel Report, para. 7.318).
[673] Korea's other appellant's submission, para. 359 (quoting *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52). See also para. 361.
[674] Korea's other appellant's submission, paras. 357-358 (referring to *Refrigerators* AD I&D memorandum and *Refrigerators* AD Samsung cost verification memorandum (Panel Exhibit KOR-98 (BCI), at p. 8 and p. 12, respectively); and *Washers* AD Samsung cost verification memorandum (Panel Exhibit KOR-99 (BCI))); and paras. 362-364 and 368.
[675] Korea's other appellant's submission, para. 356.
[676] Korea's other appellant's submission, paras. 357 and 372.
[677] United States' appellee's submission, para. 416.
[678] United States' appellee's submission, para. 418.
[679] United States' appellee's submission, para. 419.
[680] United States' appellee's submission, para. 430.
[681] United States' appellee's submission, para. 426.
[682] United States' appellee's submission, para. 431.
[683] United States' appellee's submission, para. 430.

that Samsung's R&D activities in Korea benefitted all of its digital appliance subsidiaries to be irrelevant for determining the attribution of subsidies.[684]

5.294. We understand the Panel to have upheld the USDOC's analysis based on two core premises. First, since the "benefit" constituted by the proceeds of the tax credits under Article 10(1)(3) of the RSTA was bestowed on Samsung for its R&D and HRD activities in Korea, it was irrelevant, for purposes of attribution of the subsidy, that such activities could have had a positive effect on the production of digital appliance products by Samsung's overseas subsidiaries. Second, the Panel considered that the USDOC was entitled to presume that those tax credits were being bestowed on Samsung's domestic production only, as neither the text of Article 10(1)(3) of the RSTA nor any other application or approval document showed an intent by the Government of Korea to subsidize the production of Samsung's overseas subsidiaries.

5.295. To recall, Article 19.4 of the SCM Agreement requires an investigating authority to calculate the amount of subsidy bestowed on the products under investigation "in terms of subsidization per unit of the subsidized and exported product".[685] In order to calculate per unit subsidization, an investigating authority may divide the total subsidy by the total sales value of all products to which the subsidy is attributable. In so doing, the authority must properly "match[] the elements taken into account in the numerator with the elements taken into account in the denominator".[686] The SCM Agreement does not expressly specify whether, in order to ensure this matching, the investigating authority should limit the denominator to the sales value of the recipient's production within the jurisdiction of the subsidizing Member or may also include in the denominator the sales value of the recipient's production in the jurisdictions of other Members.

5.296. As noted above[687], Article VI:3 of the GATT 1994 defines the "subsidized products" as the products for whose "manufacture, production or export" a subsidy has been "granted, directly or indirectly" in "the country of origin or exportation". By expressly referring to "manufacture, production or export", Article VI:3 contemplates that the bestowal of a subsidy may be linked to a wide array of activities, spreading across the cycle of production and sale of the relevant products. In turn, Article 1 of the SCM Agreement provides that a subsidy is deemed to exist if there is a financial contribution by a government or a public body within the territory of a Member that provides a "benefit" to the recipient.[688] Finally, under Article 14 of the SCM Agreement, investigating authorities are required to calculate the amount of a subsidy in terms of "benefit to the recipient". Read together, these provisions indicate that "subsidized products" for purposes of calculating per unit subsidization are limited to those manufactured, produced, or exported by the recipient.

5.297. However, the above-mentioned provisions do not indicate that, for purposes of calculating per unit subsidization, the subsidized products should be limited to those produced by the recipient of a subsidy within the jurisdiction of the subsidizing Member. We do not see any express limitation to this effect in the SCM Agreement. Thus, we consider that a subsidy may, indeed, be bestowed on the recipient's production outside the jurisdiction of the subsidizing Member. For instance, if the recipient is a multinational corporation with facilities located in multiple countries, the subsidized products may, depending on the circumstances of the case, include that corporation's production in those multiple countries.

5.298. In calculating the amount of *ad valorem* subsidization, an investigating authority has the task of identifying the specific products for whose "manufacture, production or export" a given subsidy has been "granted". This examination should be conducted on a case-by-case basis, based on the arguments and evidence submitted by interested parties and the specific facts surrounding the bestowal of that subsidy. Those facts may include the text, design, structure, and operation of

[684] United States' appellee's submission, paras. 422-423 and 428.
[685] See para. 5.267 of this Report.
[686] Appellate Body Report, *US – Softwood Lumber IV*, fn 196 to para. 164. (emphasis omitted)
[687] See para. 5.267 of this Report.
[688] See Appellate Body Reports, *Canada – Dairy*, para. 87; and *EC and certain member States – Large Civil Aircraft*, para. 708. According to the Appellate Body, the existence of a benefit is to be determined by reference to "whether the terms of the financial contribution are more favourable to what is available to the recipient on the market". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 974; see also e.g. Appellate Body Reports, *Canada – Aircraft*, para. 157; *US – Lead and Bismuth II*, para. 68; *US – Large Civil Aircraft (2nd complaint)*, para. 690; and *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.208)

the measure under which the subsidy is granted, as well as the structure and location of the recipient's production operations. In carrying out its assessment, the investigating authority should provide the interested parties with a meaningful opportunity to submit evidence.[689] Sometimes, an assessment of these factors may reveal that a subsidy is bestowed solely on the recipient's production within the jurisdiction of the granting authority. At other times, however, such an assessment may lead the authority to conclude that the subsidy at issue is bestowed also on the recipient's production in countries other than the subsidizing Member.

5.299. Applying these considerations to the Panel's review of the USDOC's determination, we believe that, in order to calculate appropriately the denominator of Samsung's per unit subsidization rate, the USDOC was tasked with identifying the products in respect of which the tax credits Samsung received under Article 10(1)(3) of the RSTA were granted. In so doing, the USDOC was required to consider all the relevant facts surrounding the bestowal of those tax credits, including: (i) the text, design, structure, and operation of the RSTA Article 10(1)(3) tax credit programme; and (ii) the structure and location of Samsung's production operations. We recall[690] that, in reviewing the consistency of the USDOC's determination with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, the Panel had to assess whether, having "evaluated all of the relevant evidence in an objective and unbiased manner"[691], the USDOC had provided "reasoned and adequate" explanations.[692]

5.300. The Panel relied, first, on the fact that the tax credits under Article10(1)(3) of the RSTA were provided to Samsung based on its Korea-based R&D activities and that any positive effect that such activities might have on Samsung's overseas production does not constitute a "benefit" under Article 1.1(b) of the SCM Agreement. The participants do not dispute that the "benefit" deriving from the bestowal of the subsidy under Article 10(1)(3) of the RSTA consists of the proceeds of the tax credits. Nor do they disagree that Samsung, a company established within the jurisdiction of Korea, is the "recipient" of that benefit by virtue of its R&D activities in Korea. However, as we observed in section 5.2.1.1 above, the identification of the recipient of the benefit is part of the analysis as to whether a subsidy exists pursuant to Article 1 of the SCM Agreement. This analysis is distinct from, and should not prejudge, the calculation of the amount of subsidy that has been bestowed upon the products produced by the recipient, so as to determine properly the amount of countervailing duty to be imposed on such products in accordance with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Thus, the fact that Samsung is the recipient of the "benefit" deriving from the bestowal of subsidies under Article 10(1)(3) of the RSTA does not, in and of itself, preclude a finding that those subsidies may be allocated to the production of Samsung's overseas subsidiaries. By overly focusing on the fact that Samsung was the beneficiary of the RSTA Article 10(1)(3) tax credits, the Panel appears to have conflated the concept of "recipient of the subsidy" under Article 1 of the SCM Agreement with the concept of "subsidized product" for purposes of calculating per unit subsidization under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

5.301. Similarly, we do not find the Panel's affirmation of the USDOC's presumptive allocation of subsidies to Samsung's domestic production[693] to be adequate in this case. As noted above, during the course of the *Washers* countervailing duty investigation, Samsung submitted arguments and evidence that, in its view, would have enabled the USDOC to allocate the tax credits Samsung

[689] In this respect, we note that the GATT panel in *US – Lead and Bismuth I* was confronted with a similar issue to that arising in this dispute, i.e. whether the USDOC had erred in allocating subsidies provided to a respondent exclusively over its domestic production, rather than over its world-wide production. The panel noted, *inter alia*, that the USDOC did not ask any questions to the respondents as to whether particular programmes were designed to benefit only domestic operations or both domestic and foreign operations of the companies in question. (GATT Panel Report, *US – Lead and Bismuth I* (unadopted), para. 605) The panel, therefore, took the view that the parties to the investigation had not been afforded an adequate opportunity to provide factual information relevant to whether the subsidies actually benefitted foreign production. (Ibid., para. 606)

[690] See para. 5.258 of this Report.

[691] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

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

[693] Panel Report, para. 7.319. See also *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52.

received under Article 10(1)(3) of the RSTA across its worldwide production.[694] Samsung's arguments and evidence related to the specifics of the design, structure, and operation of the RSTA Article 10(1)(3) tax credit programme, as well as to the specific structure and location of Samsung's production operations. These submissions were, at least potentially, relevant evidence surrounding the bestowal of tax credits under Article 10(1)(3) of the RSTA. Thus, the USDOC was required to review those arguments and to evaluate that evidence in order to identify the "subsidized products" for purposes of calculating per unit subsidization.

5.302. Instead, in its determination, the USDOC relied mainly on a "presumption that government subsidies benefit domestic production".[695] While that presumption could, in principle, be rebutted, the USDOC determined that the only way to do so was for Samsung to show that the Government of Korea "'explicitly stated that the subsidy was being provided for more than domestic production' in the application and/or approval documents".[696] The USDOC determined that Samsung had not made that showing, as "there is no indication in the statutory provisions" or in "the tax returns themselves" that "a company could claim a tax credit on … a facility located outside of Korea".[697]

5.303. The expressed intent of a subsidizing authority, as evinced by the face of the measure granting the subsidy, cannot be the sole factor relevant to the allocation of that subsidy to the products produced by the recipient in the context of calculating per unit subsidization. Although neither Article 10(1)(3) of the RSTA nor the related tax returns show the Government of Korea's express intent to subsidize overseas production, this does not exhaust the scope of the relevant arguments and evidence submitted by the interested parties concerning the bestowal of the subsidy, which the USDOC was required to examine. By focusing solely on the face of the statutory provisions and of the tax returns submitted by Samsung, the USDOC failed to "evaluate[] all of the relevant evidence"[698] and to provide "reasoned and adequate" explanations for its determination.[699]

5.304. Despite these deficiencies, the Panel upheld the USDOC's determination, thus condoning the USDOC's failure to assess meaningfully all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of tax credits on Samsung under Article 10(1)(3) of the RSTA. Thus, we consider that the Panel improperly concluded that, having evaluated all of the relevant evidence[700], the USDOC had provided "reasoned and adequate" explanations.[701]

5.305. In light of the above, we conclude that the Panel: (i) erroneously conflated the concept of "recipient of the benefit" under Article 1.1(b) of the SCM Agreement with the concept of "subsidized product" under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994; and (ii) improperly upheld the manner in which the USDOC presumptively attributed the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production, thereby condoning the USDOC not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of those tax credits.

[694] In particular, Samsung: (i) submitted that R&D tax credits, by their nature, benefit both a company's domestic and overseas production (Samsung *Washers* CVD case brief (Panel Exhibit KOR-90, at pp. 4-5); Korea's other appellant's submission, para. 357); (ii) noted that, in the *Washers* and *Refrigerators* anti-dumping investigations, the USDOC determined that Samsung's R&D activities in Korea benefitted all of its digital appliance subsidiaries (Samsung *Washers* CVD case brief (Panel Exhibit KOR-90, at pp. 4-5); Korea's other appellant's submission, paras. 357-358 (referring to *Refrigerators* AD I&D memorandum and *Refrigerators* AD Samsung cost verification memorandum (Panel Exhibit KOR-98 (BCI), at p. 8 and p. 12, respectively); and *Washers* AD Samsung cost verification memorandum (Panel Exhibit KOR-99 (BCI)), p. 42)); and (iii) pointed to the royalties paid by Samsung's overseas subsidiaries in order to compensate their parent company for its R&D activities in Korea (Samsung *Washers* CVD case brief (Panel Exhibit KOR-90, at pp. 4-5); and Korea's other appellant's submission, para. 357).

[695] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52. (fn omitted)

[696] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52 (quoting CVD preamble regulations (Panel Exhibit USA-25), p. 65403).

[697] *Washers* final CVD I&D memorandum (Panel Exhibit KOR-77), p. 52.

[698] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

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

[700] See Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

[701] See Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

5.306. We, therefore, reverse the Panel's finding, in paragraph 8.1.b.v of its Report[702], that "the USDOC [did not act] 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"; and find, instead, that the USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of the tax credits received by Samsung under Article 10(1)(3) of the RSTA and thereby presumptively attributing those tax credits to Samsung's domestic production.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.[703]

6.1 The relevant "pattern" for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

6.2. We agree with the Panel that, under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, "a sub-set of export transactions is set aside for specific consideration."[704] We further agree with the Panel that, once prices are identified as being different from other prices, "they constitute the relevant 'pattern'" and that, "[a]lthough 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'."[705] Although we recognize that a pattern may be identified in a variety of factual circumstances, we consider that the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 comprises prices that are significantly *lower* than other export prices among different purchasers, regions or time periods. Moreover, we consider that some transactions that differ among purchasers, taken together with some transactions that differ among regions, and some transactions that differ among time periods, cannot form a single pattern. Our interpretation does not exclude the possibility that the same exporter or producer could be practicing more than one of the three types of "targeted dumping". We also do not exclude the possibility that a pattern of significantly differing prices to a certain category (purchasers, regions, or time periods) may overlap with a pattern of significantly differing prices to another category.

6.3. We thus consider that a "pattern" for the purposes of the second sentence of Article 2.4.2 comprises *all* the export prices to one or more particular purchasers which differ significantly from the export prices to the other purchasers because they are significantly *lower* than those other prices, or *all* the export prices in one or more particular regions which differ significantly from the export prices in the other regions because they are significantly *lower* than those other prices, or *all* the export prices during one or more particular time periods which differ significantly from the export prices during the other time periods because they are significantly *lower* than those other prices.

a. Consequently, we uphold the Panel's conclusions regarding the relevant "pattern" set out in, *inter alia*, paragraphs 7.24, 7.27-7.28, 7.45-7.46, 7.141-7.142, and 7.144 of the Panel Report.

b. In addition, we uphold the Panel's finding, in paragraph 8.1.a.ix of the Panel Report[706], that "the DPM is inconsistent 'as such' with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] 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'".

[702] See also Panel Report, para. 7.320.
[703] One Member of the Division expressed a separate opinion on the issue of zeroing under the W-T comparison methodology. This separate opinion can be found in sub-section 5.1.10 of this Report.
[704] Panel Report, para. 7.24.
[705] Panel Report, para. 7.28.
[706] See also Panel Report, para. 7.147.

6.2 The scope of application of the W-T comparison methodology in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

6.4. Based on the text of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, which refers to "individual export transactions", read in context and in light of the function of the second sentence of Article 2.4.2 to allow investigating authorities to identify and address "targeted dumping", we consider that the W-T comparison methodology should only be applied to those transactions that justify its use, namely, those transactions forming the relevant "pattern".

a. Therefore, we uphold the Panel's finding, in paragraph 7.29 of the Panel Report, 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'."

b. We further uphold the Panel's consequential finding, in paragraph 8.1.a.i of the Panel Report[707], that "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".

c. We also uphold the Panel's consequential finding, in paragraph 8.1.a.vi of the Panel Report[708], that "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[s] for 66% or more of the value of total sales".

6.3 Prices which differ "significantly" under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

6.5. We consider that the Panel did not mischaracterize Korea's claim. Moreover, assessing the extent of the differences in export prices to establish whether those export prices differ *significantly* for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement entails both quantitative and qualitative dimensions. As part of the qualitative assessment, circumstances pertaining to the nature of the product or the markets may be relevant for the assessment of whether differences are "significant" in the circumstances of a particular case.

a. Therefore, we find that the requirement to identify prices which differ *significantly* means that the investigating authority is required to assess quantitatively and qualitatively the price differences at issue. This assessment may require the investigating authority to consider certain objective market factors, such as circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. However, we agree with the Panel that an investigating authority is not required to consider the cause of (or reasons for) the price differences to establish the existence of a pattern under the second sentence of Article 2.4.2.

b. We reverse the Panel's finding in respect of the *Washers* anti-dumping investigation, in paragraph 8.1.a.ii of the Panel Report[709], to the extent that the Panel found that "a pattern of export prices which differ significantly among purchasers, regions or time periods" can be established "on the basis of purely quantitative criteria".

c. We also reverse the Panel's finding in respect of the DPM, in paragraph 8.1.a.v of the Panel Report[710], to the extent that the Panel found that "a pattern of export prices which differ significantly among purchasers, regions or time periods" can be established "on the basis of purely quantitative criteria".

[707] See also Panel Report, para. 7.29.
[708] See also Panel Report, para. 7.119.c.
[709] See also Panel Report, para. 7.52.
[710] See also Panel Report, para. 7.119.a.

6.4 The explanation to be provided under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

6.6. We consider that an investigating authority has to explain why both the W-W and the T-T comparison methodologies cannot take into account appropriately the differences in export prices that form the pattern. In circumstances where the W-W and T-T comparison methodologies would yield substantially equivalent results and where an explanation has been provided with respect to one of these two methodologies, the explanation to be included with respect to the other may not need to be as elaborate.

a. Therefore, we reverse the Panel's finding, in paragraph 8.1.a.iv of the Panel Report[711], that "Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] 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."

b. We also reverse the Panel's finding, in paragraph 8.1.a.viii of the Panel Report[712], that "Korea failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] 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".

6.5 "Systemic disregarding"

6.7. With respect to the Panel's finding under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, we consider that the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping by applying the W-T comparison methodology only to "pattern transactions" to the exclusion of "non-pattern transactions". We also consider that the second sentence of Article 2.4.2 does not permit the combining of comparison methodologies. Accordingly, we find that this provision does not envisage "systemic disregarding", as described by the Panel. The second sentence of Article 2.4.2 does not envisage a mechanism whereby an investigating authority would conduct separate comparisons for "pattern transactions" under the W-T comparison methodology and for "non-pattern transactions" under the W-W or T-T comparison methodology, and exclude from its consideration the result of the latter if it yields an overall negative comparison result or aggregate it with the W-T comparison result for the "pattern transactions" if it yields an overall positive comparison result. Thus, in circumstances where the requirements of the second sentence of Article 2.4.2 have been fulfilled, an investigating authority is allowed to establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions" and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.

a. We, therefore, moot the Panel's finding, in paragraph 8.1.a.x of the Panel Report[713], that "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". Instead, when the requirements of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement are fulfilled, an investigating authority may establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.

6.8. With respect to the Panel's finding under Article 2.4 of the Anti-Dumping Agreement, we consider that Articles 2.4 and 2.4.2 not only inform each other, but must be read together harmoniously and that the exceptional nature of the W-T comparison methodology, consistent with the function of the second sentence of Article 2.4.2 as allowing an investigating authority to identify and address "targeted dumping" by considering "pattern transactions" confirms that the "fair comparison" requirement in Article 2.4 applies only in respect of "pattern transactions".

[711] See also Panel Report, para. 7.81.
[712] See also Panel Report, para. 7.119.b.
[713] See also Panel Report, para. 7.167.

Accordingly, we conclude that the establishment of margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer, is consistent with the "fair comparison" requirement in Article 2.4.

a. Having concluded that the second sentence of Article 2.4.2 does not permit an investigating authority to combine the W-T comparison methodology with the W-W or T-T comparison methodology and, thus, does not provide for "systemic disregarding" as described by the Panel, we moot the Panel's finding, in paragraph 8.1.a.xi of the Panel Report[714], that "Korea failed to establish that the United States' use of 'systemic disregarding' under the DPM is 'as such' inconsistent with Article 2.4" of the Anti-Dumping Agreement.

6.6 Zeroing under the W-T comparison methodology[715]

6.9. With respect to the consistency of zeroing under the W-T comparison methodology with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, we do not consider the Panel to have erred in its findings. The exceptional W-T comparison methodology in the second sentence of Article 2.4.2 requires a comparison between a weighted average normal value and the entire universe of export transactions that fall within the pattern as properly identified under that provision, irrespective of whether the export price of individual "pattern transactions" is above or below normal value. While the results of the transaction-specific comparisons of weighted average normal value and each individual export price falling within the pattern will be intermediate results, the aggregation of *all* these results is required and will determine dumping and margins of dumping for the product under investigation as it relates to the identified "pattern". Zeroing the negative intermediate comparison results within the pattern is neither necessary to address "targeted dumping", nor is it consistent with the establishment of dumping and margins of dumping as pertaining to the "universe of export transactions" identified under the second sentence of Article 2.4.2. While the text of the second sentence of Article 2.4.2 allows an investigating authority to focus on "pattern transactions" and exclude from its consideration "non-pattern transactions" in establishing dumping and margins of dumping under the W-T comparison methodology, it does not allow an investigating authority to exclude certain transaction-specific comparison results within the pattern, when the export price is above normal value.

a. We, therefore, uphold the Panel's findings, in paragraphs 8.1.a.xii and 8.1.a.xiv of the Panel Report[716], that "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" and that "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".

6.10. With respect to the consistency of zeroing under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 with the "fair comparison" requirement in Article 2.4, we do not consider the Panel to have erred in its findings. Setting to zero the intermediate negative comparison results has the effect of not only inflating the magnitude of dumping, thus resulting in higher margins of dumping, but it also makes a positive determination of dumping more likely in circumstances where the export prices above normal value exceed those that are below normal value. Moreover, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare *all* comparable export transactions that form the applicable "universe of export transactions" as required under the second sentence of Article 2.4.2, thus failing to make a "fair comparison" within the meaning of Article 2.4.

a. Therefore, having found that zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 and having upheld the Panel's findings on zeroing under the second sentence of Article 2.4.2, we also

[714] See also Panel Report, para. 7.169.
[715] For the separate opinion on this issue, see sub-section 5.1.10 of this Report.
[716] See also Panel Report, para. 7.192.

uphold the Panel's findings, in paragraphs 8.1.a.xiii and 8.1.a.xv of the Panel Report[717], that "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" and that "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".

6.11. With respect to the consistency of zeroing with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in the application of the W-T comparison methodology in administrative reviews, we do not consider the Panel to have erred in its finding. Article 9.3 refers to the "margin of dumping" as established under Article 2. This "margin of dumping" represents the ceiling for anti-dumping duties levied pursuant to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Accordingly, if margins of dumping are established inconsistently with Article 2.4.2 by using zeroing under the W-T comparison methodology, the corresponding anti-dumping duties that are levied will also be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, as they will exceed the margin of dumping that should have been established under Article 2. Moreover, if zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 in original anti-dumping investigations, it also cannot be permitted in respect of administrative reviews.

a. We, therefore, uphold the Panel's finding, in paragraph 8.1.a.xvi of the Panel Report[718], that "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".

6.7 Article 2.2 of the SCM Agreement

6.12. With respect to the Panel's findings under Article 2.2 of the SCM Agreement, we agree with the Panel that: (i) the term "certain enterprises" in Article 2.2 is not limited to entities with legal personality, but also encompasses sub-units or constituent parts of a company – including, but not limited to, its branch offices and the facilities in which it conducts manufacturing operations – that may or may not have distinct legal personality; (ii) the "designation" of a region for purposes of Article 2.2 need not be affirmative or explicit, but may also be carried out by exclusion or implication, provided that the region in question is clearly discernible from the text, design, structure, and operation of the subsidy at issue; and (iii) the concept of "geographical region" in Article 2.2 does not depend on the territorial size of the area covered by a subsidy. The Panel correctly found that the RSTA Article 26 tax credit programme effectively designated the region where the relevant eligible investments were to be made in order to qualify for the subsidy at issue, thereby being "limited to certain enterprises located within a designated geographical region" within Korea's jurisdiction.

a. We, therefore, uphold the Panel's finding, in paragraph 8.1.b.iii of the Panel Report[719], that "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".

6.13. With respect to the issue of whether, in its analysis of regional specificity, the Panel failed to comply with its obligations under Article 11 of the DSU, we consider that the claims that Korea raised before the Panel under Article 2.2 hinged, essentially, on the interpretation of certain terms contained in that provision, and that the Panel did address all of such interpretative claims.

a. We, therefore, find that the Panel did not act inconsistently with its duties under Article 11 of the DSU in articulating its findings on regional specificity.

[717] See also Panel Report, para. 7.206.
[718] See also Panel Report, para. 7.208.
[719] See also Panel Report, para. 7.289.

6.8 Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994

6.14. With respect to the Panel's affirmation of the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA were not tied to particular products, we consider that the Panel: (i) improperly endorsed a flawed tying test applied by the USDOC in the *Washers* countervailing duty investigation, whereby a subsidy is tied to a specific product only when the intended use of the subsidy is known to the granting authority and so acknowledged prior to or concurrent with the bestowal of the subsidy; and (ii) improperly upheld the USDOC's dismissal of certain evidence submitted by Samsung that was potentially relevant to the assessment of whether a portion of the tax credits Samsung claimed under such provisions was tied to the products manufactured by its digital appliance business unit.

a. We, therefore, reverse the Panel's finding, in paragraph 8.1.b.iv of the Panel Report[720], that "the USDOC's failure to tie the RSTA Article[s] 10(1)(3) and 26 tax credit subsidies to [d]igital [a]ppliance products is [not] inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994"; and find, instead, that the USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by: (i) applying a flawed tying test in the *Washers* countervailing duty investigation, whereby a subsidy is tied to a specific product only when the intended use of the subsidy is known to the granting authority and so acknowledged prior to or concurrent with the bestowal of the subsidy; and (ii) by dismissing certain evidence submitted by Samsung that was potentially relevant to the assessment of whether a portion of the tax credits Samsung claimed under Article 10(1)(3) and Article 26 of the RSTA was tied to the products manufactured by its digital appliance business unit.

6.15. Having reversed the Panel's finding under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, we do not find it necessary to address Korea's claim that the Panel also failed to comply with its duties under Article 11 of the DSU by stating, in paragraph 7.303 of the Panel Report, that the tax credits available under the RSTA Article 10(1)(3) tax credit programme "are not R&D subsidies".

6.16. With respect to the Panel's affirmation of the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production, we consider that the Panel: (i) erroneously conflated the concept of "recipient of the benefit" under Article 1.1(b) of the SCM Agreement with the concept of "subsidized product" under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994; and (ii) improperly upheld the manner in which the USDOC presumptively attributed the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production, thereby condoning the USDOC not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of those tax credits.

a. We, therefore, reverse the Panel's finding, in paragraph 8.1.b.v of the Panel Report[721], that "the USDOC [did not act] 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"; and find, instead, that the USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of the tax credits received by Samsung under Article 10(1)(3) of the RSTA and thereby presumptively attributing those tax credits to Samsung's domestic production.

6.9 Recommendation

6.17. The Appellate Body recommends that the DSB request the United States to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994, into conformity with its obligations under those Agreements.

[720] See also Panel Report, para. 7.307.
[721] See also Panel Report, para. 7.320.

Signed in the original in Geneva this 6th day of August 2016 by:

Thomas Graham
Presiding Member

Ricardo Ramírez-Hernández
Member

Ujal Singh Bhatia
Member

WORLD TRADE ORGANIZATION

WT/DS464/AB/R/Add.1

7 September 2016

(16-4766)

UNITED STATES – ANTIDUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

AB-2016-2

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS464/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

UNITED STATES' NOTICE OF APPEAL*

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States files this notice of appeal to the Appellate Body on certain issues of law covered in the Report of the Panel on *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464/R & WT/DS464/R/Add.1) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal interpretation of the "pattern" for purposes of 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* (the "AD Agreement").[1] The Panel found that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period) while other export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. This finding is in error and is based on erroneous findings on issues of law and legal interpretations.[2] The United States respectfully requests that the Appellate Body reverse or modify the Panel's findings.

2. The United States seeks review of the Panel's findings relating to the "scope of application"[3] of the alternative, average-to-transaction comparison methodology. The Panel found that the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement "should only be applied to transactions that constitute the 'pattern of export prices which differ significantly among different purchasers, regions or time periods'."[4] Consequently, the Panel found that the U.S. Department of Commerce ("USDOC") acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement by applying the alternative, average-to-transaction comparison methodology to all export transactions in the washers anti-dumping investigation.[5] The Panel also found that the USDOC's differential pricing analysis is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement, "as such," because it applies the alternative, average-to-transaction comparison methodology to all export transactions under certain circumstances.[6] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations.[7] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

3. The United States seeks review of the Panel's findings relating to the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.[8] The Panel found that "the USDOC's use of zeroing when applying the [average-to-transaction] comparison methodology is 'as such' inconsistent with the second sentence of Article 2.4.2," and that "the USDOC acted inconsistently with the second sentence of Article 2.4.2 by using zeroing when applying the [average-to-transaction] comparison methodology in the *Washers* anti-dumping investigation."[9] Consequently, the Panel also found that "the use of zeroing in the context of the [average-to-transaction] comparison methodology is 'as such' inconsistent with Article 2.4" of the

* This Notice, dated 19 April 2016, was circulated to Members as document WT/DS464/7.

[1] See, e.g., Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191, 8.1.a.i, 8.1.a.vi, 8.1.a.ix, and 8.1.a.xii-xvi. As with other findings reflected throughout the Panel Report, this list of the paragraphs in the Panel Report reflecting this legal error is indicative.

[2] See, e.g., Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191.

[3] Panel Report, para. 7.11.

[4] See, e.g., Panel Report, para. 7.29.

[5] See, e.g., Panel Report, paras. 7.29, 8.1.a.i.

[6] See, e.g., Panel Report, paras. 7.119, 8.1.a.vi.

[7] See, e.g., Panel Report, paras. 7.21-7.29.

[8] See Panel Report, paras. 7.172-7.209.

[9] See, e.g., Panel Report, paras. 7.192, 8.1.a.xii, 8.1.a.xiv.

AD Agreement, "the USDOC acted inconsistently with Article 2.4 by using zeroing in the *Washers* anti-dumping investigation,"[10] and "the use of zeroing by the USDOC when applying the [average-to-transaction] 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."[11] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations, including an erroneous interpretation and application of the phrase "individual export transactions" in the second sentence of Article 2.4.2 of the AD Agreement.[12] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

4. The United States seeks review of the Panel's finding that the USDOC's differential pricing analysis "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'."[13] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations, including an erroneous interpretation of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.[14] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

[10] See, e.g., Panel Report, paras. 7.206, 8.1.a.xiii, 8.1.a.xv.
[11] See, e.g., Panel Report, paras. 7.208, 8.1.a.xvi.
[12] See, e.g., Panel Report, paras. 7.187-7.193, 7.206-7.208.
[13] See, e.g., Panel Report, paras. 7.143, 7.147, 8.1.a.ix.
[14] See, e.g., Panel Report, paras. 7.138-7.147.

ANNEX A-2

KOREA'S NOTICE OF OTHER APPEAL*

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Korea hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *United States — Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464/R) ("Panel Report").

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures, Korea files this Notice of Appeal together with its Other Appellant Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Korea's ability to rely on other paragraphs of the Panel Report in its appeal.

I REVIEW OF THE PANEL'S FINDINGS UNDER THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994.

4. Korea seeks review by the Appellate Body of the Panel's interpretation of Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement as they relate to the proper way to combined the two subsets of intermediate results created by the application of the exceptional W-T comparison method in the second sentence of Article 2.4.2.[1] In particular, the Panel erred in finding that:

- The intent of the second sentence of Article 2.4.2 somehow creates an exception to the fundamental principles governing the existence of "dumping" and a "margin of dumping".[2]
- Intermediate comparison results could somehow constitute "dumping" without including the prices of all export transactions in the overall assessment.[3]
- The authority can properly find a "margin of dumping" based on a numerator consisting only some export transactions from the subset using the W-T comparison method, as long as the denominator includes all export transactions.[4]
- The need to "unmask" so-called "targeted dumping" somehow justifies departure from the fundamental principles governing the existence of "dumping" and a "margin of dumping".[5]
- Without these exceptions to the fundamental principles there would be mathematical equivalence in all cases, and that equivalence could not be eliminated by changing the assumptions behind the analysis being done.[6]
- Such disregarding of offsets does not inflate the margin of dumping contrary to Article 2.4.[7]

5. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.167, 7.169, 8.1(a)(x) and 8.1(a)(xi), that the authority may disregard offsets from the subset based on the normal comparison methods when combining those results with the subset based on the exceptional W-T comparison method. As part of this review, Korea also requests the Appellate Body to review paragraphs 7.26, 7.27, 7.162, 7.166, and any other

* This Notice, dated 25 April 2016, was circulated to Members as document WT/DS464/8.

[1] Panel Report, paras. 7.154-7.167, 7.169.
[2] Panel Report, paras. 7.155, 7.156, 7.157, 7.160.
[3] Panel Report, paras. 7.154, 7.156, 7.157, 7.160.
[4] Panel Report, paras. 7.157, 7.160.
[5] Panel Report, paras. 7.26, 7.27, 7.154, 7.162.
[6] Panel Report, paras. 7.164, 7.165, 7.166.
[7] Panel Report, para. 7.169.

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

6. Korea seeks review by the Appellate Body of the Panel's interpretation of the pattern clause of the second sentence of Article 2.4.2 as not requiring the authorities to consider qualitative factors when finding a "pattern" of export prices that "differ significantly.[8] In particular, the Panel erred in finding that:

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

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

7. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.52, 7.119(a), 8.1(a)(ii) and 8.1(a)(v), that the authorities need not consider qualitative factors as part of making a proper finding of export prices that "differ significantly" and constitute a "pattern". As part of this review, Korea also requests the Appellate Body to review paragraphs 7.72, 7.73, 7.76, and any other discussions that suggest "targeted dumping" can exist among the intermediate comparisons the authority may be conducting, before the authority has properly considered and taken into account all export transactions for the product as a whole. Korea further requests that the Appellate Body complete the analysis and find that the authorities must consider both quantitative and qualitative factors when finding a "pattern" of export prices that "differ significantly".

8. Korea seeks review by the Appellate Body of the Panel's interpretation of the explanation clause of the second sentence of Article 2.4.2 as not requiring the authorities to explain why the normal T-T comparison method cannot take into account the pattern of export price differences.[12] In particular, the Panel erred in finding that:

- The second sentence of Article 2.4.2 does not require the authorities to consider both of the normal comparison methods − both the W-W comparison method and the T-T comparison method -- before turning to the exceptional W-T comparison method.[13]

- Somehow the burden of considering the T-T comparison justifies ignoring the express requirement that the authority consider this option before turning to the exceptional W-T comparison method.[14]

9. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.81, 7.119(b), 8.1(a)(iv) and 8.1(a)(viii), that the authorities need not explain why the normal T-T comparison method cannot take into account export price differences. Korea further requests that the Appellate Body complete the analysis and find that the authorities must in every case consider both the normal comparison method − both W-W and T-T − before resorting to the exceptional W-T comparison method.

[8] Panel Report, paras. 7.44- 7.52.
[9] Panel Report, paras. 7.33, 7.48, 7.49.
[10] Panel Report, paras. 7.46, 7.47.
[11] Panel Report, paras. 7.48, 7.49.
[12] Panel Report, paras. 7.78-7.81.
[13] Panel Report, paras. 7.79, 7.80.
[14] Panel Report, para. 7.80.

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

10. Korea seeks review by the Appellate Body of the Panel's findings under Article 2.2 of the SCM Agreement as they relate to the USDOC's determination that RSTA Article 26 tax credits are regionally specific.[15]

11. The Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, because it failed to review the USDOC's determination and to determine whether the USDOC's conclusion on regional specificity was reasoned and adequate and based on positive evidence.

12. The Panel misinterpreted and misapplied Article 2.2 in finding that Korea failed to establish that the USDOC's determination of regional specificity is inconsistent with that provision. The Panel erred, *inter alia*, in finding that:

- Article 2.2 of the SCM Agreement covers all measures that include "considerations regarding geographic location" or that "encourage particular enterprises to direct their resources to certain geographic locations".[16]
- "the Article 26 subsidy is contingent on an enterprise becoming 'located within' a designated geographical region".[17]
- "[w]e 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".[18]
- "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".[19]
- "the designation of *any* geographical region − no matter how small or how large − would suffice to trigger the application of Article 2.2".[20]
- The geographical region need not be affirmatively identified, but rather, "might also be accomplished through less direct means that nevertheless make the region known".[21]
- "Article 23 of the RSTA Enforcement Decree effectively designates the geographical region in which the relevant investments will be eligible for subsidization".[22]
- The USDOC's determination that RSTA Article 26 tax credits are regionally specific is not inconsistent with Article 2.2 despite not being based on positive evidence or a reasoned and adequate explanation.[23]

13. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.289 and 8.1(b)(iii), that 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. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article 2.2 of the SCM Agreement in finding that the RSTA Article 26 tax credit scheme is regionally specific.

[15] Panel Report, paras. 7.261, 7.266-7.274, 7.279-7.283, 7.286-7.289.
[16] Panel Report, para. 7.273.
[17] Panel Report, para. 7.273.
[18] Panel Report, para. 7.267.
[19] Panel Report, para. 7.268.
[20] Panel Report, para. 7.282. (original emphasis)
[21] Panel Report, para. 7.280.
[22] Panel Report, para. 7.280.
[23] Panel Report, paras. 7.289 and 8.1(b)(iii).

14. Korea seeks review by the Appellate Body of the Panel's findings under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement as they relate to the USDOC's determination that Samsung failed to meet its burden to provide evidence that "tied" the tax credits that it received under RSTA Article 10(1)(3) and RSTA Article 26 to its development, production, and sale of the large residential washers that were the subject of the USDOC's investigation.[24]

15. The Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, in finding that the "tax credit subsidies are not R&D subsidies".[25]

16. The Panel erred in the interpretation and application of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement in finding, *inter alia*, that:

- The tax credits that Korea bestowed under Article 10(1)(3) and Article 26 were not tied to any particular product.[26]
- As a result, the USDOC was justified in allocating the tax credit subsidies across all products and not just to digital appliances, including large residential washers.[27]
- The relevant subsidies were not R&D subsidies because they were awarded after the underlying R&D activities had been undertaken.[28]
- The benefits that Samsung received as tax credits constituted revenue foregone or not collected, which is equivalent to cash that Samsung could keep in its accounts and/or spend on any product.[29]
- Samsung's discretion regarding the use of the cash resulting from the tax credit subsidies justified the USDOC's treatment of those subsidies as "untied".[30]
- Since the benefits that arose from the tax credit subsidies could be used in any way, the USDOC was not required to find that those subsidies were tied to the production of the products for which the R&D activity was undertaken.[31]
- The fact that Samsung could identify the precise R&D activities that benefited the production of the products produced in its Digital Appliance business unit was irrelevant to the issue of whether Samsung was able to tie its tax credits to those products.[32]
- The USDOC's finding in the contemporaneous antidumping investigation of large residential washers that it could directly tie R&D activity performed by Samsung's Digital Appliance business unit to the products produced by that unit was irrelevant.[33]

17. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.306 and 8.1(b)(iv), that Korea failed to establish that the USDOC's failure to tie the RSTA Article 10(1)(3) and RSTA Article 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. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 194 when it failed to find that Samsung submitted positive evidence that tied the tax credits attributable to Samsung's Digital Appliance business unit to the products that were produced by that unit.

[24] Panel Report, paras. 7.300-7.306.
[25] Panel Report, para. 7.302.
[26] Panel Report, para. 7.300.
[27] Panel Report, para. 7.302.
[28] Panel Report, para. 7.302.
[29] Panel Report, para. 7.302.
[30] Panel Report, para. 7.302.
[31] Panel Report, para. 7.303.
[32] Panel Report, para. 7.303.
[33] Panel Report, para. 7.304.

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

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

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

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

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

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

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

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[34] Panel Report, paras. 7.316-7.319.
[35] Panel Report, para. 7.317.
[36] Panel Report, para. 7.317.
[37] Panel Report, para. 7.317.
[38] Panel Report, para. 7.318.
[39] Panel Report, para. 7.318.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States appeals certain of the Panel's legal findings and conclusions related to the interpretation and application of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and certain of the Panel's findings that U.S. measures challenged by Korea in this dispute are inconsistent with various provisions of the AD Agreement and the GATT 1994.

2. As demonstrated below, the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the AD Agreement by failing to interpret that provision in accordance with the customary rules of interpretation of public international law, as required by Articles 3.2 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

3. Specifically, section II.B demonstrates that the Panel erred in its interpretation of the relevant "pattern" in the second sentence of Article 2.4.2 of the AD Agreement. The Panel concluded that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. This conclusion does not follow from a proper application of the customary rules of interpretation of public international law.

4. Properly interpreted, the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which refers to "a pattern of export prices which differ significantly among different purchasers, regions or time periods," requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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. Any such "pattern" necessarily would be a pattern of export prices that would transcend multiple purchasers, regions, or time periods, and necessarily would include both lower and higher export prices that "differ significantly" from each other.

5. Section II.C demonstrates that the Panel's findings regarding the scope of application of the alternative, average-to-transaction comparison methodology are erroneous. The Panel erred by failing to undertake a proper analysis pursuant to the customary rules of interpretation, by engaging in circular logic, and by premising its findings on its own erroneous interpretation of the relevant "pattern" under the second sentence of Article 2.4.2 of the AD Agreement.

6. Section II.D demonstrates that the Panel erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with provisions of the AD Agreement and the GATT 1994. The Panel erred by failing to properly interpret the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law.

7. The Panel engaged in virtually no analysis whatsoever of the text of what it called the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement[2]. Instead, the

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 1,297 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 32,621 words (including footnotes).

[2] The "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement provides that: "A normal value established on a weighted average basis may be compared to prices of individual export transactions…." *See United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Report of the Panel, WT/DS464/R (March 11, 2016) ("Panel Report"), para. 7.9.

Panel based its findings concerning the operation of the alternative, average-to-transaction comparison methodology and zeroing on its flawed understanding of the relevant "pattern" and its own misreading of the Appellate Body's previous findings concerning zeroing.

8. A proper 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 conclusion follows from a proper application of the customary rules of interpretation of public international law. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes, and it can be confirmed by recourse to the negotiating history of Article 2.4.2 of the AD Agreement.

9. The Panel also erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Articles 2.4 and 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994. These findings are dependent on the Panel's erroneous findings under Article 2.4.2 of the AD Agreement, and should be reversed for the same reasons.

10. Section II.E demonstrates that the Panel erred in finding that a differential pricing analysis undertaken by the U.S. Department of Commerce ("USDOC") is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement. The Panel's finding was premised on its understanding of the relevant "pattern," but the Panel's understanding of the relevant "pattern" is erroneous and not consistent with a proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement.

11. Additionally, the USDOC's differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2, when that clause is properly interpreted in accordance with the customary rules of interpretation. The "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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. The USDOC has done this when it has applied a differential pricing analysis in antidumping proceedings.

12. A differential pricing analysis seeks to identify a "pattern," but does not require a specific "target." 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." Investigating authorities might take other approaches to identify a "pattern" that also are consistent with the terms of the "pattern clause."

13. In contrast to a "targeted dumping approach," a differential pricing analysis looks 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 of the AD Agreement, 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.

14. A differential pricing analysis does not aggregate random and unrelated price variations. A differential pricing analysis considers the pricing behavior of the exporter in the United States market as a whole. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement suggests that the significant export price differences among purchasers, 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 the exporter's pricing behavior exhibits "a pattern of export prices which differ significantly among different purchasers, regions or time periods."

ANNEX B-2

EXECUTIVE SUMMARY OF KOREA'S OTHER APPELLANT'S SUBMISSION[1]

A. The Panel Erred by Allowing Authorities to Disregard Certain Results When Combining the Two Subsets Created Pursuant to the Second Sentence of Article 2.4.2

1. The Appellate Body has provided repeated guidance for more than a decade about the meaning of "dumping" and "margin of dumping". The final overall combination based on all export transactions must show a net result that meets the definition of "dumping" to establish a single "margin of dumping". Individual low prices can never be "dumped" because the concept "dumping" simply does not exist at the level of individual export prices or even partial combinations of those prices. Any calculations from some of the export prices, even if they lower, are just intermediate calculations. These principles do not depend on the comparison method being used.

2. As its most fundamental error, the Panel started its interpretative analysis with "the intent of the comparison methodology established in the second sentence of Article 2.4.2". Although the "object and purpose" represents one element of a proper analysis, the Panel should have first fully considered the text and context of that provision. The Panel did not do so, and therefore reached the wrong conclusions.

3. By its express terms, the second sentence allows investigating authorities to use a particular type of comparison method. Specifically, when certain conditions have been met, the authorities may compare "a normal value established on a weighted-average basis" to "prices of individual export transactions" when establishing the existence of the "margin of dumping" for the investigated exporter for the product under consideration. Beyond allowing an exception to the normal comparison methods, however, neither the second sentence of Article 2.4.2 nor Article 2.4.2 more generally creates any exception to the basic concepts of "dumping" and "margin of dumping".

4. Yet notwithstanding the narrow focus of the text itself, the Panel incorrectly found that the second sentence created a new "method of calculating the margin of dumping". This purported "new" method to determine the "margin of dumping" has no textual or contextual basis. Textually, the second sentence in no way suggests a special understanding of these key concepts. The context provided by Article 2.4.2 overall confirms that the second sentence does not create any new understanding of "dumping". These contextual arguments have been reviewed exhaustively by the Appellate Body in numerous prior disputes, making the Panel's failure to discuss the text or context in any detail quite surprising. Finally, the object and purpose of the second sentence is to address situations where certain purchasers, regions, or time periods are singled out for different (presumably lower) export prices. Such pricing strategies can only be identified and properly understood with reference to the overall pricing behaviour of the exporter, and cannot occur at the transaction-specific level or for any subset of exports.

5. The Panel repeatedly confused the distinction between intermediate comparisons for some export prices and a final conclusion of "dumping" based on all export prices. This conceptual error permeated the Panel's analysis, and it led the Panel repeatedly to consider something to be "dumping" or "evidence of dumping" when that intermediate stage in the analysis could not possibly yield a proper conclusion of "dumping".

6. Moreover, it is not enough to include all the export transactions in the denominator. There is no "net amount of dumping" within the subset using the W-T comparison method, because "dumping" cannot be found until all export transactions have been taken into account. Export prices within the subset using the W-T comparison method cannot be "dumping". Thus, a numerator based only on the export transactions within the subset applying the W-T comparison method does not establish a proper amount of "dumping".

[1] Pursuant to the Appellate Body guidelines for executive summaries, Korea confirms that this executive summary contains a total of 4,616 words (including footnotes) and that the overall other appellant submission (other than the executive summary) contains a total of 49,894 words (including footnotes).

7. The Panel also seems to have believed that prohibiting zeroing within each of the two subsets meant that all comparisons would be considered equally. But prohibiting zeroing within each subset ensures only that the net amounts emerging from each subset reflect all of the transactions within each subset. Those amounts still have to be combined. By setting any negative amount from the subset using the normal comparison methods equal to zero (and denying any offsets for this negative amount), the Panel's approach improperly acts as if the export prices in that subset were lower than they really were. Each export price should be given the same full effect in either subset, regardless of the comparison method applied to that subset.

8. The Panel also showed a fundamental misconception about the relationship between any "dumping" and the associated "margin of dumping". The numerator and denominator must refer to the same total universe of export sales. The Panel's approach ignores the interrelationship of the amount of "dumping" and the "margin of dumping". This connection is expressed most directly in Article VI:2 of the GATT and the Anti-Dumping Agreement, where the "amount" of the duty imposed to offset "dumping" is limited to no more than the "full margin of dumping" (Article 9.1) and "shall not exceed the margin of dumping" (Article 9.3). The same connection can also be seen in Article 7.2 regarding provisional measures. Article VI:1 of the GATT and Article 3 also require a connection between "dumping" or the "dumped imports" and the material injury to the domestic industry. The Panel's approach also disregards prior Appellate Body decisions that require both the numerator and denominator to reflect all comparison results.

9. A major part of the Panel's rationale was its belief that the purpose of the second sentence was to allow authorities to "unmask" so-called "targeted dumping". But the Panel misunderstood the purpose of the second sentence, and then used this misunderstanding to disregard the consistent Appellate Body jurisprudence about the concepts "dumping" and "margin of dumping".

10. One must look beyond short-hand phrases and look at the actual provision and its purpose more closely. The purpose that most closely links the text and context of the second sentence is simply to allow the authority to undertake the more careful examination of individual export prices that the W-T comparison method allows. The purpose to "unmask" individual export prices, however, is very different from the purpose to "unmask" so-called "targeted dumping". The purpose to "unmask" certain export prices is fully consistent with the Appellate Body's jurisprudence on "dumping" and "margin of dumping". Certain export prices are "unmasked" as an intermediate stage in the analysis. At this point, there is no conclusion about "dumping" nor can there be any such conclusion. A conclusion of "dumping" can never be reached based solely on a subset of prices. The purpose of the second sentence has been achieved once this more detailed examination has taken place at this intermediate stage.

11. The Panel thought this purpose to "unmask targeted dumping" was consistent with the negotiating history. But the Panel's citation to a single document from the negotiating history that referenced possible "masking" of "selective dumping", is a very limited piece of evidence. Moreover, the Appellate Body has already considered this legislative history, and still confirmed that there cannot be "selective dumping" based on a subset of export sales.

12. Although the phrase "targeted dumping" has been used occasionally, the phrase "unmask targeted dumping" has appeared much less frequently. This phrase has appeared in only two Appellate Body decisions, and the context in which the Appellate Body used this phrase was to note the need to limit the exceptional W-T comparison method to those transactions that met the conditions for the exception. The Appellate Body used this phrase to clarify the scope of the second sentence, not to create a new concept of "dumping". Moreover, the Appellate Body decisions on zeroing make quite clear that by "unmask" the Appellate Body certainly did not mean that zeroing (the denial of offsets) would be allowed to "unmask" some export transactions as having been "dumped" without considering all export transactions.

13. The Panel mistakenly found "mathematic equivalence". Korea notes that this argument of "mathematical equivalence" has been rejected by the Appellate Body four times, finding that even if "under certain circumstances" or "under a specific set of assumptions" the results are equivalent, such a situation does not render a provision inutile. In the face of the Appellate Body's repeated rejection of this argument, the Panel found mathematical equivalence anyway without any support for this conclusion. The Panel's bald assertion of mathematical equivalence should be rejected for several reasons. First, the Panel illogically dismissed Korea's arguments that changing the basis of normal value or changing the method of adjustments would avoid mathematical equivalence.

Second, the Panel dismissed Korea's arguments about the "assumptions" being made by the authority, including assumptions about normal value, even though they are essentially the same arguments that previously led the Appellate Body to reject mathematical equivalence in the past. Third, the Panel found mathematical equivalence even though Korea had submitted extensive evidence that the Panel did not discuss at all. Finally, there is nothing different about the situation of combining the results from two subsets. The prior arguments before the Appellate Body also addressed combining two separate results, and rejected mathematical equivalence in that context.

14. Beyond its findings under the second sentence of Article 2.4.2, the Panel also ruled against Korea's separate claim that systemic disregarding was inconsistent with Article 2.4 of the Anti-Dumping Agreement. The Panel's reasoning, however, simply repeats the legal errors identified above with regard to the Panel's interpretation of the second sentence of Article 2.4.2 that "dumping" can exist within a subset of the export sales. Therefore for the reasons set forth in more detail above, we ask the Appellate Body also to reverse these Panel findings regarding Article 2.4. Broad findings under Article 2.4 – like those made in US – Zeroing (Japan) – confirm the fundamental principles that make any denial of offsets WTO inconsistent because doing so means finding "dumping" without considering all of the export transactions fairly and equally for the product as a whole.

B. The Panel Erred by Finding that the Pattern Clause Did Not Require Authorities to Consider Qualitative Factors

15. The Panel's did not interpret the terms "significantly" and "pattern" in the context of the Anti-Dumping Agreement as a whole. This error has two aspects. First, the Panel failed to consider these terms in the context of how these terms are used elsewhere. The Panel considered the ordinary meaning of these terms, but then never considered that the Anti-Dumping Agreement as a whole uses the term "significant" precisely when it wishes to convey a broader meaning than just "large". Whether the text of the second sentence of Article 2.4.2 uses the term "reasons" misses the point. Article 2.4.2 does not merely require that export prices differ; it requires that they differ "significantly". The Panel finding that the term "significantly" can be analyzed in purely quantitative terms directly contradicts the statement of the Appellate Body in US – Large Civil Aircraft (2nd complaint) that the significance of lost sales has both "quantitative and qualitative dimensions."

16. Second, the Panel also did not read these two terms in the context of the explanation clause. The Panel seemed to think that because it found a textual basis in the explanation clause to consider qualitative factors, it could reject any such textual basis in the pattern clause. But this approach reads these two parts of the second sentence in isolation, instead of reading them together as context for each other. Such qualitative considerations – such as falling costs – should be considered both as part of determining whether price differences are "significant" and as part of determining whether W-W comparisons can "take into account appropriately" any difference. The Panel's discussion of the explanation clause seems to recognize this interrelationship, but confused the distinction between export prices differences that are "significant" as well as constituting a "pattern" and so-called "targeted dumping". The Panel improperly grounded its reading of the explanation clause in its flawed understanding of the object and purpose of "unmasking targeted dumping".

C. The Panel Erred by Finding that Authorities Need Not Address the T-T Comparison Method When Explaining the Need to Depart From the Normal Comparison Methods

17. The Panel ignored the express obligation to address both the normal comparison methods before turning to the exceptional comparison method. The absence of any explanation ever as to why the T-T comparison methodology cannot take into account appropriately the pattern of significantly different prices is contrary to the requirement in the second sentence of Article 2.4.2 that such an explanation be given.

18. The Panel misinterpreted the terms "a" and "or" in the context of the second sentence. The use of the term "a" reflects the fact that in the end the authority will be using "a" single comparison method. Similarly, the use of the term "or" reflects this choice between two alternative normal comparison methods. The use of the singular article and disjunctive conjunction simply recognizes that there are two alternative normal comparison methods that must be considered.

The text explicitly provides that if the authority seeks to depart from the use of one of those two normal methods, then the authority must explain why it cannot use either of the normal methods.

19. The Panel incorrectly seemed to think it would be burdensome and serve no purpose to require the authority to address the T-T comparison method if the authority had already selected the W-W comparison method. But the text does not specify the degree of explanation required or create any burden. Nor does this additional explanation fail to serve any purpose. W-W and T-T comparisons may be symmetrical, but they are not the same. Explaining why one works does not automatically explain why the other will not work. The purpose of the second sentence is to allow a more detailed examination of individual export prices. This purpose relates directly to the choice among the different comparison methods. The more detailed examination ensure a more thorough consideration of the three possible comparisons methods under the second sentence, and thus helps ensure that the choice is in fact "appropriate".

D. The Panel Erred in Finding that RSTA Article 26 Subsidies are a Regionally Specific Subsidy

20. RSTA Article 26 tax credits were available to all Korean corporations, wherever located that made investments anywhere outside the "overcrowding control region" of the Seoul Metropolitan Area, which comprised just 2% of Korea's land mass.

21. First, the Panel erred because it never reviewed the USDOC's determination on regional specificity in order to apply its interpretation of Article 2.2, or determine whether the USDOC's conclusion was reasoned and adequate and based on positive evidence. Thus, the Panel failed to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter.

22. Second, the Panel based its finding on an incorrect interpretation and application of Article 2.2. RSTA Article 26 subsidies do not encourage localization of the enterprises in a designated geographical region. Instead, they discourage enterprises from making investments in a small area that constitutes 2% of Korea's territory. Because the area in which investments are discouraged is so small, and the area in which investments may be made is so large (98% of the territorial jurisdiction of the granting authority) the subsidies cannot be said to be "limited" in any meaningful way.

23. Even assuming that the stipulation as to the investments made by recipient firms constituted a limitation on the location of the enterprises, the area in which investments must be made − 98% of Korea's land mass − does not constitute a "designated geographical region". The area is too unbounded; it is neither sufficiently demarcated nor cohesive enough, and there is almost total overlap with the jurisdiction of the granting authority. In such circumstances, the area in which investments may be made is not "a designated geographical region" within the meaning of Article 2.2.

24. Concluding that such subsidies are narrowly targeted, and therefore specific, is putting form over substance, and ignoring the intent of Article 2 as a whole. The reasons provided by the Panel to reject Korea's arguments are unpersuasive and did not provide a valid basis to dismiss Korea's claim.

25. Overcrowding and urban sprawl are not only a serious problem for Korea, they constitute serious challenges for many developed and developing countries. Subsidies provide an efficient and effective policy tool to mitigate this problem, while introducing minimal trade distortions. Article 2.2 does not address the kind of subsidies provided under RSTA Article 26 and thus preserves Members' ability to use such subsidies to mitigate overcrowding and urban sprawl. The Panel's overly expansive interpretation improperly constrains Members' ability to take corrective measures.

26. Korea therefore requests that the Appellate Body reverse the Panel's finding. Korea additionally requests that the Appellate Body complete the analysis and find that the USDOC's determination that RSTA Article 26 subsidies are specific is inconsistent with Article 2.2.

E. The Panel Erred in Finding that Samsung Failed to Tie the Subsidies that it Received Under RSTA Article 10(1)(3) and RSTA Article 26 that Were Attributable to Investments Made by its Digital Appliance Business Unit to the Products Made by that Unit

27. Samsung, a large and highly diversified Korean company, utilized two provisions of Korean law that provided tax credit subsidies for making specified investments in R&D activities and certain types of business assets. Samsung organized its corporate activities into business units. One such unit was the Digital Appliance business unit, which produced large residential washers, refrigerators, and other types of consumer products. This unit maintained detailed records of the investments that it made that qualified for the two tax credit programs.

28. During the course of the USDOC's antidumping investigation of large residential washers, Samsung provided to the USDOC a listing of the eligible expenditures of its Digital Appliance business unit and the tax credits that the eligible expenditures had generated under RSTA Article 10(1)(3) and Article 26. Samsung contended that the ad valorem countervailing duty margin that the USDOC should calculate for each of the two tax credit subsidy provisions should equal the tax credits attributable to Digital Appliance business unit's eligible expenditures (i.e., the numerators) divided by the Digital Appliance business unit's sales value (i.e., the denominators).

29. The USDOC rejected this calculation on the ground that Samsung had failed to "tie" the tax credits of the Digital Appliance business unit to that unit's sales. The purported reason for this alleged failure was that the amounts of the two tax credit subsidies provided to the Digital Appliance business unit were not known to the subsidy giver, i.e., to the Korean tax authorities, and so acknowledged either when the tax credits were conferred or before that time. The subsidies were conferred on the date that Samsung filed its tax return for fiscal year 2010, which was March 31, 2011. According to the USDOC, the tax return itself did not separately identify the tax credits that were attributable to the eligible expenditures made by the Digital Appliance business unit. Rather, Samsung reported a single lump sum for all of its business units for each of the two credits. However, the USDOC refused to consider evidence that Samsung presented in its questionnaire response and at the on-site verification of that response that contained the tying evidence.

30. The Panel found that Samsung failed to make a sufficient showing that it could tie the two tax credit subsidies received by the Digital Appliance business unit to expenditures made by that unit, but it relied upon a rationale that the USDOC itself did not rely upon. As a result of Samsung's alleged failure to make the required showing of tying, the Panel upheld the USDOC's calculation of the ad valorem subsidy margin attributable to Article 10(1)(3) by dividing the total eligible R&D expenses incurred by all of Samsung's business units by the total sales of those business units. The result was a dramatic inflation of the Article 10(1)(3) ad valorem subsidy margin from 0.22% to 0.72%. The USDOC similarly inflated the margin for Article 26 tax credits from 0.0046% to 1.05%.

31. WTO jurisprudence is clear that the focus in every tying inquiry must be on whether the particular subsidy can be directly linked to particular product or product line. However, the Panel did not conduct this type of inquiry. Instead, it chose to rely entirely on the fact that the cash proceeds of the tax credits could be used in any manner that Samsung chose. However, the Panel's reliance had nothing to do with determining whether there was a direct link, i.e., a tying, between the subsidy at issue and particular products. The use of the proceeds of a subsidy is irrelevant to the tying inquiry, despite the Panel's contrary finding. Moreover, if the Panel's test is correct, then virtually every subsidy is countervailable regardless of whether it can be tied to a particular product or product category.

32. The fatal flaw in the Panel's affirmance of the USDOC's ad valorem margin calculations is that the Panel failed to examine the specific issue of whether Samsung had submitted positive evidence that allowed the USDOC to calculate, i.e., to tie, the tax credit benefit that Samsung received on its development, production, and sale of the digital appliance products that it produced to the R&D and other investment activities that generated those tax credits. Instead, the Panel denied the tying claim based on its finding that the cash proceeds of the tax credits "may be spent by Samsung on any product".

33. Since the Panel failed to apply the correct tying test, it thereby failed to apply either Article VI:3 of the GATT 1994 or Article 19.4 of the SCM Agreement. Had the Panel applied the required tying analysis, it would have determined that the Article 10(1)(3) and Article 26 tax credits that Samsung received on its development, production, and sale of large residential washers were at the de minimis level, i.e. they provided a total benefit of less than 1% ad valorem. Consequently, the USDOC would not have issued a countervailing duty order to Samsung based on undisputed record facts.

34. The USDOC itself has stated that the manner in which the proceeds from any type of subsidy are spent is irrelevant to the issue of whether a subsidy can be tied to a particular product or group of products. In the preamble to the final countervailing duty regulations that the USDOC published on November 25, 1998, the USDOC provided an extended discussion of the concept of tying, and it addressed various comments that interested parties submitted on the subject of how and when tying to a particular product should be found. Some commenters "argued that because money is fungible, the Department should not allow subsidies to be tied to particular products or to particular export markets." The USDOC rejected this argument. Therefore, the Panel erred in finding that the unrestricted use of proceeds from a subsidy program constituted the deciding factor in determining whether those proceeds could be tied to a particular product or product line.

35. Equally important, the Panel was not free to reject the USDOC's finding that the use of proceeds from a subsidy was irrelevant to a tying analysis. By doing so, the Panel improperly substituted its own rationale as its legal basis for finding that tying had not been shown. The Appellate Body has stated that "panels should not substitute their own conclusions for those of the competent authorities." Moreover, "the panel should seek to review the determination while giving due regard to the approach taken by the investigating authority, or it risks constructing a case different from the one put forward by that authority."

36. For these reasons, the Appellate Body should reverse the Panel's findings and instead find that Samsung made an adequate showing of tying of tax credits earned by its Digital Appliance business unit to the eligible expenditures made by that unit.

F. The Panel Erred in Finding that the Subsidies that Samsung Received Under RSTA Article 10(1)(3) Benefited Only Samsung's Domestic Production and Not its Worldwide Production

37. The USDOC collects countervailing duties by first calculating the ad valorem margin of subsidy provided by each of the programs that it determines to countervail, expressed as a percentage. The total ad valorem margin for all countervailable programs is then applied to the entered value of a particular importation to determine the amount of countervailing duties that are owed. If the entered value of a particular shipment of large residential washers is $100,000 and the applicable total ad valorem duty is 1.2%, then the importer must pay a countervailing duty of 1.2% x $100,000, or $1,200, to the United States Treasury.

38. The calculation of the ad valorem margin is a critical determinant of the amount of countervailing duties that an importer may owe. That margin consists of a numerator, which equals the total amount of the countervailed subsidies, and a denominator, which equals the total value of the sales that benefited from the countervailed subsidies. As a matter of simple mathematics, an increase in the denominator will reduce the ad valorem margin percentage, and a reduction in the denominator will increase that margin.

39. The dispute between Korea and the United States focuses on the calculation of the denominator that the USDOC used to calculate the ad valorem margin attributable to the tax credit benefits that Samsung received under RSTA Article 10(1)(3). Samsung contended that the eligible R&D investments that it undertook and, the tax credits that it obtained from those investments benefited its worldwide production. However, the USDOC found that the tax credits benefited only Samsung's production in its home market of Korea. The ad valorem margin attributable to Article 10(1)(3) R&D tax credits that the USDOC calculated using Samsung's home market sales value was 0.72%. Had the USDOC used Samsung's worldwide sales value, it would have calculated an ad valorem margin of only 0.49%.

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

41. Here again, the Panel employed an erroneous analysis because it failed to determine the appropriate denominator that was to be linked with the numerator. By focusing on the use of the "tax credit cash", the Panel ignored the underlying requirement that it determine which products Samsung had produced and sold that had benefited from the R&D activities that Samsung had performed, which resulted in the tax credits that were then provided.

42. Samsung also provided substantial evidence to the USDOC, which the Panel ignored, that demonstrated unequivocally that the R&D activities that it performed benefited its worldwide production and that the USDOC had found to this effect. If the R&D activities benefited worldwide production, then the tax credits attributable to those activities similarly benefited worldwide production. This evidence rebutted any presumption that the USDOC, or the Panel, might otherwise have been entitled to employ to the effect that subsidy programs benefit only production in the country where the benefits are provided.

ANNEX B-3

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. Korea appeals a number of Panel findings related to the U.S. anti-dumping and countervailing duty measures that Korea has challenged in this dispute. As demonstrated in this submission, the Panel did not err in its interpretation and application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Additionally, as shown below, Korea's various claims that the Panel acted inconsistently with Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") lack merit.

2. The U.S. appellee submission is organized as follows, and includes detailed discussion of, *inter alia*, the following arguments.

3. Section II.A responds to Korea's appeal of the Panel's findings related to the approach of the U.S. Department of Commerce ("USDOC") to the application of a "mixed" comparison methodology. In Korea's view, the Panel should have found the USDOC's approach inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement for the same reasons that it found zeroing inconsistent with those provisions of the AD Agreement. The Panel was correct to reject Korea's claims. Indeed, if, as the Panel found, the alternative comparison methodology can only be applied to a subset of sales, then the Panel's finding with respect to a "mixed" comparison methodology is the only way to interpret the second sentence of Article 2.4.2 so as to give meaning to this key provision of the AD Agreement.

4. Korea fails to offer any legal argument against the USDOC's approach that would accord with the customary rules of interpretation as to why mandatory re-masking is required under the second sentence of Article 2.4.2 of the AD Agreement. Instead, Korea argues that the USDOC's approach is the "functional equivalent of zeroing," and Korea asserts that previous Appellate Body findings are dispositive of its claims. Korea's arguments lack any merit.

5. No prior WTO dispute has involved a Member's application of the comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. This dispute presents an issue of first impression for the Appellate Body.

6. To the extent that the USDOC's approach to the application of a "mixed" comparison methodology can be likened to zeroing, the U.S. appellant submission demonstrates 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. Additionally, the U.S. appellant submission shows that the application of the alternative, average-to-transaction comparison methodology to all sales (with zeroing) is not inconsistent with Article 2.4.2 of the AD Agreement.

7. There is no legal basis for finding that the USDOC's approach to the application of a "mixed" comparison methodology is impermissible. Where an investigating authority applies the average-to-transaction comparison methodology to fewer than all export prices, the AD Agreement does not obligate the investigating authority to offset or re-mask the evidence of dumping that has been unmasked through the use of average-to-transaction comparisons. Korea's arguments in support of its position lack merit.

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 4,130 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 48,435 words (including footnotes).

8. The Panel did not find that "individual low prices" can be "dumped" or that "dumping" can "exist at the level of individual export prices." The Panel found that the second sentence of Article 2.4.2 of the AD Agreement provides a means for investigating authorities "to ensure that any evidence of dumping with regard to [pattern transactions] is not masked by non-dumping in respect of transactions falling outside of the pattern." When the price of an export transaction is below normal value, that may, indeed, be "evidence of dumping." When the price of an export transaction is above normal value, that may be evidence suggesting that no dumping has occurred. However, such a price also could be masking evidence of dumping under certain circumstances, such as when the "stringent conditions" set forth in the second sentence of Article 2.4.2 of the AD Agreement have been established.

9. Contrary to Korea's argument, the second sentence of Article 2.4.2 establishes "special rules." The Panel was right to interpret the second sentence of Article 2.4.2 as being an exception to the first sentence of Article 2.4.2, and as setting forth a special methodology for establishing margins of dumping that may be used when certain conditions are met.

10. The United States does not disagree that all of an exporter's export transactions must be "taken into account" in the determination of dumping. The USDOC's approach does, in fact, take account of all export transactions. What Korea really means, however, is that evidence of "targeted dumping" must be re-masked by aggregating all results for all transactions in the numerator of the calculation of the margin of dumping. Korea provides no legal or logical basis for this conclusion.

11. Korea's arguments raise the question of what it means for an export transaction to be "consider[ed]" or "taken into account." To the extent that certain export transactions may be masking "evidence of dumping," it is appropriate for those export transactions to be "taken into account" in a way that prevents such masking.

12. The weakness of Korea's appeal is evidenced by Korea's astonishing attempt to contest the clear and obvious role of the second sentence of Article 2.4.2 within the context of the AD Agreement as a whole. Korea now argues that the "purpose" of the second sentence "is simply to allow the authority to undertake the more careful examination of individual export prices that the [average-to-transaction] method makes possible." Korea's argument makes no sense. If Korea were correct, there would never be any reason for an investigating authority to resort to the alternative, average-to-transaction comparison methodology described in the second sentence of Article 2.4.2. The transaction-to-transaction comparison methodology, set forth in the first sentence of Article 2.4.2, already provides an investigating authority with the possibility of undertaking such a "granular examination of individual export prices," and also individual normal value sales transactions.

13. The only logical conclusion, as the Appellate Body has itself observed, and as the Panel, both of the parties (at one time or another), and all but one of the third parties in this dispute agreed, is that the second sentence of Article 2.4.2 of the AD Agreement is intended "to enable investigating authorities to 'unmask' so-called 'targeted dumping'."

14. Korea's arguments related to mathematical equivalence lack merit. The U.S. appellant submission discusses the Appellate Body reports in prior disputes to which Korea refers and demonstrates that the Appellate Body's previous consideration of mathematical equivalence neither supports rejection of the mathematical equivalence argument in this dispute, nor compels it. Korea also contends that the Panel "provided no support" for its mathematical equivalence finding. However, it is evident from the panel report that, after considering the positions of the parties, the Panel agreed with the United States and did not agree with Korea.

15. The U.S. appellant submission conclusively demonstrates mathematical equivalence. It is evident from Korea's arguments regarding different weighted average normal values and different adjustments that breaking mathematical equivalence is Korea's goal. Korea is not seeking an interpretation that gives meaning to the second sentence of Article 2.4.2 of the AD Agreement. On the contrary, Korea seeks to read the second sentence of Article 2.4.2 out of the AD Agreement entirely. Such an interpretation is inconsistent with the customary rules of interpretation of public international law, in particular the principle of effectiveness.

16. Korea also argues that the Panel erred in finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent, "as such," with Article 2.4 of the AD Agreement. Korea's arguments concerning Article 2.4 are dependent on its arguments concerning Article 2.4.2, and lack merit for the same reasons. Additionally, Korea requests that the Appellate Body complete the legal analysis, but the reasons Korea gives for doing so are not availing, and the Appellate Body should reject Korea's request.

17. Section II.B responds to Korea's appeal of certain Panel findings related to the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. The "pattern clause" sets forth the first of the two conditions for using the alternative, average-to-transaction comparison methodology, and provides that an investigating authority may utilize the alternative comparison methodology "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods."

18. Korea argues that the Panel mischaracterized its claim, as if Korea's claim were solely that an investigating authority must state the "reasons" why export prices differ. Korea alleges that the Panel "recast[] Korea's argument into something different from − and substantially narrower than − what Korea actually argued." Korea contends that, by recasting its claim too narrowly, the Panel failed to address the claim that Korea actually made, which, Korea asserts, related to the obligation to undertake a qualitative analysis when determining whether there exists a "pattern" of export prices which differ "significantly." The Panel did not mischaracterize Korea's claims.

19. Korea appears to misunderstand the difference between claims and arguments. Consistent with the DSU and prior Appellate Body guidance, Korea's "claims" necessarily are those set forth in Korea's request for the establishment of a panel. The two relevant claims set forth in Korea's panel request relate to the "reasons" or "explanations" for why export prices differ − or the factors to which the pattern of export prices is "attributable" − and the USDOC's decision not to consider the reasons why export prices differ as part of its analysis. Neither claim refers more broadly to an obligation to examine so-called "qualitative aspects." The Panel examined Korea's panel request and correctly understood the nature and scope of Korea's claims. On appeal, Korea attempts to expand its claims beyond what is set forth in its panel request. That is not possible, and Korea's attempt should be rejected.

20. Korea also argues that the Panel incorrectly interpreted the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, and erroneously found that it does not require an investigating authority to examine the reasons why export prices differ. Korea's arguments lack merit.

21. The Panel agreed that the term "significantly" has a qualitative dimension as well as a quantitative dimension. However, the Panel did not agree with Korea that it follows from this that an investigating authority is obligated to assess the "reasons" why export prices differ when it is determining whether there exists a pattern of export prices which differ significantly.

22. Korea is incorrect when it suggests that the Panel "dismissed" the *US − Upland Cotton* panel report and the *US − Large Civil Aircraft (Second Complaint)* Appellate Body report. On the contrary, the Panel appropriately relied on those reports as support for its own interpretative conclusions. The Panel correctly noted, however, that those reports do not support Korea's argument that the underlying reasons are relevant to an examination of significance.

23. Korea's understanding of the term "significant" would read the quantitative dimension out of that term, necessitating an exclusive focus on Korea's understanding of the qualitative dimension. In Korea's view, any numerical difference in export prices can be explained away. Korea's proposed interpretation is inconsistent with the ordinary meaning of the term "significantly" in its context, and also with the Appellate Body's guidance regarding the meaning of the term "significant."

24. Section II.C responds to Korea's appeal of certain Panel findings related to the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement. The "explanation clause" sets forth the second of two conditions for using the alternative, average-to-transaction comparison methodology, and provides that an investigating authority may utilize the alternative comparison methodology "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."

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

26. Korea's proposed interpretation also does not accord with prior Appellate Body guidance concerning the relationship of the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."

27. Korea's proposed interpretation also is not logical. Logically, if an investigating authority is free to choose between the average-to-average comparison methodology and the transaction-to-transaction comparison methodology, and those 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 transaction-to-transaction 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 average-to-average comparison methodology.

28. Finally, Korea's concern about the purported "potential for serious abuse" lacks foundation, both in the evidentiary record before the Panel and in logic. Korea appears to suggest that an investigating authority might first opt to use the average-to-average comparison methodology, and then, when considering whether to use the alternative, average-to-transaction comparison methodology, explain only why the transaction-to-transaction comparison methodology could not take into account appropriately the pattern of export prices which differ significantly. Of course, this is not what the USDOC did in the washers anti-dumping investigation, nor has Korea pointed to any evidence that its concern has ever manifested itself in any USDOC determination.

29. Furthermore, in light of previous Appellate Body guidance, an investigating authority is obligated to reach conclusions that are "reasoned and adequate," and the investigating authority's reasoning must be "coherent and internally consistent." The hypothetical scenario Korea about which Korea speculates likely would not meet those requirements.

30. In section III, we address Korea's appeal of certain Panel findings with respect to the USDOC's countervailing duty determination.

31. Section III.A addresses Korea's claim that the Panel erred in rejecting its specificity claim with respect to RSTA Article 26. Contrary to Korea's assertions in this appeal, the Panel was faced with a straightforward application of Article 2.2 of the SCM Agreement. Article 2.2 provides, in relevant part, that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

32. The RSTA Article 26 subsidy program is expressly limited to investments in newly-acquired facilities located in a designated geographic region − i.e., the territory of Korea that falls outside the "Seoul overcrowding area." The Panel appropriately found no error in the USDOC's determination that this express limitation on access to a designated region rendered the subsidies regionally specific.

33. On appeal, Korea asserts a series of increasingly untenable legal and factual arguments.

34. Korea adduces a narrow, results-oriented reading of Article 2.2 of the SCM Agreement. According to Korea, the phrase "certain enterprises" in Article 2.2 means that regional specificity exists only where access to a subsidy is limited to the "legal personality" of enterprises falling within the region. On this theory, an enterprise can only have a single "location" − i.e., the "place" of its legal personality (despite the fact that an enterprise's legal personality is a fiction, and may not be affixed to a particular location).

35. The Panel correctly rejected this interpretative legerdemain. As the Panel observed, this line of reasoning is inconsistent with the text, context, and rationale of Article 2.2. Article 2.2 applies to situations in which access to subsidies is limited to a designated geographical region. The term "certain enterprises," which appears in Article 2.2, does not imply an additional requirement - i.e., that subsidies also must be limited with respect to the "location" of an individual enterprise's legal personality. Such a reading would be inconsistent with the definition of "certain enterprises" found in the chapeau of Article 2.1(a) of the SCM Agreement, and the ordinary meaning of the terms within that definition. Nor is Article 2.2 restricted to the location in which an enterprise happens to receive the "benefit" of a subsidy (which may or may not correspond to the location of that enterprise's "legal personality"). Korea's attempt to conflate concepts of "benefit" and specificity is improper.

36. And Korea's approach would create gaping loopholes where the text does not provide for them. Korea draws a sharp distinction between an "enterprise" and its "facilities," asserting that the latter are somehow excluded from the former and irrelevant to Article 2.2. This interpretation would permit RSTA Article 26 subsidies − which are available with respect to "facilities" that are located in a designated region − to evade scrutiny under the SCM Agreement.

37. In addition, Korea effectively re-asserts its argument that there is a "hierarchy" between Articles 2.1(b) and 2.2 of the SCM Agreement. The Panel correctly rejected this theory. There is no textual or logical basis for the assertion that a finding of regional specificity under Article 2.2 is subject to a finding under Article 2.1(b).

38. Korea criticizes the Panel's interpretation and application of the phrase "designated geographical region" in Article 2.2. Korea complains that the Panel should have adopted a series of results-oriented interpretations − for instance, finding in Article 2.2 an alleged requirement that a Member "affirmatively" designate a geographical region for a subsidy to be regionally specific. But the Panel correctly reasoned that Korea's argument would mean that where a Member expressly identifies a region in which access to subsidies is excluded, there is no "affirmative" designation of a region, despite the fact that such a designation would also make clear which geographical region is included, and have the same effect. The Panel correctly found that Article 2.2 does not include the "affirmatively" identify requirement Korea seeks to read into the text, which would reduce the inquiry under Article 2.2 to a semantic game, inviting ready circumvention of subsidy disciplines.

39. Korea then falls back on the "object and purpose" of Article 2.2, arguing that regional specificity is a "flexible" test, based on a sliding scale. But where the text of the measure limits access to a designated geographical region, no amount of "flexibility" makes it contrary to Article 2.2 to find that the subsidy is regionally specific. Among its many deficiencies, this argument would create a carve-out of certain regions from Article 2.2 that is nowhere found in the text, and fundamentally distort the nature of the inquiry under this provision.

40. Korea deploys "policy" arguments to buttress its critique. Korea asserts that subsidies are often a "first-best policy," and suggests that the Panel's interpretation would "improperly constrain" Member's ability to provide subsidies that address "overcrowding and urban sprawl." Korea goes so far as to impugn the Panel for having "impose[d] its own preferences on Members." The Panel did nothing of the sort, and this argument provides no basis to conclude that it is contrary to Article 2.2 to find a subsidy regionally specific where the text of the subsidy limits access to a designated geographical region.

41. Finally, Korea asserts two claims under Article 11 of the DSU. Korea asserts that the Panel's interpretation of Article 2.2 was insufficiently "positive" and "coherent," and makes the facially implausible claim that the Panel "completely fail[ed] to review" the USDOC's determination. These arguments are unsupported, and have no basis in Article 11.

42. In Section III.B, we address Korea's arguments with respect to the USDOC's calculation of the subsidy ratio for RSTA Articles 10(1)(3) and 26. Korea impugns the USDOC's decision to calculate these ratios in an "untied" manner. According to Korea, the USDOC should have employed a novel variation of the "tied" approach to attribution. Under Korea's theory, the USDOC should have carved up both the numerator and denominator of the subsidy ratio, based on a forensic accounting analysis of R&D and facilities expenses previously incurred.

43. The Panel appropriately rejected Korea's novel theory. As the Panel found, Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require that approach. Korea's theory is based on the alleged effect − which Korea misleadingly refers to as the "benefit" − of expenses that were incurred and associated activities that were undertaken well before the subsidy was bestowed. The Panel observed that the concept of an "expense" or "activity" conferring a "benefit" is alien to the SCM Agreement.

44. As the Panel's findings and record demonstrate, the R&D and facilities subsidies at issue lacked a "tie" to particular products:

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

- The structure, architecture, and design of the RSTA subsidy programs did not reflect a product-specific tie. As the Panel found, the tax credits were conferred by reference to "total R&D activities." Samsung submitted an *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.

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

45. Korea's remaining assertions − including its reliance on cost accounting materials from separate anti-dumping proceedings − are equally deficient. As the Panel explained, there is no basis for importing cost accounting principles into this countervailing duty proceeding. Nor did the Panel fail to conduct an objective assessment under Article 11 of the DSU, as Korea asserts.

46. Section III.C refutes Korea's claim with respect to overseas manufacturing. Korea criticizes the Panel for upholding the USDOC's decision not to include overseas sales in the denominator of the ratio for RSTA Article 10(1)(3) subsidies. Korea portrays this as a failure to "match" the elements in the numerator and denominator.

47. But like Korea's "tying" theory, this claim has no grounding in the bestowal of subsidies. This theory would require the attribution of subsidies based on the indirect overseas effect of R&D activity. The Panel appropriately rejected this theory.

48. 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. To the contrary, the language of these provisions suggests a focus on production activity occurring within the territory of the granting Member.

49. Korea dismisses the Panel's findings, on the grounds that the Panel improperly substituted a different rationale from the USDOC's. But it was entirely appropriate for the Panel to respond to Korea's claim in these proceedings, and assess its consistency with the SCM Agreement.

50. Korea relies heavily on cost verification documents from separate anti-dumping proceedings. Yet neither of these anti-dumping proceedings has any bearing on the subsidy attribution issue here. Even if R&D expenses or activities could be said to "benefit" or affect an overseas subsidiary for cost accounting purposes, this would not mean that subsidies should be attributed to overseas production.

51. Moreover, Korea fails to address the troubling implications of its theory. Investigating authorities would be required to conduct a jurisdiction-by-jurisdiction inquiry into how R&D activities affect production across the globe.

52. The USDOC presumed (rebuttably) that a Member grants a subsidy to benefit domestic production. Korea challenges that Panel's finding that the USDOC was entitled to conclude that this presumption was not rebutted on these facts. Here, again, Korea relies on separate anti-dumping proceedings, but they cannot rebut a presumption with respect to the attribution of the "benefit" of a subsidy to overseas manufacturing.

53. Korea falls back on a series of factual arguments. Korea's apparent request to have the Appellate Body render factual findings is improper. In any event, Korea's factual assertions are inaccurate and misleading, and Korea neglects other facts which strongly militate against its theory.

ANNEX B-4

EXECUTIVE SUMMARY OF KOREA'S APPELLEE'S SUBMISSION[1]

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

1. The Appellate Body has repeatedly clarified that "dumping" only exists based on a full consideration of all export transactions by each exporter, and only based on the product as a whole. Considering all export transactions is not "masking" anything, and is an indispensable part of a proper finding of "dumping".

2. The U.S. arguments on why the second sentence of Article 2.4.2 allows zeroing share two overarching flaws. First, the United States tries to distinguish the second sentence from the first sentence based on a few words in isolation without taking into account the Anti-Dumping Agreement as a whole and the consistent use of the key language "dumping" and "margin of dumping". Second, the United States has not really found any new arguments, and thus faces the difficulty of finding an argument that does not directly contradict prior Appellate Body findings.

3. Nothing in the text or context of Article 2.4.2 suggests that "dumping" or "margin of dumping" should have any different meaning than the rest of the Anti-Dumping Agreement. Indeed, this need for a consistent interpretation is why Article 2.4.2 opens with the overarching phrase "the existence of margins of dumping" – which echoes the Article 2.1 phrase that a product "is considered as being dumped" – before turning to some specific rules about the use of different comparison methods under different circumstances.

4. The U.S. textual arguments all fail. The Appellate Body has not grounded its zeroing decisions solely on narrow textual differences between the first and second sentences of Article 2.4.2. Rather, the Appellate Body has focused on the proper understanding of the overarching concepts of "dumping" and "margin of dumping", allowing the Appellate Body to interpret consistently the obligations of the various provisions of the Anti-Dumping Agreement under which zeroing has been challenged.

5. The United States argues for "systematically different" results that will "unmask targeted dumping". Implicit in this U.S. argument is its belief that "dumping" somehow exists for a group of export transactions, which must be "unmasked" so as to find "dumping" to exist. This U.S. inference that "dumping" for a subset of export transactions needs to be "unmasked" has no basis in the text of Article 2.4.2 or Appellate Body jurisprudence.

6. The U.S. argument for systematically different results so as to satisfy the principle of effectiveness has several problems. First, this argument essentially would have the principle of "effectiveness" take precedence over all other principles of interpretation. Second, a treaty text can have meaning even if the text results in the same or similar margins of dumping in some cases; treaty text can have meaning as long as it sometimes has meaning in those other cases. Third, the U.S. argument depends entirely on a false assertion of mathematical equivalence.

7. The U.S. argument about mathematical equivalence should be rejected for several reasons. First, the U.S. argument rests largely on the false assumption that the method of determining normal value must remain fixed. Changing normal value or changing export price adjustments makes perfect sense in the context of the inquiry posed by the second sentence of Article 2.4.2. Such changes would allow a more precise comparison, and thus allow a W-W or T-T comparison to "appropriately" take into account significant price differences. Although the United States develops many different hypothetical scenarios in an effort to show mathematical equivalence, these scenarios all depend critically on the assumption that normal value remains fixed.

[1] Pursuant to the Appellate Body guidelines for executive summaries, Korea confirms that this executive summary contains a total of 1,884 words (including footnotes) and that the overall other appellee submission (other than the executive summary) contains a total of 19,109 words (including footnotes).

8. Second, as is true with its hypothetical examples, the specific U.S. examples from *Washers* also depend on the same assumption that normal value does not change. Korea submitted specific evidence to the Panel demonstrating what would have happened in the *Washers* original investigation if normal value had been changed from an annual average to monthly averages. The results showed materially different dumping margins for both Samsung and LG. The United States never disputed this evidence.

9. Third, this argument of "mathematical equivalence" has been considered and rejected by the Appellate Body four times. The Appellate Body has repeatedly found that even if "under certain circumstances" or "under a specific set of assumptions" the results from different comparison methods are equivalent, such a situation does not render a provision *inutile*. The U.S. efforts to distinguish these repeated Appellate Body findings fail. The Appellate Body's occasional use of the phrase "unmask targeted dumping" does not require any different conclusion.

10. The Panel did not create a new approach that "effectively rewrote the second sentence". The Appellate Body has already provided repeated clarification of what "dumping" and "margin of dumping" mean for the Anti-Dumping Agreement. It is the United States − not the Panel − that now seeks to rewrite the text of Article 2.4.2 to create a different concept of "dumping" − one that finds "dumping" to exist in a subset of export transactions and ignores the remainder of the export transactions for an exporter.

B. The Panel Correctly Interpreted the "Pattern" Requirement

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

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

12. The fundamental flaw in the U.S. argument is that it fails to properly read the ordinary meaning of "pattern" in the overall context of the second sentence. The United States simply strings together dictionary definitions, and misses the most important contextual point in the second sentence − that the terms "pattern" and "differ significantly" set forth distinct requirements that both must be met. It is not enough to have export prices that "differ significantly" within one of the three specially enumerated categories. This need to focus on specific categories is precisely why the text does not just say the authorities must "find export prices which differ significantly". The text also requires finding a "pattern".

13. A "pattern" of lower prices makes sense because the lower prices can constitute the "intelligible form" that can be discerned from the other prices. There might even be a "pattern" of higher prices − higher export prices that stand out from the other export prices in some discernible and intelligible way. Yet the United States ignores this aspect of the term "pattern" and allows a "pattern" to be any collection of differing prices − including both higher and lower prices at the same time.

14. The United States also incorrectly believes that because the lower prices are being distinguished with reference to the higher prices, both the lower prices and the higher prices and all of the other prices are necessarily part of the "pattern". The Panel correctly dismissed this argument by noting the higher and lower prices could not be part of the same "pattern". The Panel noted that the "characteristic for establishing the degree of price variation is therefore not the same", since being higher than other prices or being lower than other prices are distinct "patterns".

15. Any need to "unmask" so-called "targeted dumping" does not change this interpretation. Korea has explained at some length in its Other Appellant Submission that the Panel misconceived the purpose of the second sentence, and that this language, "unmask targeted dumping", used by the Appellate Body in a single decision must be understood in context.

2. Random Price Differences Cannot Be Aggregated to Find a "Pattern"

16. The Panel correctly found two textual bases for its interpretation that distinct categories cannot be combined. First, the Panel reasonably interpreted the term "or". Since the categories of "purchasers, regions, or time periods" are inherently different, it was reasonable to interpret the use of "or" in this context as disjunctive. Moreover, within the text of the second sentence, the text uses the disjunctive "or" when discussing these three distinctive categories, but uses the conjunctive "and" to make clear that there must be both a "pattern" and an explanation.

17. Second, the Panel also reasonably interpreted the term "among", finding this term referred to something "in relation to the rest of the group they belong to". The issue is not whether the DPM initially tests each purchaser against other purchasers. Rather, the issue is whether differences for purchasers can be combined with differences based on time, and with differences based on regions, so as to find a single "pattern".

18. The United States also ignores other textual and contextual points. Under the U.S. interpretation of aggregating across different categories, any true "pattern" becomes obscured and becomes just random price variation. The authority can no longer distinguish whether export prices are actually differing among various purchasers, from whether different purchasers bought at different points in time.

C. The Panel Correctly Limited the Scope of the Exceptional Comparison Method

19. The Appellate Body has confirmed that the exception should be applied only to those transactions that meet the conditions to invoke the exception − the export transactions that fall within the "pattern". The Panel correctly noted that the text makes clear that the exceptional comparison method applies to the "prices of individual export transactions". The Panel also stressed the reference to "such differences" as confirming that the "individual export transactions" at issue were those that fell within the relevant pattern. The Panel also correctly noted the contextual point that the second sentence explicitly focused on a subset of export transactions that constitute a "pattern," and by definition created another subset of export transactions that were not part of the "pattern".

20. The United States tries to limit the Panel's rationale to the single word, "individual", even though the Panel explicitly addressed other textual elements of the second sentence and Article 2.4.2 more generally. This U.S. argument ignores the rest of the second sentence. The United States is also reading the term, "individual", narrower than the Appellate Body has read the term.

21. The United States also inappropriately dismisses the textual reference to "such differences". The existence of this particular phrase in the second sentence is telling. Instead of focusing on all price differences among all export transactions, the text instead focuses specifically on "such differences" and requires the explanation to focus on "such differences." The text is thus explicitly creating a group of sales that meet the conditions for the exception and another group of sales that do not.

22. It does not make interpretative sense to make all of the export transactions part of the "pattern". Even if all export prices are used as a benchmark to determine the subset of prices that "differ significantly" from the benchmark, use of the benchmark export prices does not make them part of the "pattern".

23. The U.S. interpretation also ignores the logical relationship between a basic rule and an exception. Under the U.S. interpretation, there would be no limit on the scope of the exception.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil would like to comment in the present appeal proceedings three specific aspects of Panel's report: (i) the identification of the patterns for purchasers, regions or time periods and their aggregation; (ii) the explanation requirement to depart from the normal comparison methods; and (iii) the practical application of the second sentence of Article 2.4.2.

2. Brazil understands that the patterns of price variations that matter for determining the margin of dumping in the situations of "targeted dumping" are only those that are significantly *below* the price for the tested purchaser, region or time period. Brazil also agrees with the Panel when it states that a "pattern" of export prices cannot be found *across* the different categories covered by the second sentence of Article 2.4.2, but should rather be found than "among" the constituent elements of each category.

3. With regard to the "explanation" required by Article 2.4.2, Brazil understands that a departure from the normal symmetrical methods demands an explanation as to why the price differences could not be unmasked by the application of both W-W or T-T methods.

4. The application of the W-T method also presents serious challenges, such as what should be done with the transactions outside the pattern. It is important to reach a clear distinction between "zeroing" and "systemic disregarding". The solution given by the Panel appears to be in line with the objectives of the Anti-Dumping Agreement.

ANNEX C-2

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. Canada is participating in this appeal as it has a substantial systemic interest in the interpretation of WTO anti-dumping rules.

2. Canada's written submission addresses three issues regarding the application of the exceptional weighted average-to-transaction (average-to-transaction) methodology referred to in 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). In particular, Canada will focus on the need for an investigating authority to properly identify a pattern among export prices, the impermissibility of zeroing in applying the average-to-transaction methodology, and the Panel's errors in allowing "systemic disregarding".

3. The text of the second sentence of Article 2.4.2 creates an exception to the two standard dumping calculation methodologies and thus requires a rigorous application of the criteria contained therein. An investigating authority must examine whether a pattern consisting of a regular and intelligible series of export prices can be identified among purchasers, regions, or time periods. The Panel correctly found that the United States Department of Commerce (USDOC) Differential Pricing Methodology (DPM) fails to meet this requirement when it aggregates transactions from across all three groups.

4. With respect to zeroing, the correct application of the principles espoused in past decisions can only lead to the conclusion that zeroing is also impermissible under the average-to-transaction methodology. Furthermore, as zeroing distorts the magnitude of a dumping margin, its use in applying the average-to-transaction methodology violates the fair comparison requirement in Article 2.4.

5. Finally, the Panel erred in finding that the second sentence of Article 2.4.2 permits an investigating authority to establish an "amount of dumping" exclusively by reference to "pattern" transactions. The Panel further erred in finding that, when combining comparison results under the weighted average-to-weighted average (average-to-average) and average-to-transaction methodologies, the "systemic disregarding" of negative average-to-average comparison results is permissible.

6. There are four fundamental problems associated with these findings. First, the Panel misapplied the well-established interpretation of "dumping" as an exporter- and product-specific concept, and the "margin of dumping" as pertaining to all export sales of subject goods by an exporter. Second, the exception under the second sentence of Article 2.4.2 does not alter these principles by permitting an investigating authority to disregard certain transactions when calculating a margin of dumping for an exporter. Third, the Panel ignored the Appellate Body's repeated rejection of mathematical equivalence as a basis for justifying zeroing. Fourth, permitting the establishment of a "margin of dumping" based on a subset of "pattern" transactions would distort the margin of dumping in a manner as egregious as the application of zeroing under the average-to-average or transaction-to-transaction methodologies.

[1] Pursuant to the Appellate Body guidelines for executive summaries, Canada confirms that the executive summary contains a total of 478 words (including footnotes) and that the overall third party submission (other than the executive summary) contains a total of 4823 words (including footnotes).

ANNEX C-3

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

I. ISSUES COVERED BY CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. China's third participant's submission focuses primarily on issues of legal interpretation that are relevant for China's own complaint against certain US measures in the parallel proceedings in *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* (DS471).

II. APPEAL ISSUES RELATING TO USDOC'S FAILURE TO COMPLY WITH THE CONDITIONS ON THE USE OF THE EXCEPTIONAL W-T COMPARISON METHODOLOGY UNDER ARTICLE 2.4.2, SECOND SENTENCE

A. The Panel did not err in its interpretation of the scope of the relevant pricing pattern under Article 2.4.2, second sentence

2. The Panel did not err when concluding that the "pattern" for purposes of Article 2.4.2, second sentence, comprises only a *subset* of the examined export transactions. A consideration of the text, context and object and purpose of Article 2.4.2 reveals that the Panel committed no error in finding that a "pattern of export prices which differ significantly among different purchasers, regions or time periods" ("relevant pricing pattern") necessarily comprises a *subset* of the entire universe of the export sales of a product as a whole by an exporter, and *not* as the United States seems to contend, *all* export sales. Specifically, a relevant pricing pattern is a subset of low-priced sales to a particular customer or a particular region, or during a particular time period.

3. Identifying a pattern of export prices characterized by *high* export prices would be inconsistent with the very concept of dumping that is at the centre of Article 2.4.2. Hence, the relevant pricing pattern referred to in Article 2.4.2, second sentence, must be one of *low* and not *high* export prices. The differences between high prices and other prices are not a justification for resort to the exceptional methodology under the second sentence. Such differences are not *significant* in the sense of Article 2.4.2.

4. Accordingly, the Appellate Body should uphold the Panel's finding that the "pattern" for purposes of Article 2.4.2, second sentence, necessarily comprises only a *subset* of the examined export transactions. The Appellate Body should modify the Panel's findings to state clearly that a "pattern" under Article 2.4.2, second sentence, may comprise only *low-priced* sales.

B. The Panel did not err in finding that USDOC's differential pricing methodology is "as such" inconsistent with Article 2.4.2, second sentence, because it aggregates random and unrelated price variations and thereby does not allow proper establishment of a relevant pricing pattern

5. The Panel did not err when finding that USDOC's so-called "differential pricing" methodology ("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.

6. China agrees that the phrase "among different purchasers, regions or time periods" in Article 2.4.2, second sentence, determines the question of how the relevant pricing pattern must be identified. The Panel rightly attached significance to the use of the disjunctive "or" in this phrase, 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 as USDOC appears to do with the DPM. The Panel was equally right to take the view that a "pattern" of significant price differences "among" different purchasers, regions or time periods must be found in the price variation *within a group* of purchasers, regions, or time periods.

7. The Appellate Body should, therefore, uphold the Panel's finding that USDOC's DPM is inconsistent "as such" with the second sentence of Article 2.4.2.

C. The Panel erred by finding that investigating authorities are not required, under Article 2.4.2, second sentence, to consider qualitative factors

8. The Panel erred when it found that USDOC did not act inconsistently with Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* by determining the existence of "a pattern of export prices which differ significantly . . ." on the basis of purely *quantitative* criteria, without any *qualitative* assessment of the reasons for the relevant price differences.

9. One *qualitative* dimension that must be considered – especially where targeted dumping is alleged with respect to a period of time – is *seasonality*. Another such qualitative dimension would be a *secular decline in costs of production* over the course of the relevant time period, which equally affects home market and export market prices for the product.

10. The Appellate Body should reverse the Panel's interpretation and find that investigating authorities must consider qualitative factors when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among purchasers, regions, or time periods. The Appellate Body should find that the qualitative factors to be considered are factors that are unrelated to any form of unfair pricing practice but that lead to regular or predicable variations in prices. The Appellate Body should find that an authority has an obligation to examine these qualitative factors on its own initiative, i.e., regardless whether verifiable evidence has been provided by interested parties.

D. The Panel erred by finding that investigating authorities need not address the T-T comparison methodology when explaining the need to depart from the symmetrical comparison methodologies

11. The Panel erred when it rejected Korea's claim that USDOC acted inconsistently with Article 2.4.2, second sentence, by failing to explain why the observed export price differences could not be taken into account appropriately by the use of the transaction-to-transaction ("T-T") comparison methodology. China agrees with Korea that the required "explanation" must include a discussion of *both* the weighted average-to-weighted average ("W-W") and transaction-to-transaction ("T-T") comparison methodologies.

12. As a textual matter, this issue devolves upon the meaning of the word "or" in the explanation clause of the second sentence of Article 2.4.2. In order properly to interpret the use of the word "or" in that sentence, one must take into account the context provided by the first sentence of Article 2.4.2, which contains the general rule that "normally" an authority is to use a symmetrical comparison methodology. Hence, recourse to the exceptional W-T comparison methodology is allowed only if *neither* of the symmetrical comparison methodologies can take the identified "pattern" into account appropriately.

13. China agrees that Article 2.4.2 grants discretion to investigating authorities when it comes to choosing between the two comparison methodologies that are *normally* to be used. However, that initial discretion has been exhausted and thereby becomes irrelevant if the investigating authority wishes to have recourse to the exceptional W-T comparison methodology, inasmuch as that exceptional comparison methodology may be employed only if the specific conditions set forth by the second sentence of Article 2.4.2 are met.

14. The Appellate Body should therefore reverse the appealed finding by the Panel, and confirm that, under Article 2.4.2, second sentence, investigating authorities must address the reason why the T-T comparison methodology, as well as the W-W comparison methodology, cannot be used before turning to the exceptional W-T comparison methodology.

III. APPEAL ISSUES RELATING TO THE DISCIPLINES IMPOSED BY THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994 ON THE MANNER IN WHICH THE W-T COMPARISON METHODOLOGY MAY BE APPLIED

A. The Panel did not err in finding that the W-T comparison methodology under Article 2.4.2, second sentence, may only be applied to transactions that form part of the relevant pricing pattern

15. The Panel's finding that, under Article 2.4.2, second sentence, the W-T comparison methodology may not be applied to all export sales but only to those forming part of the relevant pricing pattern is *not* in error. This view finds support in the text of the *Anti-Dumping Agreement*.

16. *First*, the phrase "individual export transactions" in the text of the second sentence of Article 2.4.2 refers to the specific transactions falling within the relevant pricing pattern. Having applied the W-T comparison methodology to the individual transactions that comprise the "pattern", the non-pattern transactions must be compared with normal value on the basis of one of the symmetrical comparison methodologies. The authority would then need to aggregate all intermediate comparison results (whether W-W, T-T or W-T) in order to determine a margin of dumping for the product as a whole.

17. *Second*, it flows from the text of Article 2.4.2 that a relevant pricing pattern may only be taken into account "appropriately" and not in an unreasonable or disproportionate manner. The permission to use the W-T comparison methodology is not a blanket authorization to use that methodology for all sales. Rather, it grants limited authority to enable an authority to deal appropriately with a relevant pricing pattern that arises in respect of a subset of sales.

18. *Third*, pursuant to an established canon of treaty interpretation, exceptions (such as that expressed in the second sentence of Article 2.4.2) apply only to the extent that they conflict with the general rule from which they derogate. It follows that the alternative methodology may be applied solely to sales forming part of a relevant pricing pattern that cannot be taken into account by using a symmetrical comparison methodology.

19. Accordingly, the Appellate Body should uphold the Panel's finding that the W-T comparison methodology may not be applied to all export sales. For sales that are *not* part of the relevant pricing pattern, Article 2.4.2, second sentence, does not provide any authorization to depart from the standard rule that mandates use of the symmetrical comparison methodologies.

B. The Panel did not err in finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Article 2.4.2, second sentence

20. The Panel did not err when it found that the use of zeroing in connection with the application of the W-T comparison methodology under Article 2.4.2, second sentence, is inconsistent with the second sentence of Article 2.4.2 "as such", and "as applied" in the *Washers* anti-dumping investigation.

21. The use of zeroing when applying the W-T comparison methodology under Article 2.4.2, second sentence, violates the fundamental product-wide and exporter specific nature of the concepts of "dumping" and "margins of dumping" Because a transaction-specific (or intermediate) comparison result is *not* itself "dumping", the United States is mistaken that a transaction-specific comparison result can be *evidence* of dumping in and of itself, without aggregating the individual transaction-specific comparison result *together* with all other intermediate transaction-specific comparison results to see if there actually is "dumping".

22. Although the Panel's ultimate finding as to the WTO-inconsistency of zeroing when aggregating transaction-specific comparison results arising in the context of the W-T comparison methodology is correct, its reasoning contains an important error regarding the nature of "dumping". The Panel reasoned that, 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 limit its analysis to the pricing behaviour of the exporter or foreign producer in respect of the transactions that form a "pattern". That approach

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

23. The United States insists that the second sentence of Article 2.4.2 would be inutile unless zeroing is permitted. In the United States' view, in order to avoid inutility, it is essential that the results of use of the W-T comparison methodology differ systematically from those that would arise under the W-W comparison methodology. Yet, to the extent that the investigating authority considers it necessary to ensure that the application of the W-T comparison methodology leads to a different outcome than the application of the W-W comparison methodology, it may always have recourse to the existing WTO-consistent alternative techniques for calculating the weighted average normal value.

24. Overall, although certain elements of the Panel's reasoning are problematic, the Appellate Body should uphold the Panel's finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Article 2.4.2, second sentence.

C. The Panel erred by allowing investigating authorities to disregard certain results when combining the results of W-T comparisons with other comparisons obtained through using the W-W comparison methodology

25. The Panel erred when it rejected Korea's claim that USDOC's practice of failing to give the full mathematical weight to the intermediate results of certain comparisons when aggregating those results with the intermediate results of other comparisons, amounts to a form of zeroing. Under the challenged practice, just as in other forms of zeroing, negative intermediate values are not permitted to offset positive intermediate values during the aggregation process.

26. The Panel's reasoning suggests that export prices for sales *outside* of the identified pattern may somehow be disregarded when establishing the numerator of the fraction used to calculate a margin of dumping. China considers that the Panel's asymmetrical treatment of the numerator and denominator is unsupported by the text of Article 2.4.2, and is contrary to the general principle that a margin of dumping must be calculated for the product as a whole. In order to satisfy that fundamental obligation, the numerator of the fraction must include *all* intermediate comparison results and the denominator must include the value of all sales on which those intermediate comparison results were calculated.

27. The Appellate Body should reverse the Panel's decision to reject Korea's claim that USDOC's use of what Korea calls "systemic disregarding" in the context of the DPM is inconsistent "as such" with Article 2.4.2, and Article 2.4 of the *Anti-Dumping Agreement*.

D. The Panel did not err in finding that the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994

28. The Panel did not err in finding that the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994. The United States' appeal of this finding by the Panel is fully consequential to its appeal of the Panel's finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Articles 2.4.2, second sentence, and Article 2.4.

29. Even if the Appellate Body were to find that investigating authorities may apply zeroing procedures when using the W-T comparison methodology under the second sentence of Article 2.4.2, the United States' appeal remains devoid of merit. In essence, this is so because the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994. The United States has not even attempted to demonstrate that Article 2.4.2, second sentence applies to administrative reviews.

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

ANNEX C-4

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

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

1. 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.

2. 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.

3. 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.

4. The matter before the Appellate Body 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.

5. 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.

6. 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.

7. 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.

B. Korea's claims under the SCM Agreement

8. With respect to the issue of regional specificity, the European Union considers that Korea's distinction between "enterprises" and "facilities" is artificial as facilities will normally form part of an enterprise. Korea's argument that enterprises must have legal personality is not convincing because the term "certain enterprises" in Article 2.2 also covers industries which clearly do not have legal personality. Furthermore, there is no apparent reason why subsidies should not be covered by Article 2.2 if they are granted to entities that may not necessarily have legal personality. A different interpretation could lead to the circumvention of Article 2.2.

9. The European Union considers that specificity under Article 2.2 is not called into question by the fact that the subsidy only excludes investments in 2% of Korea's land mass. The term "geographical region" in Article 2.2 is not qualified in any way and hence the designation of *any* geographical region − irrespective of its size − may trigger the application of Article 2.2. Korea's interpretation would also risk leading to significant legal uncertainty as regards determining the relevant geographic size of an area. The European Union notes further that while the Seoul overcrowding control region may only account for 2% of Korea's land mass, the city of Seoul (excluding the metropolitan area) accounts for more than 20% of Korea's total population and in 2012 created 23% of Korea's overall GDP.

10. The European Union agrees with the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that the application of one of the sub-paragraphs of Article 2.1 is not in itself determinative as regards "specificity". The European Union therefore disagrees with Korea's argument that a finding of non-specificity under Article 2.1(b) should lead to a finding of non-specificity also under Article 2.2.

11. With respect to Article VI:3 of the GATT1994 and Article 19.4 of the SCM Agreement, the European Union recalls that both provisions require a direct link between the levy of countervailing duties with respect to the product under investigation and the determination that a subsidy is found with respect to "such" (i.e. the same) product. In light of these provisions and previous case law, Members must accurately determine the per unit subsidy amount with respect to the product in question and not exceed that amount. However, in practice it may be very difficult to establish if a subsidy is clearly "tied" in law or in fact to the production or sale of a particular product. If the subsidy is not tied to any particular product, it may be presumed that the company allocated this benefit across its entire production.

12. Regarding the issue whether the tax credits in the case at hand were "tied" to Samsung's digital appliances, the European Union considers that one relevant element to consider could be whether the *eligibility criteria* for the subsidy are linked – i.e. tied - to the product in question. Other elements to consider could be whether *the use of the subsidy* is limited - i.e. tied - to the product in question or whether Samsung *in casu* did actually use the tax credits for its digital appliances.

13. Regarding the issue whether the subsidy is to be allocated to Samsung's local or worldwide activities, the European Union considers that relevant elements to consider could be whether the subsidy was granted with respect to R&D activities conducted in Korea or with respect to R&D activities also outside Korea and whether Samsung used the tax credits for its Korean or worldwide production.

ANNEX C-5

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. In this appellate proceeding, Japan will focus on the requirements of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement and the USDOC's methodologies concerning the application of the said provision. In doing so, Japan would particularly like to address the systemic issues arising out of the USDOC's continued use of zeroing when determining dumping and calculating margins of dumping by referring to the second sentence of Article 2.4.2.

2. To start with the overview of the relevant provisions of the Anti-Dumping Agreement and the understanding of dumping and margins of dumping as a background, Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement recognise dumping when "a product" is introduced into the commerce of an importing Member at less than its normal value. Through a number of prior WTO disputes, the Appellate Body has established that dumping and margins of dumping within the meaning of Article VI of the GATT 1994 and the Anti-Dumping Agreement do not pertain to individual transactions or individual models/sub-types of a product, but to a product under investigation as a whole. The Appellate Body also ruled that such interpretation 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. On this basis, the Appellate Body has consistently held zeroing to be inconsistent with the Anti-Dumping Agreement.

3. Article 2.4.2 of the Anti-Dumping Agreement sets forth three comparison methodologies for establishing the existence of margins of dumping. While the W-W and T-T comparison methodologies under the first sentence "shall normally" be used, an investigating authority may use the exceptional W-T comparison methodology under the second sentence if the requirements of its pattern clause and explanation clause are met. As clarified by the Appellate Body, the second sentence is an instrument to "unmask" "targeted dumping", i.e. dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.

4. Regarding the interpretation of the pattern clause, a "pattern" must be of export prices that differ significantly "among different purchasers, regions or time periods". In other words, export prices for *some* purchaser (or region or time period) must differ significantly from export prices for *other* purchasers (or region or time period). Further, the Appellate Body in *US – Zeroing (Japan)* explained that the export prices that fall within the relevant pricing pattern "must be found to differ significantly from other export prices."

5. In order to evaluate whether observed price differences are "significant[]", one needs to examine whether the observed price differences are "important, notable, consequential" in the context of the specific case at hand. Thus, as the Panel correctly found, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances, including the nature of the product and market in question. In addition, since an exporter generally does not sell its product at a uniform price across different purchasers, regions and time periods, the term "significantly" implies that price differences must go beyond the kind of price variations that "normally" exist in the market.

6. As to the explanation clause, 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 "taken into account appropriately" by the methodologies set forth in the first sentence of Article 2.4.2, which "shall normally" be used. Thus, an "explanation" has to be provided as to the fact that observed variations in export prices are not a mere reflection of factors or pricing patterns that normally exist or otherwise the methodologies contemplated in the first sentence cannot be used to determine an appropriate margin of dumping. Japan agrees with the Panel's finding to that effect.

7. On the other hand, Japan does not agree with the Panel's finding that the investigating authority need not provide an explanation as to why the T-T comparison methodology cannot take into account appropriately the price differences. The combination of the negative form ("cannot") and the conjunction "or" in the second sentence clearly indicate that the investigating authority must address both the W-W *and* the T-T comparison methodology under the explanation clause.

8. The appropriate scope of the application of the W-T comparison methodology under the second sentence should be determined by considering not only the term "pattern" in isolation but also its context, including, *inter alia*, its explanation clause as well as the first sentence. Since the W-W and T-T comparison methodologies under the first sentence cover situations where all export transactions are taken into account, it appears natural to limit the application of the W-T comparison methodology under the second sentence in a manner necessary and appropriate to unmask the "three kinds of" targeted dumping, i.e. dumping targeted purchasers, regions or time periods. This reading is consistent with the use of the term "may" in the second sentence, as well as the Appellate Body's explanation in *US – Zeroing (Japan)*.

9. Regarding the permissibility of zeroing under the second sentence of Article 2.4.2, neither that provision nor other provisions of the Anti-Dumping Agreement contain any language suggesting that an investigating authority is allowed to depart from the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-specific, and not transaction-specific, concepts. Zeroing is also at odds with, and goes far beyond, the role and function of the second sentence of Article 2.4.2 to unmask the "three kinds of" targeted dumping. Furthermore, the mathematical equivalence argument does not warrant an interpretation that zeroing is permitted. While this argument rests on the assumption that W-W and W-T comparison methodologies always or normally use the exact same set of pricing data (i.e. normal value(s) and export prices), such assumption finds no basis in the Anti-Dumping Agreement.

10. Finally, with respect to the application of the second sentence of Article 2.4.2 to the specific methodology adopted by the USDOC, the DPM relies solely on mechanical and inflexible criteria such as +0.8 or −0.8, and 33% in order to determine whether export prices "differ significantly" from one another. Thus, the DPM fails to consider the prevailing factual circumstances on a case-by-case basis, which is inconsistent with the second sentence of Article 2.4.2. In addition, the DPM fails to identify a pattern of export prices which differ significantly "among different purchasers, regions or time periods", because it aggregates unrelated price variations *across* different purchasers, regions *and* time periods, and because it takes into account price variations among different *models* of a single product as constituting a "pattern".

ANNEX C-6

EXECUTIVE SUMMARY OF NORWAY'S THIRD PARTICIPANT'S SUBMISSION

THE USE OF ZEROING

1. The Panel found that the United States' use of zeroing when applying the "weighted-average-to-transaction" methodology is both "as applied" and "as such" inconsistent with the second sentence of Article 2.4.2 and Article 2.4 of the *Anti-Dumping Agreement*. The United States seeks review of these findings. Norway argues that the Panel's findings on these issues should be upheld.

2. In line with previous Appellate Body Reports, Norway holds that "dumping" and "margins of dumping" cannot occur at the level of individual transactions. The Appellate Body has emphasized that the concepts have the same meaning throughout the *Anti-Dumping Agreement* and for all types of proceedings. All intermediate comparison results must be aggregated in order to establish the margin of dumping for the product as a whole and for each individual exporter. The negotiation history referred to by the United States furthermore only shows that some Members were concerned about the use of zeroing when applying the comparison methodology in question. A permission of applying zeroing when using said methodology cannot be deducted.

3. Furthermore, the use of zeroing while applying the "weighted-average-to-transaction" methodology distorts certain facts related to the investigation and contains an inherent bias, making a positive determination of dumping more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the *Anti-Dumping Agreement*.

ANNEX C-7

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

1. The Panel correctly applied the Appellate Body's numerous rulings that the terms "dumping" and "margin of dumping" are exporter-specific concepts that require that all sales from each exporter be included so that the determination of dumping can be made on the product as a whole. The practice of "zeroing", which disregards export transactions made at prices above normal value, is necessarily inconsistent with the Appellate Body's repeated determinations concerning the meaning of the terms "dumping" and "margin of dumping".

2. Viet Nam therefore disagrees with the United States' claim that zeroing can be applied in some cases under the guise of the second sentence of Article 2.4.2 of the Anti-dumping Agreement. The United States' claim is based on a strained and improper reading of isolated words within the second sentence of Article 2.4.2. Moreover, the United States' peculiar justification because of a concept of "mathematical equivalence" is neither required by the Anti-dumping Agreement, nor correct as a matter of fact.

3. Viet Nam agrees with Korea's arguments that the Panel's acceptance of "zeroing", even when limited to the combination of sales in the W-W subgroup and those in the W-T subgroup, is inconsistent with the Anti-dumping Agreement. Viet Nam submits that the panel's conclusion in this respect is fundamentally inconsistent with the terms "dumping" and "margin of dumping" as repeatedly enunciated by the Appellate Body. Further, Viet Nam believes that there is nothing in either the language or the "object and purpose" of Article 2.4.2 that compels such an inconsistent result.

ANNEX D

PROCEDURAL RULING

ANNEX D-1

PROCEDURAL RULING OF 9 MAY 2016

1. On 5 April 2016, the United States and Korea jointly addressed a letter ("joint request") to the Chairman of the Appellate Body, requesting that the Division that would hear the appeal in this dispute adopt, pursuant to Rule 16(1) of the Working Procedures, additional procedures for the protection of business confidential information (BCI) on the record of this dispute.

2. The United States and Korea requested the Appellate Body to adopt additional procedures for the protection of BCI on the basis of the BCI procedures adopted by the Panel and attached draft procedures to their joint request. They explained that BCI procedures in this appeal would serve "the interest of fairness and orderly procedure in the conduct of an appeal", according to Rule 16(1) of the Working Procedures.

3. The United States and Korea stated that the BCI procedures adopted by the Panel were necessary to enable the parties to submit to the Panel BCI that was previously treated as confidential in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute. They requested additional protection of BCI allowing third parties and their government employees to have access to BCI and requiring non-disclosure to officers or employees of enterprises engaged in the production, export or import of the products that were the subject of the investigations at issue. They requested that BCI be identified in documents and that documents containing BCI be marked as such. They further requested that parties making oral statements containing BCI be required to inform the Division, and that the Division ensure that only persons entitled to access BCI are in the room to hear the statements. They proposed that no BCI be disclosed in the Appellate Body Report. They proposed that the Appellate Body provide the participants with a confidential version of the draft Appellate Body Report and give each of them the opportunity to review the Report prior to its circulation to verify and ensure that the Appellate Body does not inadvertently disclose any information that contains BCI. Korea and the United States also proposed that these additional procedures contain further requirements: (i) to treat the information designated as BCI as confidential; (ii) not to disclose the information to non-authorized persons under the procedures; and (iii) to use the information only for the purposes of the dispute.

4. On 8 April 2016, the European Union addressed a letter to the Chairman of the Appellate Body commenting on the joint request. The European Union expressed the view that BCI procedures at the appellate stage should not be based on the Panel's BCI procedures, which it considered were, in certain respects, superseded by recent rulings by the Appellate Body. The European Union recalled recent Appellate Body decisions on the issues of BCI and argued that BCI procedures at the appellate stage should not define BCI by reference to the definition that was adopted by the Panel, which in turn referred to the definition adopted in the underlying municipal proceedings. Moreover, the European Union argued that BCI procedures at the appellate stage should provide for the possibility of review by the Appellate Body of the designation of information as BCI proposed by the participants, either at the request of any participants or third participants or on its own motion.

5. On 19 April 2016, the United States filed its Notice of Appeal. In a letter communicated to the Appellate Body on the same day, the United States sought guidance from the Appellate Body on how to proceed with filing its appellant's submission, which contained information that was designated as BCI in the panel proceedings. In a letter issued on the same day, the Chair of the Appellate Body on behalf of the Division informed the United States and the other participants that, pending a final decision on the joint request, the Division had decided to provide provisional additional protection to information marked as BCI in the United States' appellant's submission and in an eventual other appellant's submission by Korea. On 19 April 2016, the United States filed its appellant's submission. Korea filed a Notice of Other Appeal and an other appellant's submission on 25 April 2016. Both submissions contain information marked as BCI.

6. On 21 April 2016, the Chair of the Appellate Body addressed a letter on behalf of the Division hearing the appeal in this dispute to the participants, asking them to further substantiate

why certain information contained in their submissions and in the Panel record warranted special protection at the appellate stage beyond that already provided under the confidentiality standards set out in Articles 17.10 and 18.2 of the DSU, and the Rules of Conduct. Korea and the United States responded to this request with separate communications on 26 April 2016.

7. Korea noted that its other appellant's submission contained information regarding one of the Korean exporters' sales volumes and values, costs of production, including R&D expenditures, and other financial information, whose disclosure could cause this exporter to suffer competitive harm. Korea pointed out that this information is not in the public domain and was provided by the exporter under the expectation that it will be adequately protected. Korea further argued that the information for which Korea and the United States jointly requested additional protection met the criteria identified by the Appellate Body in its Procedural Ruling in *EC and certain member States — Large Civil Aircraft* and that the additional protection requested by Korea and the United States would not impinge on the duties of the Appellate Body or on the rights of the third participants.

8. The United States noted that there was no disagreement between the parties concerning whether certain information constituted BCI, and that there was no basis to doubt that the information was confidential as contemplated under Article 6.5 of the Anti-Dumping Agreement. The United States further noted that the information related to sensitive commercial data, such as sales and production data, tax information, and research and development expenses for the submitting companies, and that any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies submitting the information.

9. The United States considered that the additional protection sought by the parties, although important, was minimal and would not hinder the participation by third participants or the work of the Division in this appeal. The United States recalled that, in essence, this protection amounted to a requirement to appropriately identify and mark submissions or statements containing BCI, including when BCI is submitted by a party or third party that did not originally provide the information to the Panel, and a restriction that would preclude access to BCI by individuals representing competitor companies in order to avoid harm to the originator of the information.

10. On 26 April 2016, the Division invited the third participants to provide further comments on the joint request by Korea and the United States of 5 April 2016 and on their subsequent communications of 26 April 2016. The European Union recalled its communication of 8 April 2016 and noted that Articles 17.10 and 18.2 of the DSU already imply the protection jointly requested by Korea and the United States. The European Union considered what was requested by Korea and the United States less in the nature of "additional protection" and more in the nature of clarifications and elaborations of the protection already provided by the existing general rules. China did not provide substantive comments on the joint request and stated that it had no objection to the joint proposal of the parties for additional protection of BCI.

11. We recall that in *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered that the DSU and the *Rules of Conduct* already provide for confidentiality, and that any additional protection must be justified. The Appellate Body stated that, while "[p]articipants requesting particularized arrangements have the burden of justifying that such arrangements are *necessary* in a given case adequately to protect certain information"[1], it is the task of the WTO adjudicator and not of the parties to determine whether additional protection in the form of BCI procedures is called for. The Appellate Body considered in that dispute that the WTO adjudicator should decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection.[2]

12. The Appellate Body also stated in *EC and certain member States – Large Civil Aircraft* that "the determination of whether the particular information that was submitted deserved additional protection and the particular degree of such protection" should be based on objective criteria, which "could include, for example: whether the information is proprietary; whether it is in the public domain or protected; whether it has a high commercial value for the originator of the

[1] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10.

[2] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market".[3]

13. In *China – HP-SSST*, the Appellate Body stated that "[i]n determining the scope and content of such procedures, the panel must consider the effect they may have on the exercise by the panel of its adjudicative duties under the DSU and other covered agreements, the parties' rights to due process, the rights of the third parties, and the rights and systemic interests of other WTO Members."[4] The Appellate Body noted that any "additional procedures adopted by a panel to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the relevant provisions of the DSU and other covered agreements (including the Anti-Dumping Agreement)."[5] The Appellate Body stated that an obligation rested upon the panel to adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential.[6] We further note that the panel in *China – HP-SSST* removed, in a preliminary ruling, from its initial procedures for the protection of BCI, the requirement that a party must provide prior written authorization from the entity that submitted the confidential information in the underlying anti-dumping proceedings when submitting such information to the Panel.[7]

14. In *China – HP-SSST*, the Appellate Body also considered that the treatment of information as confidential by an investigative authority in domestic proceedings should not be conflated with "the confidential treatment of information provided *by a WTO Member to a panel or the Appellate Body in the context of WTO dispute settlement proceedings*"[8], and that "whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO panel".[9]

15. Bearing in mind the above-mentioned rulings by the Appellate Body on the issue of additional protection of BCI, we have decided to accord additional protection to the information, which has been designated as BCI in the submissions to the Appellate Body and in the panel record. As Korea and the United States have explained in their joint requests and substantiated further in their subsequent written clarifications, the information for which additional protection is sought relates to sensitive commercial data of the companies concerned in these proceedings. Korea noted, inter alia, that its other appellant's submission contained information marked as BCI regarding one of the exporters' sales volumes and values, costs of production, including R&D expenditures, and other financial information whose disclosure could cause this exporter to suffer competitive harm. The United States in turn submitted that the information marked as BCI in its appellant's submission related to sensitive commercial data, such as sales and production data, tax information, and research and development expenses of the submitting companies and that any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies submitting the information.

16. The additional BCI protection is provided according to the following terms:

17. No person may have access to information, which has been designated as BCI in the submissions to the Appellate Body and in the panel record, except a member of the Appellate Body

[3] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[4] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 8-9).

[5] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9).

[6] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311.

[7] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.26-7.29. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.305.

[8] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.313. (emphasis original)

[9] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.316.

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

18. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant or third participant shall have responsibility in this regard for its employees as well as any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

19. A participant or third participant that submits a document containing BCI to the Appellate Body, including in written submissions and oral statements, shall clearly identify such information in the document. The participant or third participant shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[…]]. The first page or cover of the document shall state "Contains business confidential information on pages XXX", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party or third party that intends to make an oral statement containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

20. The Appellate Body 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 Appellate Body may, however, make statements of conclusion drawn from such information.

WORLD TRADE ORGANIZATION

WT/DS464/AB/R/Add.1

7 September 2016

(16-4766)

UNITED STATES – ANTIDUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

AB-2016-2

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS464/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

UNITED STATES' NOTICE OF APPEAL*

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States files this notice of appeal to the Appellate Body on certain issues of law covered in the Report of the Panel on *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464/R & WT/DS464/R/Add.1) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal interpretation of the "pattern" for purposes of 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* (the "AD Agreement").[1] The Panel found that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period) while other export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. This finding is in error and is based on erroneous findings on issues of law and legal interpretations.[2] The United States respectfully requests that the Appellate Body reverse or modify the Panel's findings.

2. The United States seeks review of the Panel's findings relating to the "scope of application"[3] of the alternative, average-to-transaction comparison methodology. The Panel found that the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement "should only be applied to transactions that constitute the 'pattern of export prices which differ significantly among different purchasers, regions or time periods'."[4] Consequently, the Panel found that the U.S. Department of Commerce ("USDOC") acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement by applying the alternative, average-to-transaction comparison methodology to all export transactions in the washers anti-dumping investigation.[5] The Panel also found that the USDOC's differential pricing analysis is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement, "as such," because it applies the alternative, average-to-transaction comparison methodology to all export transactions under certain circumstances.[6] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations.[7] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

3. The United States seeks review of the Panel's findings relating to the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.[8] The Panel found that "the USDOC's use of zeroing when applying the [average-to-transaction] comparison methodology is 'as such' inconsistent with the second sentence of Article 2.4.2," and that "the USDOC acted inconsistently with the second sentence of Article 2.4.2 by using zeroing when applying the [average-to-transaction] comparison methodology in the *Washers* anti-dumping investigation."[9] Consequently, the Panel also found that "the use of zeroing in the context of the [average-to-transaction] comparison methodology is 'as such' inconsistent with Article 2.4" of the

* This Notice, dated 19 April 2016, was circulated to Members as document WT/DS464/7.

[1] See, e.g., Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191, 8.1.a.i, 8.1.a.vi, 8.1.a.ix, and 8.1.a.xii-xvi. As with other findings reflected throughout the Panel Report, this list of the paragraphs in the Panel Report reflecting this legal error is indicative.

[2] See, e.g., Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191.

[3] Panel Report, para. 7.11.

[4] See, e.g., Panel Report, para. 7.29.

[5] See, e.g., Panel Report, paras. 7.29, 8.1.a.i.

[6] See, e.g., Panel Report, paras. 7.119, 8.1.a.vi.

[7] See, e.g., Panel Report, paras. 7.21-7.29.

[8] See Panel Report, paras. 7.172-7.209.

[9] See, e.g., Panel Report, paras. 7.192, 8.1.a.xii, 8.1.a.xiv.

AD Agreement, "the USDOC acted inconsistently with Article 2.4 by using zeroing in the *Washers* anti-dumping investigation,"[10] and "the use of zeroing by the USDOC when applying the [average-to-transaction] 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."[11] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations, including an erroneous interpretation and application of the phrase "individual export transactions" in the second sentence of Article 2.4.2 of the AD Agreement.[12] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

4. The United States seeks review of the Panel's finding that the USDOC's differential pricing analysis "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'."[13] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations, including an erroneous interpretation of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.[14] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

[10] See, e.g., Panel Report, paras. 7.206, 8.1.a.xiii, 8.1.a.xv.
[11] See, e.g., Panel Report, paras. 7.208, 8.1.a.xvi.
[12] See, e.g., Panel Report, paras. 7.187-7.193, 7.206-7.208.
[13] See, e.g., Panel Report, paras. 7.143, 7.147, 8.1.a.ix.
[14] See, e.g., Panel Report, paras. 7.138-7.147.

ANNEX A-2

KOREA'S NOTICE OF OTHER APPEAL*

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Korea hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *United States — Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464/R) ("Panel Report").

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures, Korea files this Notice of Appeal together with its Other Appellant Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Korea's ability to rely on other paragraphs of the Panel Report in its appeal.

I REVIEW OF THE PANEL'S FINDINGS UNDER THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994.

4. Korea seeks review by the Appellate Body of the Panel's interpretation of Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement as they relate to the proper way to combined the two subsets of intermediate results created by the application of the exceptional W-T comparison method in the second sentence of Article 2.4.2.[1] In particular, the Panel erred in finding that:

- The intent of the second sentence of Article 2.4.2 somehow creates an exception to the fundamental principles governing the existence of "dumping" and a "margin of dumping".[2]
- Intermediate comparison results could somehow constitute "dumping" without including the prices of all export transactions in the overall assessment.[3]
- The authority can properly find a "margin of dumping" based on a numerator consisting only some export transactions from the subset using the W-T comparison method, as long as the denominator includes all export transactions.[4]
- The need to "unmask" so-called "targeted dumping" somehow justifies departure from the fundamental principles governing the existence of "dumping" and a "margin of dumping".[5]
- Without these exceptions to the fundamental principles there would be mathematical equivalence in all cases, and that equivalence could not be eliminated by changing the assumptions behind the analysis being done.[6]
- Such disregarding of offsets does not inflate the margin of dumping contrary to Article 2.4.[7]

5. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.167, 7.169, 8.1(a)(x) and 8.1(a)(xi), that the authority may disregard offsets from the subset based on the normal comparison methods when combining those results with the subset based on the exceptional W-T comparison method. As part of this review, Korea also requests the Appellate Body to review paragraphs 7.26, 7.27, 7.162, 7.166, and any other

* This Notice, dated 25 April 2016, was circulated to Members as document WT/DS464/8.

[1] Panel Report, paras. 7.154-7.167, 7.169.
[2] Panel Report, paras. 7.155, 7.156, 7.157, 7.160.
[3] Panel Report, paras. 7.154, 7.156, 7.157, 7.160.
[4] Panel Report, paras. 7.157, 7.160.
[5] Panel Report, paras. 7.26, 7.27, 7.154, 7.162.
[6] Panel Report, paras. 7.164, 7.165, 7.166.
[7] Panel Report, para. 7.169.

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

6. Korea seeks review by the Appellate Body of the Panel's interpretation of the pattern clause of the second sentence of Article 2.4.2 as not requiring the authorities to consider qualitative factors when finding a "pattern" of export prices that "differ significantly.[8] In particular, the Panel erred in finding that:

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

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

7. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.52, 7.119(a), 8.1(a)(ii) and 8.1(a)(v), that the authorities need not consider qualitative factors as part of making a proper finding of export prices that "differ significantly" and constitute a "pattern". As part of this review, Korea also requests the Appellate Body to review paragraphs 7.72, 7.73, 7.76, and any other discussions that suggest "targeted dumping" can exist among the intermediate comparisons the authority may be conducting, before the authority has properly considered and taken into account all export transactions for the product as a whole. Korea further requests that the Appellate Body complete the analysis and find that the authorities must consider both quantitative and qualitative factors when finding a "pattern" of export prices that "differ significantly".

8. Korea seeks review by the Appellate Body of the Panel's interpretation of the explanation clause of the second sentence of Article 2.4.2 as not requiring the authorities to explain why the normal T-T comparison method cannot take into account the pattern of export price differences.[12] In particular, the Panel erred in finding that:

- The second sentence of Article 2.4.2 does not require the authorities to consider both of the normal comparison methods − both the W-W comparison method and the T-T comparison method -- before turning to the exceptional W-T comparison method.[13]

- Somehow the burden of considering the T-T comparison justifies ignoring the express requirement that the authority consider this option before turning to the exceptional W-T comparison method.[14]

9. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.81, 7.119(b), 8.1(a)(iv) and 8.1(a)(viii), that the authorities need not explain why the normal T-T comparison method cannot take into account export price differences. Korea further requests that the Appellate Body complete the analysis and find that the authorities must in every case consider both the normal comparison method − both W-W and T-T − before resorting to the exceptional W-T comparison method.

[8] Panel Report, paras. 7.44- 7.52.
[9] Panel Report, paras. 7.33, 7.48, 7.49.
[10] Panel Report, paras. 7.46, 7.47.
[11] Panel Report, paras. 7.48, 7.49.
[12] Panel Report, paras. 7.78-7.81.
[13] Panel Report, paras. 7.79, 7.80.
[14] Panel Report, para. 7.80.

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

10. Korea seeks review by the Appellate Body of the Panel's findings under Article 2.2 of the SCM Agreement as they relate to the USDOC's determination that RSTA Article 26 tax credits are regionally specific.[15]

11. The Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, because it failed to review the USDOC's determination and to determine whether the USDOC's conclusion on regional specificity was reasoned and adequate and based on positive evidence.

12. The Panel misinterpreted and misapplied Article 2.2 in finding that Korea failed to establish that the USDOC's determination of regional specificity is inconsistent with that provision. The Panel erred, *inter alia*, in finding that:

- Article 2.2 of the SCM Agreement covers all measures that include "considerations regarding geographic location" or that "encourage particular enterprises to direct their resources to certain geographic locations".[16]
- "the Article 26 subsidy is contingent on an enterprise becoming 'located within' a designated geographical region".[17]
- "[w]e 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".[18]
- "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".[19]
- "the designation of *any* geographical region − no matter how small or how large − would suffice to trigger the application of Article 2.2".[20]
- The geographical region need not be affirmatively identified, but rather, "might also be accomplished through less direct means that nevertheless make the region known".[21]
- "Article 23 of the RSTA Enforcement Decree effectively designates the geographical region in which the relevant investments will be eligible for subsidization".[22]
- The USDOC's determination that RSTA Article 26 tax credits are regionally specific is not inconsistent with Article 2.2 despite not being based on positive evidence or a reasoned and adequate explanation.[23]

13. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.289 and 8.1(b)(iii), that 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. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article 2.2 of the SCM Agreement in finding that the RSTA Article 26 tax credit scheme is regionally specific.

[15] Panel Report, paras. 7.261, 7.266-7.274, 7.279-7.283, 7.286-7.289.
[16] Panel Report, para. 7.273.
[17] Panel Report, para. 7.273.
[18] Panel Report, para. 7.267.
[19] Panel Report, para. 7.268.
[20] Panel Report, para. 7.282. (original emphasis)
[21] Panel Report, para. 7.280.
[22] Panel Report, para. 7.280.
[23] Panel Report, paras. 7.289 and 8.1(b)(iii).

14. Korea seeks review by the Appellate Body of the Panel's findings under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement as they relate to the USDOC's determination that Samsung failed to meet its burden to provide evidence that "tied" the tax credits that it received under RSTA Article 10(1)(3) and RSTA Article 26 to its development, production, and sale of the large residential washers that were the subject of the USDOC's investigation.[24]

15. The Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, in finding that the "tax credit subsidies are not R&D subsidies".[25]

16. The Panel erred in the interpretation and application of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement in finding, *inter alia*, that:

- The tax credits that Korea bestowed under Article 10(1)(3) and Article 26 were not tied to any particular product.[26]
- As a result, the USDOC was justified in allocating the tax credit subsidies across all products and not just to digital appliances, including large residential washers.[27]
- The relevant subsidies were not R&D subsidies because they were awarded after the underlying R&D activities had been undertaken.[28]
- The benefits that Samsung received as tax credits constituted revenue foregone or not collected, which is equivalent to cash that Samsung could keep in its accounts and/or spend on any product.[29]
- Samsung's discretion regarding the use of the cash resulting from the tax credit subsidies justified the USDOC's treatment of those subsidies as "untied".[30]
- Since the benefits that arose from the tax credit subsidies could be used in any way, the USDOC was not required to find that those subsidies were tied to the production of the products for which the R&D activity was undertaken.[31]
- The fact that Samsung could identify the precise R&D activities that benefited the production of the products produced in its Digital Appliance business unit was irrelevant to the issue of whether Samsung was able to tie its tax credits to those products.[32]
- The USDOC's finding in the contemporaneous antidumping investigation of large residential washers that it could directly tie R&D activity performed by Samsung's Digital Appliance business unit to the products produced by that unit was irrelevant.[33]

17. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.306 and 8.1(b)(iv), that Korea failed to establish that the USDOC's failure to tie the RSTA Article 10(1)(3) and RSTA Article 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. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 194 when it failed to find that Samsung submitted positive evidence that tied the tax credits attributable to Samsung's Digital Appliance business unit to the products that were produced by that unit.

[24] Panel Report, paras. 7.300-7.306.
[25] Panel Report, para. 7.302.
[26] Panel Report, para. 7.300.
[27] Panel Report, para. 7.302.
[28] Panel Report, para. 7.302.
[29] Panel Report, para. 7.302.
[30] Panel Report, para. 7.302.
[31] Panel Report, para. 7.303.
[32] Panel Report, para. 7.303.
[33] Panel Report, para. 7.304.

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

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

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

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

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

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

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

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[34] Panel Report, paras. 7.316-7.319.
[35] Panel Report, para. 7.317.
[36] Panel Report, para. 7.317.
[37] Panel Report, para. 7.317.
[38] Panel Report, para. 7.318.
[39] Panel Report, para. 7.318.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States appeals certain of the Panel's legal findings and conclusions related to the interpretation and application of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and certain of the Panel's findings that U.S. measures challenged by Korea in this dispute are inconsistent with various provisions of the AD Agreement and the GATT 1994.

2. As demonstrated below, the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the AD Agreement by failing to interpret that provision in accordance with the customary rules of interpretation of public international law, as required by Articles 3.2 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

3. Specifically, section II.B demonstrates that the Panel erred in its interpretation of the relevant "pattern" in the second sentence of Article 2.4.2 of the AD Agreement. The Panel concluded that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. This conclusion does not follow from a proper application of the customary rules of interpretation of public international law.

4. Properly interpreted, the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which refers to "a pattern of export prices which differ significantly among different purchasers, regions or time periods," requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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. Any such "pattern" necessarily would be a pattern of export prices that would transcend multiple purchasers, regions, or time periods, and necessarily would include both lower and higher export prices that "differ significantly" from each other.

5. Section II.C demonstrates that the Panel's findings regarding the scope of application of the alternative, average-to-transaction comparison methodology are erroneous. The Panel erred by failing to undertake a proper analysis pursuant to the customary rules of interpretation, by engaging in circular logic, and by premising its findings on its own erroneous interpretation of the relevant "pattern" under the second sentence of Article 2.4.2 of the AD Agreement.

6. Section II.D demonstrates that the Panel erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with provisions of the AD Agreement and the GATT 1994. The Panel erred by failing to properly interpret the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law.

7. The Panel engaged in virtually no analysis whatsoever of the text of what it called the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement[2]. Instead, the

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 1,297 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 32,621 words (including footnotes).

[2] The "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement provides that: "A normal value established on a weighted average basis may be compared to prices of individual export transactions…." *See United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Report of the Panel, WT/DS464/R (March 11, 2016) ("Panel Report"), para. 7.9.

Panel based its findings concerning the operation of the alternative, average-to-transaction comparison methodology and zeroing on its flawed understanding of the relevant "pattern" and its own misreading of the Appellate Body's previous findings concerning zeroing.

8. A proper 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 conclusion follows from a proper application of the customary rules of interpretation of public international law. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes, and it can be confirmed by recourse to the negotiating history of Article 2.4.2 of the AD Agreement.

9. The Panel also erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Articles 2.4 and 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994. These findings are dependent on the Panel's erroneous findings under Article 2.4.2 of the AD Agreement, and should be reversed for the same reasons.

10. Section II.E demonstrates that the Panel erred in finding that a differential pricing analysis undertaken by the U.S. Department of Commerce ("USDOC") is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement. The Panel's finding was premised on its understanding of the relevant "pattern," but the Panel's understanding of the relevant "pattern" is erroneous and not consistent with a proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement.

11. Additionally, the USDOC's differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2, when that clause is properly interpreted in accordance with the customary rules of interpretation. The "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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. The USDOC has done this when it has applied a differential pricing analysis in antidumping proceedings.

12. A differential pricing analysis seeks to identify a "pattern," but does not require a specific "target." 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." Investigating authorities might take other approaches to identify a "pattern" that also are consistent with the terms of the "pattern clause."

13. In contrast to a "targeted dumping approach," a differential pricing analysis looks 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 of the AD Agreement, 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.

14. A differential pricing analysis does not aggregate random and unrelated price variations. A differential pricing analysis considers the pricing behavior of the exporter in the United States market as a whole. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement suggests that the significant export price differences among purchasers, 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 the exporter's pricing behavior exhibits "a pattern of export prices which differ significantly among different purchasers, regions or time periods."

ANNEX B-2

EXECUTIVE SUMMARY OF KOREA'S OTHER APPELLANT'S SUBMISSION[1]

A. The Panel Erred by Allowing Authorities to Disregard Certain Results When Combining the Two Subsets Created Pursuant to the Second Sentence of Article 2.4.2

1. The Appellate Body has provided repeated guidance for more than a decade about the meaning of "dumping" and "margin of dumping". The final overall combination based on all export transactions must show a net result that meets the definition of "dumping" to establish a single "margin of dumping". Individual low prices can never be "dumped" because the concept "dumping" simply does not exist at the level of individual export prices or even partial combinations of those prices. Any calculations from some of the export prices, even if they lower, are just intermediate calculations. These principles do not depend on the comparison method being used.

2. As its most fundamental error, the Panel started its interpretative analysis with "the intent of the comparison methodology established in the second sentence of Article 2.4.2". Although the "object and purpose" represents one element of a proper analysis, the Panel should have first fully considered the text and context of that provision. The Panel did not do so, and therefore reached the wrong conclusions.

3. By its express terms, the second sentence allows investigating authorities to use a particular type of comparison method. Specifically, when certain conditions have been met, the authorities may compare "a normal value established on a weighted-average basis" to "prices of individual export transactions" when establishing the existence of the "margin of dumping" for the investigated exporter for the product under consideration. Beyond allowing an exception to the normal comparison methods, however, neither the second sentence of Article 2.4.2 nor Article 2.4.2 more generally creates any exception to the basic concepts of "dumping" and "margin of dumping".

4. Yet notwithstanding the narrow focus of the text itself, the Panel incorrectly found that the second sentence created a new "method of calculating the margin of dumping". This purported "new" method to determine the "margin of dumping" has no textual or contextual basis. Textually, the second sentence in no way suggests a special understanding of these key concepts. The context provided by Article 2.4.2 overall confirms that the second sentence does not create any new understanding of "dumping". These contextual arguments have been reviewed exhaustively by the Appellate Body in numerous prior disputes, making the Panel's failure to discuss the text or context in any detail quite surprising. Finally, the object and purpose of the second sentence is to address situations where certain purchasers, regions, or time periods are singled out for different (presumably lower) export prices. Such pricing strategies can only be identified and properly understood with reference to the overall pricing behaviour of the exporter, and cannot occur at the transaction-specific level or for any subset of exports.

5. The Panel repeatedly confused the distinction between intermediate comparisons for some export prices and a final conclusion of "dumping" based on all export prices. This conceptual error permeated the Panel's analysis, and it led the Panel repeatedly to consider something to be "dumping" or "evidence of dumping" when that intermediate stage in the analysis could not possibly yield a proper conclusion of "dumping".

6. Moreover, it is not enough to include all the export transactions in the denominator. There is no "net amount of dumping" within the subset using the W-T comparison method, because "dumping" cannot be found until all export transactions have been taken into account. Export prices within the subset using the W-T comparison method cannot be "dumping". Thus, a numerator based only on the export transactions within the subset applying the W-T comparison method does not establish a proper amount of "dumping".

[1] Pursuant to the Appellate Body guidelines for executive summaries, Korea confirms that this executive summary contains a total of 4,616 words (including footnotes) and that the overall other appellant submission (other than the executive summary) contains a total of 49,894 words (including footnotes).

7. The Panel also seems to have believed that prohibiting zeroing within each of the two subsets meant that all comparisons would be considered equally. But prohibiting zeroing within each subset ensures only that the net amounts emerging from each subset reflect all of the transactions within each subset. Those amounts still have to be combined. By setting any negative amount from the subset using the normal comparison methods equal to zero (and denying any offsets for this negative amount), the Panel's approach improperly acts as if the export prices in that subset were lower than they really were. Each export price should be given the same full effect in either subset, regardless of the comparison method applied to that subset.

8. The Panel also showed a fundamental misconception about the relationship between any "dumping" and the associated "margin of dumping". The numerator and denominator must refer to the same total universe of export sales. The Panel's approach ignores the interrelationship of the amount of "dumping" and the "margin of dumping". This connection is expressed most directly in Article VI:2 of the GATT and the Anti-Dumping Agreement, where the "amount" of the duty imposed to offset "dumping" is limited to no more than the "full margin of dumping" (Article 9.1) and "shall not exceed the margin of dumping" (Article 9.3). The same connection can also be seen in Article 7.2 regarding provisional measures. Article VI:1 of the GATT and Article 3 also require a connection between "dumping" or the "dumped imports" and the material injury to the domestic industry. The Panel's approach also disregards prior Appellate Body decisions that require both the numerator and denominator to reflect all comparison results.

9. A major part of the Panel's rationale was its belief that the purpose of the second sentence was to allow authorities to "unmask" so-called "targeted dumping". But the Panel misunderstood the purpose of the second sentence, and then used this misunderstanding to disregard the consistent Appellate Body jurisprudence about the concepts "dumping" and "margin of dumping".

10. One must look beyond short-hand phrases and look at the actual provision and its purpose more closely. The purpose that most closely links the text and context of the second sentence is simply to allow the authority to undertake the more careful examination of individual export prices that the W-T comparison method allows. The purpose to "unmask" individual export prices, however, is very different from the purpose to "unmask" so-called "targeted dumping". The purpose to "unmask" certain export prices is fully consistent with the Appellate Body's jurisprudence on "dumping" and "margin of dumping". Certain export prices are "unmasked" as an intermediate stage in the analysis. At this point, there is no conclusion about "dumping" nor can there be any such conclusion. A conclusion of "dumping" can never be reached based solely on a subset of prices. The purpose of the second sentence has been achieved once this more detailed examination has taken place at this intermediate stage.

11. The Panel thought this purpose to "unmask targeted dumping" was consistent with the negotiating history. But the Panel's citation to a single document from the negotiating history that referenced possible "masking" of "selective dumping", is a very limited piece of evidence. Moreover, the Appellate Body has already considered this legislative history, and still confirmed that there cannot be "selective dumping" based on a subset of export sales.

12. Although the phrase "targeted dumping" has been used occasionally, the phrase "unmask targeted dumping" has appeared much less frequently. This phrase has appeared in only two Appellate Body decisions, and the context in which the Appellate Body used this phrase was to note the need to limit the exceptional W-T comparison method to those transactions that met the conditions for the exception. The Appellate Body used this phrase to clarify the scope of the second sentence, not to create a new concept of "dumping". Moreover, the Appellate Body decisions on zeroing make quite clear that by "unmask" the Appellate Body certainly did not mean that zeroing (the denial of offsets) would be allowed to "unmask" some export transactions as having been "dumped" without considering all export transactions.

13. The Panel mistakenly found "mathematic equivalence". Korea notes that this argument of "mathematical equivalence" has been rejected by the Appellate Body four times, finding that even if "under certain circumstances" or "under a specific set of assumptions" the results are equivalent, such a situation does not render a provision inutile. In the face of the Appellate Body's repeated rejection of this argument, the Panel found mathematical equivalence anyway without any support for this conclusion. The Panel's bald assertion of mathematical equivalence should be rejected for several reasons. First, the Panel illogically dismissed Korea's arguments that changing the basis of normal value or changing the method of adjustments would avoid mathematical equivalence.

Second, the Panel dismissed Korea's arguments about the "assumptions" being made by the authority, including assumptions about normal value, even though they are essentially the same arguments that previously led the Appellate Body to reject mathematical equivalence in the past. Third, the Panel found mathematical equivalence even though Korea had submitted extensive evidence that the Panel did not discuss at all. Finally, there is nothing different about the situation of combining the results from two subsets. The prior arguments before the Appellate Body also addressed combining two separate results, and rejected mathematical equivalence in that context.

14. Beyond its findings under the second sentence of Article 2.4.2, the Panel also ruled against Korea's separate claim that systemic disregarding was inconsistent with Article 2.4 of the Anti-Dumping Agreement. The Panel's reasoning, however, simply repeats the legal errors identified above with regard to the Panel's interpretation of the second sentence of Article 2.4.2 that "dumping" can exist within a subset of the export sales. Therefore for the reasons set forth in more detail above, we ask the Appellate Body also to reverse these Panel findings regarding Article 2.4. Broad findings under Article 2.4 – like those made in US – Zeroing (Japan) – confirm the fundamental principles that make any denial of offsets WTO inconsistent because doing so means finding "dumping" without considering all of the export transactions fairly and equally for the product as a whole.

B. The Panel Erred by Finding that the Pattern Clause Did Not Require Authorities to Consider Qualitative Factors

15. The Panel's did not interpret the terms "significantly" and "pattern" in the context of the Anti-Dumping Agreement as a whole. This error has two aspects. First, the Panel failed to consider these terms in the context of how these terms are used elsewhere. The Panel considered the ordinary meaning of these terms, but then never considered that the Anti-Dumping Agreement as a whole uses the term "significant" precisely when it wishes to convey a broader meaning than just "large". Whether the text of the second sentence of Article 2.4.2 uses the term "reasons" misses the point. Article 2.4.2 does not merely require that export prices differ; it requires that they differ "significantly". The Panel finding that the term "significantly" can be analyzed in purely quantitative terms directly contradicts the statement of the Appellate Body in US – Large Civil Aircraft (2nd complaint) that the significance of lost sales has both "quantitative and qualitative dimensions."

16. Second, the Panel also did not read these two terms in the context of the explanation clause. The Panel seemed to think that because it found a textual basis in the explanation clause to consider qualitative factors, it could reject any such textual basis in the pattern clause. But this approach reads these two parts of the second sentence in isolation, instead of reading them together as context for each other. Such qualitative considerations – such as falling costs – should be considered both as part of determining whether price differences are "significant" and as part of determining whether W-W comparisons can "take into account appropriately" any difference. The Panel's discussion of the explanation clause seems to recognize this interrelationship, but confused the distinction between export prices differences that are "significant" as well as constituting a "pattern" and so-called "targeted dumping". The Panel improperly grounded its reading of the explanation clause in its flawed understanding of the object and purpose of "unmasking targeted dumping".

C. The Panel Erred by Finding that Authorities Need Not Address the T-T Comparison Method When Explaining the Need to Depart From the Normal Comparison Methods

17. The Panel ignored the express obligation to address both the normal comparison methods before turning to the exceptional comparison method. The absence of any explanation ever as to why the T-T comparison methodology cannot take into account appropriately the pattern of significantly different prices is contrary to the requirement in the second sentence of Article 2.4.2 that such an explanation be given.

18. The Panel misinterpreted the terms "a" and "or" in the context of the second sentence. The use of the term "a" reflects the fact that in the end the authority will be using "a" single comparison method. Similarly, the use of the term "or" reflects this choice between two alternative normal comparison methods. The use of the singular article and disjunctive conjunction simply recognizes that there are two alternative normal comparison methods that must be considered.

The text explicitly provides that if the authority seeks to depart from the use of one of those two normal methods, then the authority must explain why it cannot use either of the normal methods.

19. The Panel incorrectly seemed to think it would be burdensome and serve no purpose to require the authority to address the T-T comparison method if the authority had already selected the W-W comparison method. But the text does not specify the degree of explanation required or create any burden. Nor does this additional explanation fail to serve any purpose. W-W and T-T comparisons may be symmetrical, but they are not the same. Explaining why one works does not automatically explain why the other will not work. The purpose of the second sentence is to allow a more detailed examination of individual export prices. This purpose relates directly to the choice among the different comparison methods. The more detailed examination ensure a more thorough consideration of the three possible comparisons methods under the second sentence, and thus helps ensure that the choice is in fact "appropriate".

D. The Panel Erred in Finding that RSTA Article 26 Subsidies are a Regionally Specific Subsidy

20. RSTA Article 26 tax credits were available to all Korean corporations, wherever located that made investments anywhere outside the "overcrowding control region" of the Seoul Metropolitan Area, which comprised just 2% of Korea's land mass.

21. First, the Panel erred because it never reviewed the USDOC's determination on regional specificity in order to apply its interpretation of Article 2.2, or determine whether the USDOC's conclusion was reasoned and adequate and based on positive evidence. Thus, the Panel failed to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter.

22. Second, the Panel based its finding on an incorrect interpretation and application of Article 2.2. RSTA Article 26 subsidies do not encourage localization of the enterprises in a designated geographical region. Instead, they discourage enterprises from making investments in a small area that constitutes 2% of Korea's territory. Because the area in which investments are discouraged is so small, and the area in which investments may be made is so large (98% of the territorial jurisdiction of the granting authority) the subsidies cannot be said to be "limited" in any meaningful way.

23. Even assuming that the stipulation as to the investments made by recipient firms constituted a limitation on the location of the enterprises, the area in which investments must be made − 98% of Korea's land mass − does not constitute a "designated geographical region". The area is too unbounded; it is neither sufficiently demarcated nor cohesive enough, and there is almost total overlap with the jurisdiction of the granting authority. In such circumstances, the area in which investments may be made is not "a designated geographical region" within the meaning of Article 2.2.

24. Concluding that such subsidies are narrowly targeted, and therefore specific, is putting form over substance, and ignoring the intent of Article 2 as a whole. The reasons provided by the Panel to reject Korea's arguments are unpersuasive and did not provide a valid basis to dismiss Korea's claim.

25. Overcrowding and urban sprawl are not only a serious problem for Korea, they constitute serious challenges for many developed and developing countries. Subsidies provide an efficient and effective policy tool to mitigate this problem, while introducing minimal trade distortions. Article 2.2 does not address the kind of subsidies provided under RSTA Article 26 and thus preserves Members' ability to use such subsidies to mitigate overcrowding and urban sprawl. The Panel's overly expansive interpretation improperly constrains Members' ability to take corrective measures.

26. Korea therefore requests that the Appellate Body reverse the Panel's finding. Korea additionally requests that the Appellate Body complete the analysis and find that the USDOC's determination that RSTA Article 26 subsidies are specific is inconsistent with Article 2.2.

E. The Panel Erred in Finding that Samsung Failed to Tie the Subsidies that it Received Under RSTA Article 10(1)(3) and RSTA Article 26 that Were Attributable to Investments Made by its Digital Appliance Business Unit to the Products Made by that Unit

27. Samsung, a large and highly diversified Korean company, utilized two provisions of Korean law that provided tax credit subsidies for making specified investments in R&D activities and certain types of business assets. Samsung organized its corporate activities into business units. One such unit was the Digital Appliance business unit, which produced large residential washers, refrigerators, and other types of consumer products. This unit maintained detailed records of the investments that it made that qualified for the two tax credit programs.

28. During the course of the USDOC's antidumping investigation of large residential washers, Samsung provided to the USDOC a listing of the eligible expenditures of its Digital Appliance business unit and the tax credits that the eligible expenditures had generated under RSTA Article 10(1)(3) and Article 26. Samsung contended that the ad valorem countervailing duty margin that the USDOC should calculate for each of the two tax credit subsidy provisions should equal the tax credits attributable to Digital Appliance business unit's eligible expenditures (i.e., the numerators) divided by the Digital Appliance business unit's sales value (i.e., the denominators).

29. The USDOC rejected this calculation on the ground that Samsung had failed to "tie" the tax credits of the Digital Appliance business unit to that unit's sales. The purported reason for this alleged failure was that the amounts of the two tax credit subsidies provided to the Digital Appliance business unit were not known to the subsidy giver, i.e., to the Korean tax authorities, and so acknowledged either when the tax credits were conferred or before that time. The subsidies were conferred on the date that Samsung filed its tax return for fiscal year 2010, which was March 31, 2011. According to the USDOC, the tax return itself did not separately identify the tax credits that were attributable to the eligible expenditures made by the Digital Appliance business unit. Rather, Samsung reported a single lump sum for all of its business units for each of the two credits. However, the USDOC refused to consider evidence that Samsung presented in its questionnaire response and at the on-site verification of that response that contained the tying evidence.

30. The Panel found that Samsung failed to make a sufficient showing that it could tie the two tax credit subsidies received by the Digital Appliance business unit to expenditures made by that unit, but it relied upon a rationale that the USDOC itself did not rely upon. As a result of Samsung's alleged failure to make the required showing of tying, the Panel upheld the USDOC's calculation of the ad valorem subsidy margin attributable to Article 10(1)(3) by dividing the total eligible R&D expenses incurred by all of Samsung's business units by the total sales of those business units. The result was a dramatic inflation of the Article 10(1)(3) ad valorem subsidy margin from 0.22% to 0.72%. The USDOC similarly inflated the margin for Article 26 tax credits from 0.0046% to 1.05%.

31. WTO jurisprudence is clear that the focus in every tying inquiry must be on whether the particular subsidy can be directly linked to particular product or product line. However, the Panel did not conduct this type of inquiry. Instead, it chose to rely entirely on the fact that the cash proceeds of the tax credits could be used in any manner that Samsung chose. However, the Panel's reliance had nothing to do with determining whether there was a direct link, i.e., a tying, between the subsidy at issue and particular products. The use of the proceeds of a subsidy is irrelevant to the tying inquiry, despite the Panel's contrary finding. Moreover, if the Panel's test is correct, then virtually every subsidy is countervailable regardless of whether it can be tied to a particular product or product category.

32. The fatal flaw in the Panel's affirmance of the USDOC's ad valorem margin calculations is that the Panel failed to examine the specific issue of whether Samsung had submitted positive evidence that allowed the USDOC to calculate, i.e., to tie, the tax credit benefit that Samsung received on its development, production, and sale of the digital appliance products that it produced to the R&D and other investment activities that generated those tax credits. Instead, the Panel denied the tying claim based on its finding that the cash proceeds of the tax credits "may be spent by Samsung on any product".

33. Since the Panel failed to apply the correct tying test, it thereby failed to apply either Article VI:3 of the GATT 1994 or Article 19.4 of the SCM Agreement. Had the Panel applied the required tying analysis, it would have determined that the Article 10(1)(3) and Article 26 tax credits that Samsung received on its development, production, and sale of large residential washers were at the de minimis level, i.e. they provided a total benefit of less than 1% ad valorem. Consequently, the USDOC would not have issued a countervailing duty order to Samsung based on undisputed record facts.

34. The USDOC itself has stated that the manner in which the proceeds from any type of subsidy are spent is irrelevant to the issue of whether a subsidy can be tied to a particular product or group of products. In the preamble to the final countervailing duty regulations that the USDOC published on November 25, 1998, the USDOC provided an extended discussion of the concept of tying, and it addressed various comments that interested parties submitted on the subject of how and when tying to a particular product should be found. Some commenters "argued that because money is fungible, the Department should not allow subsidies to be tied to particular products or to particular export markets." The USDOC rejected this argument. Therefore, the Panel erred in finding that the unrestricted use of proceeds from a subsidy program constituted the deciding factor in determining whether those proceeds could be tied to a particular product or product line.

35. Equally important, the Panel was not free to reject the USDOC's finding that the use of proceeds from a subsidy was irrelevant to a tying analysis. By doing so, the Panel improperly substituted its own rationale as its legal basis for finding that tying had not been shown. The Appellate Body has stated that "panels should not substitute their own conclusions for those of the competent authorities." Moreover, "the panel should seek to review the determination while giving due regard to the approach taken by the investigating authority, or it risks constructing a case different from the one put forward by that authority."

36. For these reasons, the Appellate Body should reverse the Panel's findings and instead find that Samsung made an adequate showing of tying of tax credits earned by its Digital Appliance business unit to the eligible expenditures made by that unit.

F. The Panel Erred in Finding that the Subsidies that Samsung Received Under RSTA Article 10(1)(3) Benefited Only Samsung's Domestic Production and Not its Worldwide Production

37. The USDOC collects countervailing duties by first calculating the ad valorem margin of subsidy provided by each of the programs that it determines to countervail, expressed as a percentage. The total ad valorem margin for all countervailable programs is then applied to the entered value of a particular importation to determine the amount of countervailing duties that are owed. If the entered value of a particular shipment of large residential washers is $100,000 and the applicable total ad valorem duty is 1.2%, then the importer must pay a countervailing duty of 1.2% x $100,000, or $1,200, to the United States Treasury.

38. The calculation of the ad valorem margin is a critical determinant of the amount of countervailing duties that an importer may owe. That margin consists of a numerator, which equals the total amount of the countervailed subsidies, and a denominator, which equals the total value of the sales that benefited from the countervailed subsidies. As a matter of simple mathematics, an increase in the denominator will reduce the ad valorem margin percentage, and a reduction in the denominator will increase that margin.

39. The dispute between Korea and the United States focuses on the calculation of the denominator that the USDOC used to calculate the ad valorem margin attributable to the tax credit benefits that Samsung received under RSTA Article 10(1)(3). Samsung contended that the eligible R&D investments that it undertook and, the tax credits that it obtained from those investments benefited its worldwide production. However, the USDOC found that the tax credits benefited only Samsung's production in its home market of Korea. The ad valorem margin attributable to Article 10(1)(3) R&D tax credits that the USDOC calculated using Samsung's home market sales value was 0.72%. Had the USDOC used Samsung's worldwide sales value, it would have calculated an ad valorem margin of only 0.49%.

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

41. Here again, the Panel employed an erroneous analysis because it failed to determine the appropriate denominator that was to be linked with the numerator. By focusing on the use of the "tax credit cash", the Panel ignored the underlying requirement that it determine which products Samsung had produced and sold that had benefited from the R&D activities that Samsung had performed, which resulted in the tax credits that were then provided.

42. Samsung also provided substantial evidence to the USDOC, which the Panel ignored, that demonstrated unequivocally that the R&D activities that it performed benefited its worldwide production and that the USDOC had found to this effect. If the R&D activities benefited worldwide production, then the tax credits attributable to those activities similarly benefited worldwide production. This evidence rebutted any presumption that the USDOC, or the Panel, might otherwise have been entitled to employ to the effect that subsidy programs benefit only production in the country where the benefits are provided.

ANNEX B-3

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. Korea appeals a number of Panel findings related to the U.S. anti-dumping and countervailing duty measures that Korea has challenged in this dispute. As demonstrated in this submission, the Panel did not err in its interpretation and application of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). Additionally, as shown below, Korea's various claims that the Panel acted inconsistently with Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") lack merit.

2. The U.S. appellee submission is organized as follows, and includes detailed discussion of, *inter alia*, the following arguments.

3. Section II.A responds to Korea's appeal of the Panel's findings related to the approach of the U.S. Department of Commerce ("USDOC") to the application of a "mixed" comparison methodology. In Korea's view, the Panel should have found the USDOC's approach inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement for the same reasons that it found zeroing inconsistent with those provisions of the AD Agreement. The Panel was correct to reject Korea's claims. Indeed, if, as the Panel found, the alternative comparison methodology can only be applied to a subset of sales, then the Panel's finding with respect to a "mixed" comparison methodology is the only way to interpret the second sentence of Article 2.4.2 so as to give meaning to this key provision of the AD Agreement.

4. Korea fails to offer any legal argument against the USDOC's approach that would accord with the customary rules of interpretation as to why mandatory re-masking is required under the second sentence of Article 2.4.2 of the AD Agreement. Instead, Korea argues that the USDOC's approach is the "functional equivalent of zeroing," and Korea asserts that previous Appellate Body findings are dispositive of its claims. Korea's arguments lack any merit.

5. No prior WTO dispute has involved a Member's application of the comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. This dispute presents an issue of first impression for the Appellate Body.

6. To the extent that the USDOC's approach to the application of a "mixed" comparison methodology can be likened to zeroing, the U.S. appellant submission demonstrates 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. Additionally, the U.S. appellant submission shows that the application of the alternative, average-to-transaction comparison methodology to all sales (with zeroing) is not inconsistent with Article 2.4.2 of the AD Agreement.

7. There is no legal basis for finding that the USDOC's approach to the application of a "mixed" comparison methodology is impermissible. Where an investigating authority applies the average-to-transaction comparison methodology to fewer than all export prices, the AD Agreement does not obligate the investigating authority to offset or re-mask the evidence of dumping that has been unmasked through the use of average-to-transaction comparisons. Korea's arguments in support of its position lack merit.

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 4,130 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 48,435 words (including footnotes).

8. The Panel did not find that "individual low prices" can be "dumped" or that "dumping" can "exist at the level of individual export prices." The Panel found that the second sentence of Article 2.4.2 of the AD Agreement provides a means for investigating authorities "to ensure that any evidence of dumping with regard to [pattern transactions] is not masked by non-dumping in respect of transactions falling outside of the pattern." When the price of an export transaction is below normal value, that may, indeed, be "evidence of dumping." When the price of an export transaction is above normal value, that may be evidence suggesting that no dumping has occurred. However, such a price also could be masking evidence of dumping under certain circumstances, such as when the "stringent conditions" set forth in the second sentence of Article 2.4.2 of the AD Agreement have been established.

9. Contrary to Korea's argument, the second sentence of Article 2.4.2 establishes "special rules." The Panel was right to interpret the second sentence of Article 2.4.2 as being an exception to the first sentence of Article 2.4.2, and as setting forth a special methodology for establishing margins of dumping that may be used when certain conditions are met.

10. The United States does not disagree that all of an exporter's export transactions must be "taken into account" in the determination of dumping. The USDOC's approach does, in fact, take account of all export transactions. What Korea really means, however, is that evidence of "targeted dumping" must be re-masked by aggregating all results for all transactions in the numerator of the calculation of the margin of dumping. Korea provides no legal or logical basis for this conclusion.

11. Korea's arguments raise the question of what it means for an export transaction to be "consider[ed]" or "taken into account." To the extent that certain export transactions may be masking "evidence of dumping," it is appropriate for those export transactions to be "taken into account" in a way that prevents such masking.

12. The weakness of Korea's appeal is evidenced by Korea's astonishing attempt to contest the clear and obvious role of the second sentence of Article 2.4.2 within the context of the AD Agreement as a whole. Korea now argues that the "purpose" of the second sentence "is simply to allow the authority to undertake the more careful examination of individual export prices that the [average-to-transaction] method makes possible." Korea's argument makes no sense. If Korea were correct, there would never be any reason for an investigating authority to resort to the alternative, average-to-transaction comparison methodology described in the second sentence of Article 2.4.2. The transaction-to-transaction comparison methodology, set forth in the first sentence of Article 2.4.2, already provides an investigating authority with the possibility of undertaking such a "granular examination of individual export prices," and also individual normal value sales transactions.

13. The only logical conclusion, as the Appellate Body has itself observed, and as the Panel, both of the parties (at one time or another), and all but one of the third parties in this dispute agreed, is that the second sentence of Article 2.4.2 of the AD Agreement is intended "to enable investigating authorities to 'unmask' so-called 'targeted dumping'."

14. Korea's arguments related to mathematical equivalence lack merit. The U.S. appellant submission discusses the Appellate Body reports in prior disputes to which Korea refers and demonstrates that the Appellate Body's previous consideration of mathematical equivalence neither supports rejection of the mathematical equivalence argument in this dispute, nor compels it. Korea also contends that the Panel "provided no support" for its mathematical equivalence finding. However, it is evident from the panel report that, after considering the positions of the parties, the Panel agreed with the United States and did not agree with Korea.

15. The U.S. appellant submission conclusively demonstrates mathematical equivalence. It is evident from Korea's arguments regarding different weighted average normal values and different adjustments that breaking mathematical equivalence is Korea's goal. Korea is not seeking an interpretation that gives meaning to the second sentence of Article 2.4.2 of the AD Agreement. On the contrary, Korea seeks to read the second sentence of Article 2.4.2 out of the AD Agreement entirely. Such an interpretation is inconsistent with the customary rules of interpretation of public international law, in particular the principle of effectiveness.

16. Korea also argues that the Panel erred in finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent, "as such," with Article 2.4 of the AD Agreement. Korea's arguments concerning Article 2.4 are dependent on its arguments concerning Article 2.4.2, and lack merit for the same reasons. Additionally, Korea requests that the Appellate Body complete the legal analysis, but the reasons Korea gives for doing so are not availing, and the Appellate Body should reject Korea's request.

17. Section II.B responds to Korea's appeal of certain Panel findings related to the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. The "pattern clause" sets forth the first of the two conditions for using the alternative, average-to-transaction comparison methodology, and provides that an investigating authority may utilize the alternative comparison methodology "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods."

18. Korea argues that the Panel mischaracterized its claim, as if Korea's claim were solely that an investigating authority must state the "reasons" why export prices differ. Korea alleges that the Panel "recast[] Korea's argument into something different from − and substantially narrower than − what Korea actually argued." Korea contends that, by recasting its claim too narrowly, the Panel failed to address the claim that Korea actually made, which, Korea asserts, related to the obligation to undertake a qualitative analysis when determining whether there exists a "pattern" of export prices which differ "significantly." The Panel did not mischaracterize Korea's claims.

19. Korea appears to misunderstand the difference between claims and arguments. Consistent with the DSU and prior Appellate Body guidance, Korea's "claims" necessarily are those set forth in Korea's request for the establishment of a panel. The two relevant claims set forth in Korea's panel request relate to the "reasons" or "explanations" for why export prices differ − or the factors to which the pattern of export prices is "attributable" − and the USDOC's decision not to consider the reasons why export prices differ as part of its analysis. Neither claim refers more broadly to an obligation to examine so-called "qualitative aspects." The Panel examined Korea's panel request and correctly understood the nature and scope of Korea's claims. On appeal, Korea attempts to expand its claims beyond what is set forth in its panel request. That is not possible, and Korea's attempt should be rejected.

20. Korea also argues that the Panel incorrectly interpreted the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, and erroneously found that it does not require an investigating authority to examine the reasons why export prices differ. Korea's arguments lack merit.

21. The Panel agreed that the term "significantly" has a qualitative dimension as well as a quantitative dimension. However, the Panel did not agree with Korea that it follows from this that an investigating authority is obligated to assess the "reasons" why export prices differ when it is determining whether there exists a pattern of export prices which differ significantly.

22. Korea is incorrect when it suggests that the Panel "dismissed" the *US − Upland Cotton* panel report and the *US − Large Civil Aircraft (Second Complaint)* Appellate Body report. On the contrary, the Panel appropriately relied on those reports as support for its own interpretative conclusions. The Panel correctly noted, however, that those reports do not support Korea's argument that the underlying reasons are relevant to an examination of significance.

23. Korea's understanding of the term "significant" would read the quantitative dimension out of that term, necessitating an exclusive focus on Korea's understanding of the qualitative dimension. In Korea's view, any numerical difference in export prices can be explained away. Korea's proposed interpretation is inconsistent with the ordinary meaning of the term "significantly" in its context, and also with the Appellate Body's guidance regarding the meaning of the term "significant."

24. Section II.C responds to Korea's appeal of certain Panel findings related to the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement. The "explanation clause" sets forth the second of two conditions for using the alternative, average-to-transaction comparison methodology, and provides that an investigating authority may utilize the alternative comparison methodology "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."

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

26. Korea's proposed interpretation also does not accord with prior Appellate Body guidance concerning the relationship of the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."

27. Korea's proposed interpretation also is not logical. Logically, if an investigating authority is free to choose between the average-to-average comparison methodology and the transaction-to-transaction comparison methodology, and those 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 transaction-to-transaction 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 average-to-average comparison methodology.

28. Finally, Korea's concern about the purported "potential for serious abuse" lacks foundation, both in the evidentiary record before the Panel and in logic. Korea appears to suggest that an investigating authority might first opt to use the average-to-average comparison methodology, and then, when considering whether to use the alternative, average-to-transaction comparison methodology, explain only why the transaction-to-transaction comparison methodology could not take into account appropriately the pattern of export prices which differ significantly. Of course, this is not what the USDOC did in the washers anti-dumping investigation, nor has Korea pointed to any evidence that its concern has ever manifested itself in any USDOC determination.

29. Furthermore, in light of previous Appellate Body guidance, an investigating authority is obligated to reach conclusions that are "reasoned and adequate," and the investigating authority's reasoning must be "coherent and internally consistent." The hypothetical scenario Korea about which Korea speculates likely would not meet those requirements.

30. In section III, we address Korea's appeal of certain Panel findings with respect to the USDOC's countervailing duty determination.

31. Section III.A addresses Korea's claim that the Panel erred in rejecting its specificity claim with respect to RSTA Article 26. Contrary to Korea's assertions in this appeal, the Panel was faced with a straightforward application of Article 2.2 of the SCM Agreement. Article 2.2 provides, in relevant part, that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

32. The RSTA Article 26 subsidy program is expressly limited to investments in newly-acquired facilities located in a designated geographic region − i.e., the territory of Korea that falls outside the "Seoul overcrowding area." The Panel appropriately found no error in the USDOC's determination that this express limitation on access to a designated region rendered the subsidies regionally specific.

33. On appeal, Korea asserts a series of increasingly untenable legal and factual arguments.

34. Korea adduces a narrow, results-oriented reading of Article 2.2 of the SCM Agreement. According to Korea, the phrase "certain enterprises" in Article 2.2 means that regional specificity exists only where access to a subsidy is limited to the "legal personality" of enterprises falling within the region. On this theory, an enterprise can only have a single "location" − i.e., the "place" of its legal personality (despite the fact that an enterprise's legal personality is a fiction, and may not be affixed to a particular location).

35. The Panel correctly rejected this interpretative legerdemain. As the Panel observed, this line of reasoning is inconsistent with the text, context, and rationale of Article 2.2. Article 2.2 applies to situations in which access to subsidies is limited to a designated geographical region. The term "certain enterprises," which appears in Article 2.2, does not imply an additional requirement - i.e., that subsidies also must be limited with respect to the "location" of an individual enterprise's legal personality. Such a reading would be inconsistent with the definition of "certain enterprises" found in the chapeau of Article 2.1(a) of the SCM Agreement, and the ordinary meaning of the terms within that definition. Nor is Article 2.2 restricted to the location in which an enterprise happens to receive the "benefit" of a subsidy (which may or may not correspond to the location of that enterprise's "legal personality"). Korea's attempt to conflate concepts of "benefit" and specificity is improper.

36. And Korea's approach would create gaping loopholes where the text does not provide for them. Korea draws a sharp distinction between an "enterprise" and its "facilities," asserting that the latter are somehow excluded from the former and irrelevant to Article 2.2. This interpretation would permit RSTA Article 26 subsidies − which are available with respect to "facilities" that are located in a designated region − to evade scrutiny under the SCM Agreement.

37. In addition, Korea effectively re-asserts its argument that there is a "hierarchy" between Articles 2.1(b) and 2.2 of the SCM Agreement. The Panel correctly rejected this theory. There is no textual or logical basis for the assertion that a finding of regional specificity under Article 2.2 is subject to a finding under Article 2.1(b).

38. Korea criticizes the Panel's interpretation and application of the phrase "designated geographical region" in Article 2.2. Korea complains that the Panel should have adopted a series of results-oriented interpretations − for instance, finding in Article 2.2 an alleged requirement that a Member "affirmatively" designate a geographical region for a subsidy to be regionally specific. But the Panel correctly reasoned that Korea's argument would mean that where a Member expressly identifies a region in which access to subsidies is excluded, there is no "affirmative" designation of a region, despite the fact that such a designation would also make clear which geographical region is included, and have the same effect. The Panel correctly found that Article 2.2 does not include the "affirmatively" identify requirement Korea seeks to read into the text, which would reduce the inquiry under Article 2.2 to a semantic game, inviting ready circumvention of subsidy disciplines.

39. Korea then falls back on the "object and purpose" of Article 2.2, arguing that regional specificity is a "flexible" test, based on a sliding scale. But where the text of the measure limits access to a designated geographical region, no amount of "flexibility" makes it contrary to Article 2.2 to find that the subsidy is regionally specific. Among its many deficiencies, this argument would create a carve-out of certain regions from Article 2.2 that is nowhere found in the text, and fundamentally distort the nature of the inquiry under this provision.

40. Korea deploys "policy" arguments to buttress its critique. Korea asserts that subsidies are often a "first-best policy," and suggests that the Panel's interpretation would "improperly constrain" Member's ability to provide subsidies that address "overcrowding and urban sprawl." Korea goes so far as to impugn the Panel for having "impose[d] its own preferences on Members." The Panel did nothing of the sort, and this argument provides no basis to conclude that it is contrary to Article 2.2 to find a subsidy regionally specific where the text of the subsidy limits access to a designated geographical region.

41. Finally, Korea asserts two claims under Article 11 of the DSU. Korea asserts that the Panel's interpretation of Article 2.2 was insufficiently "positive" and "coherent," and makes the facially implausible claim that the Panel "completely fail[ed] to review" the USDOC's determination. These arguments are unsupported, and have no basis in Article 11.

42. In Section III.B, we address Korea's arguments with respect to the USDOC's calculation of the subsidy ratio for RSTA Articles 10(1)(3) and 26. Korea impugns the USDOC's decision to calculate these ratios in an "untied" manner. According to Korea, the USDOC should have employed a novel variation of the "tied" approach to attribution. Under Korea's theory, the USDOC should have carved up both the numerator and denominator of the subsidy ratio, based on a forensic accounting analysis of R&D and facilities expenses previously incurred.

43. The Panel appropriately rejected Korea's novel theory. As the Panel found, Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require that approach. Korea's theory is based on the alleged effect − which Korea misleadingly refers to as the "benefit" − of expenses that were incurred and associated activities that were undertaken well before the subsidy was bestowed. The Panel observed that the concept of an "expense" or "activity" conferring a "benefit" is alien to the SCM Agreement.

44. As the Panel's findings and record demonstrate, the R&D and facilities subsidies at issue lacked a "tie" to particular products:

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

- The structure, architecture, and design of the RSTA subsidy programs did not reflect a product-specific tie. As the Panel found, the tax credits were conferred by reference to "total R&D activities." Samsung submitted an *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.

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

45. Korea's remaining assertions − including its reliance on cost accounting materials from separate anti-dumping proceedings − are equally deficient. As the Panel explained, there is no basis for importing cost accounting principles into this countervailing duty proceeding. Nor did the Panel fail to conduct an objective assessment under Article 11 of the DSU, as Korea asserts.

46. Section III.C refutes Korea's claim with respect to overseas manufacturing. Korea criticizes the Panel for upholding the USDOC's decision not to include overseas sales in the denominator of the ratio for RSTA Article 10(1)(3) subsidies. Korea portrays this as a failure to "match" the elements in the numerator and denominator.

47. But like Korea's "tying" theory, this claim has no grounding in the bestowal of subsidies. This theory would require the attribution of subsidies based on the indirect overseas effect of R&D activity. The Panel appropriately rejected this theory.

48. 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. To the contrary, the language of these provisions suggests a focus on production activity occurring within the territory of the granting Member.

49. Korea dismisses the Panel's findings, on the grounds that the Panel improperly substituted a different rationale from the USDOC's. But it was entirely appropriate for the Panel to respond to Korea's claim in these proceedings, and assess its consistency with the SCM Agreement.

50. Korea relies heavily on cost verification documents from separate anti-dumping proceedings. Yet neither of these anti-dumping proceedings has any bearing on the subsidy attribution issue here. Even if R&D expenses or activities could be said to "benefit" or affect an overseas subsidiary for cost accounting purposes, this would not mean that subsidies should be attributed to overseas production.

51. Moreover, Korea fails to address the troubling implications of its theory. Investigating authorities would be required to conduct a jurisdiction-by-jurisdiction inquiry into how R&D activities affect production across the globe.

52. The USDOC presumed (rebuttably) that a Member grants a subsidy to benefit domestic production. Korea challenges that Panel's finding that the USDOC was entitled to conclude that this presumption was not rebutted on these facts. Here, again, Korea relies on separate anti-dumping proceedings, but they cannot rebut a presumption with respect to the attribution of the "benefit" of a subsidy to overseas manufacturing.

53. Korea falls back on a series of factual arguments. Korea's apparent request to have the Appellate Body render factual findings is improper. In any event, Korea's factual assertions are inaccurate and misleading, and Korea neglects other facts which strongly militate against its theory.

ANNEX B-4

EXECUTIVE SUMMARY OF KOREA'S APPELLEE'S SUBMISSION[1]

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

1. The Appellate Body has repeatedly clarified that "dumping" only exists based on a full consideration of all export transactions by each exporter, and only based on the product as a whole. Considering all export transactions is not "masking" anything, and is an indispensable part of a proper finding of "dumping".

2. The U.S. arguments on why the second sentence of Article 2.4.2 allows zeroing share two overarching flaws. First, the United States tries to distinguish the second sentence from the first sentence based on a few words in isolation without taking into account the Anti-Dumping Agreement as a whole and the consistent use of the key language "dumping" and "margin of dumping". Second, the United States has not really found any new arguments, and thus faces the difficulty of finding an argument that does not directly contradict prior Appellate Body findings.

3. Nothing in the text or context of Article 2.4.2 suggests that "dumping" or "margin of dumping" should have any different meaning than the rest of the Anti-Dumping Agreement. Indeed, this need for a consistent interpretation is why Article 2.4.2 opens with the overarching phrase "the existence of margins of dumping" – which echoes the Article 2.1 phrase that a product "is considered as being dumped" – before turning to some specific rules about the use of different comparison methods under different circumstances.

4. The U.S. textual arguments all fail. The Appellate Body has not grounded its zeroing decisions solely on narrow textual differences between the first and second sentences of Article 2.4.2. Rather, the Appellate Body has focused on the proper understanding of the overarching concepts of "dumping" and "margin of dumping", allowing the Appellate Body to interpret consistently the obligations of the various provisions of the Anti-Dumping Agreement under which zeroing has been challenged.

5. The United States argues for "systematically different" results that will "unmask targeted dumping". Implicit in this U.S. argument is its belief that "dumping" somehow exists for a group of export transactions, which must be "unmasked" so as to find "dumping" to exist. This U.S. inference that "dumping" for a subset of export transactions needs to be "unmasked" has no basis in the text of Article 2.4.2 or Appellate Body jurisprudence.

6. The U.S. argument for systematically different results so as to satisfy the principle of effectiveness has several problems. First, this argument essentially would have the principle of "effectiveness" take precedence over all other principles of interpretation. Second, a treaty text can have meaning even if the text results in the same or similar margins of dumping in some cases; treaty text can have meaning as long as it sometimes has meaning in those other cases. Third, the U.S. argument depends entirely on a false assertion of mathematical equivalence.

7. The U.S. argument about mathematical equivalence should be rejected for several reasons. First, the U.S. argument rests largely on the false assumption that the method of determining normal value must remain fixed. Changing normal value or changing export price adjustments makes perfect sense in the context of the inquiry posed by the second sentence of Article 2.4.2. Such changes would allow a more precise comparison, and thus allow a W-W or T-T comparison to "appropriately" take into account significant price differences. Although the United States develops many different hypothetical scenarios in an effort to show mathematical equivalence, these scenarios all depend critically on the assumption that normal value remains fixed.

[1] Pursuant to the Appellate Body guidelines for executive summaries, Korea confirms that this executive summary contains a total of 1,884 words (including footnotes) and that the overall other appellee submission (other than the executive summary) contains a total of 19,109 words (including footnotes).

8. Second, as is true with its hypothetical examples, the specific U.S. examples from *Washers* also depend on the same assumption that normal value does not change. Korea submitted specific evidence to the Panel demonstrating what would have happened in the *Washers* original investigation if normal value had been changed from an annual average to monthly averages. The results showed materially different dumping margins for both Samsung and LG. The United States never disputed this evidence.

9. Third, this argument of "mathematical equivalence" has been considered and rejected by the Appellate Body four times. The Appellate Body has repeatedly found that even if "under certain circumstances" or "under a specific set of assumptions" the results from different comparison methods are equivalent, such a situation does not render a provision *inutile*. The U.S. efforts to distinguish these repeated Appellate Body findings fail. The Appellate Body's occasional use of the phrase "unmask targeted dumping" does not require any different conclusion.

10. The Panel did not create a new approach that "effectively rewrote the second sentence". The Appellate Body has already provided repeated clarification of what "dumping" and "margin of dumping" mean for the Anti-Dumping Agreement. It is the United States − not the Panel − that now seeks to rewrite the text of Article 2.4.2 to create a different concept of "dumping" − one that finds "dumping" to exist in a subset of export transactions and ignores the remainder of the export transactions for an exporter.

B. The Panel Correctly Interpreted the "Pattern" Requirement

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

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

12. The fundamental flaw in the U.S. argument is that it fails to properly read the ordinary meaning of "pattern" in the overall context of the second sentence. The United States simply strings together dictionary definitions, and misses the most important contextual point in the second sentence − that the terms "pattern" and "differ significantly" set forth distinct requirements that both must be met. It is not enough to have export prices that "differ significantly" within one of the three specially enumerated categories. This need to focus on specific categories is precisely why the text does not just say the authorities must "find export prices which differ significantly". The text also requires finding a "pattern".

13. A "pattern" of lower prices makes sense because the lower prices can constitute the "intelligible form" that can be discerned from the other prices. There might even be a "pattern" of higher prices − higher export prices that stand out from the other export prices in some discernible and intelligible way. Yet the United States ignores this aspect of the term "pattern" and allows a "pattern" to be any collection of differing prices − including both higher and lower prices at the same time.

14. The United States also incorrectly believes that because the lower prices are being distinguished with reference to the higher prices, both the lower prices and the higher prices and all of the other prices are necessarily part of the "pattern". The Panel correctly dismissed this argument by noting the higher and lower prices could not be part of the same "pattern". The Panel noted that the "characteristic for establishing the degree of price variation is therefore not the same", since being higher than other prices or being lower than other prices are distinct "patterns".

15. Any need to "unmask" so-called "targeted dumping" does not change this interpretation. Korea has explained at some length in its Other Appellant Submission that the Panel misconceived the purpose of the second sentence, and that this language, "unmask targeted dumping", used by the Appellate Body in a single decision must be understood in context.

2. Random Price Differences Cannot Be Aggregated to Find a "Pattern"

16. The Panel correctly found two textual bases for its interpretation that distinct categories cannot be combined. First, the Panel reasonably interpreted the term "or". Since the categories of "purchasers, regions, or time periods" are inherently different, it was reasonable to interpret the use of "or" in this context as disjunctive. Moreover, within the text of the second sentence, the text uses the disjunctive "or" when discussing these three distinctive categories, but uses the conjunctive "and" to make clear that there must be both a "pattern" and an explanation.

17. Second, the Panel also reasonably interpreted the term "among", finding this term referred to something "in relation to the rest of the group they belong to". The issue is not whether the DPM initially tests each purchaser against other purchasers. Rather, the issue is whether differences for purchasers can be combined with differences based on time, and with differences based on regions, so as to find a single "pattern".

18. The United States also ignores other textual and contextual points. Under the U.S. interpretation of aggregating across different categories, any true "pattern" becomes obscured and becomes just random price variation. The authority can no longer distinguish whether export prices are actually differing among various purchasers, from whether different purchasers bought at different points in time.

C. The Panel Correctly Limited the Scope of the Exceptional Comparison Method

19. The Appellate Body has confirmed that the exception should be applied only to those transactions that meet the conditions to invoke the exception − the export transactions that fall within the "pattern". The Panel correctly noted that the text makes clear that the exceptional comparison method applies to the "prices of individual export transactions". The Panel also stressed the reference to "such differences" as confirming that the "individual export transactions" at issue were those that fell within the relevant pattern. The Panel also correctly noted the contextual point that the second sentence explicitly focused on a subset of export transactions that constitute a "pattern," and by definition created another subset of export transactions that were not part of the "pattern".

20. The United States tries to limit the Panel's rationale to the single word, "individual", even though the Panel explicitly addressed other textual elements of the second sentence and Article 2.4.2 more generally. This U.S. argument ignores the rest of the second sentence. The United States is also reading the term, "individual", narrower than the Appellate Body has read the term.

21. The United States also inappropriately dismisses the textual reference to "such differences". The existence of this particular phrase in the second sentence is telling. Instead of focusing on all price differences among all export transactions, the text instead focuses specifically on "such differences" and requires the explanation to focus on "such differences." The text is thus explicitly creating a group of sales that meet the conditions for the exception and another group of sales that do not.

22. It does not make interpretative sense to make all of the export transactions part of the "pattern". Even if all export prices are used as a benchmark to determine the subset of prices that "differ significantly" from the benchmark, use of the benchmark export prices does not make them part of the "pattern".

23. The U.S. interpretation also ignores the logical relationship between a basic rule and an exception. Under the U.S. interpretation, there would be no limit on the scope of the exception.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil would like to comment in the present appeal proceedings three specific aspects of Panel's report: (i) the identification of the patterns for purchasers, regions or time periods and their aggregation; (ii) the explanation requirement to depart from the normal comparison methods; and (iii) the practical application of the second sentence of Article 2.4.2.

2. Brazil understands that the patterns of price variations that matter for determining the margin of dumping in the situations of "targeted dumping" are only those that are significantly *below* the price for the tested purchaser, region or time period. Brazil also agrees with the Panel when it states that a "pattern" of export prices cannot be found *across* the different categories covered by the second sentence of Article 2.4.2, but should rather be found than "among" the constituent elements of each category.

3. With regard to the "explanation" required by Article 2.4.2, Brazil understands that a departure from the normal symmetrical methods demands an explanation as to why the price differences could not be unmasked by the application of both W-W or T-T methods.

4. The application of the W-T method also presents serious challenges, such as what should be done with the transactions outside the pattern. It is important to reach a clear distinction between "zeroing" and "systemic disregarding". The solution given by the Panel appears to be in line with the objectives of the Anti-Dumping Agreement.

ANNEX C-2

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. Canada is participating in this appeal as it has a substantial systemic interest in the interpretation of WTO anti-dumping rules.

2. Canada's written submission addresses three issues regarding the application of the exceptional weighted average-to-transaction (average-to-transaction) methodology referred to in 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). In particular, Canada will focus on the need for an investigating authority to properly identify a pattern among export prices, the impermissibility of zeroing in applying the average-to-transaction methodology, and the Panel's errors in allowing "systemic disregarding".

3. The text of the second sentence of Article 2.4.2 creates an exception to the two standard dumping calculation methodologies and thus requires a rigorous application of the criteria contained therein. An investigating authority must examine whether a pattern consisting of a regular and intelligible series of export prices can be identified among purchasers, regions, or time periods. The Panel correctly found that the United States Department of Commerce (USDOC) Differential Pricing Methodology (DPM) fails to meet this requirement when it aggregates transactions from across all three groups.

4. With respect to zeroing, the correct application of the principles espoused in past decisions can only lead to the conclusion that zeroing is also impermissible under the average-to-transaction methodology. Furthermore, as zeroing distorts the magnitude of a dumping margin, its use in applying the average-to-transaction methodology violates the fair comparison requirement in Article 2.4.

5. Finally, the Panel erred in finding that the second sentence of Article 2.4.2 permits an investigating authority to establish an "amount of dumping" exclusively by reference to "pattern" transactions. The Panel further erred in finding that, when combining comparison results under the weighted average-to-weighted average (average-to-average) and average-to-transaction methodologies, the "systemic disregarding" of negative average-to-average comparison results is permissible.

6. There are four fundamental problems associated with these findings. First, the Panel misapplied the well-established interpretation of "dumping" as an exporter- and product-specific concept, and the "margin of dumping" as pertaining to all export sales of subject goods by an exporter. Second, the exception under the second sentence of Article 2.4.2 does not alter these principles by permitting an investigating authority to disregard certain transactions when calculating a margin of dumping for an exporter. Third, the Panel ignored the Appellate Body's repeated rejection of mathematical equivalence as a basis for justifying zeroing. Fourth, permitting the establishment of a "margin of dumping" based on a subset of "pattern" transactions would distort the margin of dumping in a manner as egregious as the application of zeroing under the average-to-average or transaction-to-transaction methodologies.

[1] Pursuant to the Appellate Body guidelines for executive summaries, Canada confirms that the executive summary contains a total of 478 words (including footnotes) and that the overall third party submission (other than the executive summary) contains a total of 4823 words (including footnotes).

ANNEX C-3

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

I. ISSUES COVERED BY CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. China's third participant's submission focuses primarily on issues of legal interpretation that are relevant for China's own complaint against certain US measures in the parallel proceedings in *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* (DS471).

II. APPEAL ISSUES RELATING TO USDOC'S FAILURE TO COMPLY WITH THE CONDITIONS ON THE USE OF THE EXCEPTIONAL W-T COMPARISON METHODOLOGY UNDER ARTICLE 2.4.2, SECOND SENTENCE

A. The Panel did not err in its interpretation of the scope of the relevant pricing pattern under Article 2.4.2, second sentence

2. The Panel did not err when concluding that the "pattern" for purposes of Article 2.4.2, second sentence, comprises only a *subset* of the examined export transactions. A consideration of the text, context and object and purpose of Article 2.4.2 reveals that the Panel committed no error in finding that a "pattern of export prices which differ significantly among different purchasers, regions or time periods" ("relevant pricing pattern") necessarily comprises a *subset* of the entire universe of the export sales of a product as a whole by an exporter, and *not* as the United States seems to contend, *all* export sales. Specifically, a relevant pricing pattern is a subset of low-priced sales to a particular customer or a particular region, or during a particular time period.

3. Identifying a pattern of export prices characterized by *high* export prices would be inconsistent with the very concept of dumping that is at the centre of Article 2.4.2. Hence, the relevant pricing pattern referred to in Article 2.4.2, second sentence, must be one of *low* and not *high* export prices. The differences between high prices and other prices are not a justification for resort to the exceptional methodology under the second sentence. Such differences are not *significant* in the sense of Article 2.4.2.

4. Accordingly, the Appellate Body should uphold the Panel's finding that the "pattern" for purposes of Article 2.4.2, second sentence, necessarily comprises only a *subset* of the examined export transactions. The Appellate Body should modify the Panel's findings to state clearly that a "pattern" under Article 2.4.2, second sentence, may comprise only *low-priced* sales.

B. The Panel did not err in finding that USDOC's differential pricing methodology is "as such" inconsistent with Article 2.4.2, second sentence, because it aggregates random and unrelated price variations and thereby does not allow proper establishment of a relevant pricing pattern

5. The Panel did not err when finding that USDOC's so-called "differential pricing" methodology ("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.

6. China agrees that the phrase "among different purchasers, regions or time periods" in Article 2.4.2, second sentence, determines the question of how the relevant pricing pattern must be identified. The Panel rightly attached significance to the use of the disjunctive "or" in this phrase, 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 as USDOC appears to do with the DPM. The Panel was equally right to take the view that a "pattern" of significant price differences "among" different purchasers, regions or time periods must be found in the price variation *within a group* of purchasers, regions, or time periods.

7. The Appellate Body should, therefore, uphold the Panel's finding that USDOC's DPM is inconsistent "as such" with the second sentence of Article 2.4.2.

C. The Panel erred by finding that investigating authorities are not required, under Article 2.4.2, second sentence, to consider qualitative factors

8. The Panel erred when it found that USDOC did not act inconsistently with Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* by determining the existence of "a pattern of export prices which differ significantly . . ." on the basis of purely *quantitative* criteria, without any *qualitative* assessment of the reasons for the relevant price differences.

9. One *qualitative* dimension that must be considered – especially where targeted dumping is alleged with respect to a period of time – is *seasonality*. Another such qualitative dimension would be a *secular decline in costs of production* over the course of the relevant time period, which equally affects home market and export market prices for the product.

10. The Appellate Body should reverse the Panel's interpretation and find that investigating authorities must consider qualitative factors when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among purchasers, regions, or time periods. The Appellate Body should find that the qualitative factors to be considered are factors that are unrelated to any form of unfair pricing practice but that lead to regular or predicable variations in prices. The Appellate Body should find that an authority has an obligation to examine these qualitative factors on its own initiative, i.e., regardless whether verifiable evidence has been provided by interested parties.

D. The Panel erred by finding that investigating authorities need not address the T-T comparison methodology when explaining the need to depart from the symmetrical comparison methodologies

11. The Panel erred when it rejected Korea's claim that USDOC acted inconsistently with Article 2.4.2, second sentence, by failing to explain why the observed export price differences could not be taken into account appropriately by the use of the transaction-to-transaction ("T-T") comparison methodology. China agrees with Korea that the required "explanation" must include a discussion of *both* the weighted average-to-weighted average ("W-W") and transaction-to-transaction ("T-T") comparison methodologies.

12. As a textual matter, this issue devolves upon the meaning of the word "or" in the explanation clause of the second sentence of Article 2.4.2. In order properly to interpret the use of the word "or" in that sentence, one must take into account the context provided by the first sentence of Article 2.4.2, which contains the general rule that "normally" an authority is to use a symmetrical comparison methodology. Hence, recourse to the exceptional W-T comparison methodology is allowed only if *neither* of the symmetrical comparison methodologies can take the identified "pattern" into account appropriately.

13. China agrees that Article 2.4.2 grants discretion to investigating authorities when it comes to choosing between the two comparison methodologies that are *normally* to be used. However, that initial discretion has been exhausted and thereby becomes irrelevant if the investigating authority wishes to have recourse to the exceptional W-T comparison methodology, inasmuch as that exceptional comparison methodology may be employed only if the specific conditions set forth by the second sentence of Article 2.4.2 are met.

14. The Appellate Body should therefore reverse the appealed finding by the Panel, and confirm that, under Article 2.4.2, second sentence, investigating authorities must address the reason why the T-T comparison methodology, as well as the W-W comparison methodology, cannot be used before turning to the exceptional W-T comparison methodology.

III. APPEAL ISSUES RELATING TO THE DISCIPLINES IMPOSED BY THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994 ON THE MANNER IN WHICH THE W-T COMPARISON METHODOLOGY MAY BE APPLIED

A. The Panel did not err in finding that the W-T comparison methodology under Article 2.4.2, second sentence, may only be applied to transactions that form part of the relevant pricing pattern

15. The Panel's finding that, under Article 2.4.2, second sentence, the W-T comparison methodology may not be applied to all export sales but only to those forming part of the relevant pricing pattern is *not* in error. This view finds support in the text of the *Anti-Dumping Agreement*.

16. *First*, the phrase "individual export transactions" in the text of the second sentence of Article 2.4.2 refers to the specific transactions falling within the relevant pricing pattern. Having applied the W-T comparison methodology to the individual transactions that comprise the "pattern", the non-pattern transactions must be compared with normal value on the basis of one of the symmetrical comparison methodologies. The authority would then need to aggregate all intermediate comparison results (whether W-W, T-T or W-T) in order to determine a margin of dumping for the product as a whole.

17. *Second*, it flows from the text of Article 2.4.2 that a relevant pricing pattern may only be taken into account "appropriately" and not in an unreasonable or disproportionate manner. The permission to use the W-T comparison methodology is not a blanket authorization to use that methodology for all sales. Rather, it grants limited authority to enable an authority to deal appropriately with a relevant pricing pattern that arises in respect of a subset of sales.

18. *Third*, pursuant to an established canon of treaty interpretation, exceptions (such as that expressed in the second sentence of Article 2.4.2) apply only to the extent that they conflict with the general rule from which they derogate. It follows that the alternative methodology may be applied solely to sales forming part of a relevant pricing pattern that cannot be taken into account by using a symmetrical comparison methodology.

19. Accordingly, the Appellate Body should uphold the Panel's finding that the W-T comparison methodology may not be applied to all export sales. For sales that are *not* part of the relevant pricing pattern, Article 2.4.2, second sentence, does not provide any authorization to depart from the standard rule that mandates use of the symmetrical comparison methodologies.

B. The Panel did not err in finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Article 2.4.2, second sentence

20. The Panel did not err when it found that the use of zeroing in connection with the application of the W-T comparison methodology under Article 2.4.2, second sentence, is inconsistent with the second sentence of Article 2.4.2 "as such", and "as applied" in the *Washers* anti-dumping investigation.

21. The use of zeroing when applying the W-T comparison methodology under Article 2.4.2, second sentence, violates the fundamental product-wide and exporter specific nature of the concepts of "dumping" and "margins of dumping" Because a transaction-specific (or intermediate) comparison result is *not* itself "dumping", the United States is mistaken that a transaction-specific comparison result can be *evidence* of dumping in and of itself, without aggregating the individual transaction-specific comparison result *together* with all other intermediate transaction-specific comparison results to see if there actually is "dumping".

22. Although the Panel's ultimate finding as to the WTO-inconsistency of zeroing when aggregating transaction-specific comparison results arising in the context of the W-T comparison methodology is correct, its reasoning contains an important error regarding the nature of "dumping". The Panel reasoned that, 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 limit its analysis to the pricing behaviour of the exporter or foreign producer in respect of the transactions that form a "pattern". That approach

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

23. The United States insists that the second sentence of Article 2.4.2 would be inutile unless zeroing is permitted. In the United States' view, in order to avoid inutility, it is essential that the results of use of the W-T comparison methodology differ systematically from those that would arise under the W-W comparison methodology. Yet, to the extent that the investigating authority considers it necessary to ensure that the application of the W-T comparison methodology leads to a different outcome than the application of the W-W comparison methodology, it may always have recourse to the existing WTO-consistent alternative techniques for calculating the weighted average normal value.

24. Overall, although certain elements of the Panel's reasoning are problematic, the Appellate Body should uphold the Panel's finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Article 2.4.2, second sentence.

C. The Panel erred by allowing investigating authorities to disregard certain results when combining the results of W-T comparisons with other comparisons obtained through using the W-W comparison methodology

25. The Panel erred when it rejected Korea's claim that USDOC's practice of failing to give the full mathematical weight to the intermediate results of certain comparisons when aggregating those results with the intermediate results of other comparisons, amounts to a form of zeroing. Under the challenged practice, just as in other forms of zeroing, negative intermediate values are not permitted to offset positive intermediate values during the aggregation process.

26. The Panel's reasoning suggests that export prices for sales *outside* of the identified pattern may somehow be disregarded when establishing the numerator of the fraction used to calculate a margin of dumping. China considers that the Panel's asymmetrical treatment of the numerator and denominator is unsupported by the text of Article 2.4.2, and is contrary to the general principle that a margin of dumping must be calculated for the product as a whole. In order to satisfy that fundamental obligation, the numerator of the fraction must include *all* intermediate comparison results and the denominator must include the value of all sales on which those intermediate comparison results were calculated.

27. The Appellate Body should reverse the Panel's decision to reject Korea's claim that USDOC's use of what Korea calls "systemic disregarding" in the context of the DPM is inconsistent "as such" with Article 2.4.2, and Article 2.4 of the *Anti-Dumping Agreement*.

D. The Panel did not err in finding that the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994

28. The Panel did not err in finding that the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994. The United States' appeal of this finding by the Panel is fully consequential to its appeal of the Panel's finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Articles 2.4.2, second sentence, and Article 2.4.

29. Even if the Appellate Body were to find that investigating authorities may apply zeroing procedures when using the W-T comparison methodology under the second sentence of Article 2.4.2, the United States' appeal remains devoid of merit. In essence, this is so because the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994. The United States has not even attempted to demonstrate that Article 2.4.2, second sentence applies to administrative reviews.

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

ANNEX C-4

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

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

1. 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.

2. 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.

3. 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.

4. The matter before the Appellate Body 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.

5. 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.

6. 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.

7. 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.

B. Korea's claims under the SCM Agreement

8. With respect to the issue of regional specificity, the European Union considers that Korea's distinction between "enterprises" and "facilities" is artificial as facilities will normally form part of an enterprise. Korea's argument that enterprises must have legal personality is not convincing because the term "certain enterprises" in Article 2.2 also covers industries which clearly do not have legal personality. Furthermore, there is no apparent reason why subsidies should not be covered by Article 2.2 if they are granted to entities that may not necessarily have legal personality. A different interpretation could lead to the circumvention of Article 2.2.

9. The European Union considers that specificity under Article 2.2 is not called into question by the fact that the subsidy only excludes investments in 2% of Korea's land mass. The term "geographical region" in Article 2.2 is not qualified in any way and hence the designation of *any* geographical region − irrespective of its size − may trigger the application of Article 2.2. Korea's interpretation would also risk leading to significant legal uncertainty as regards determining the relevant geographic size of an area. The European Union notes further that while the Seoul overcrowding control region may only account for 2% of Korea's land mass, the city of Seoul (excluding the metropolitan area) accounts for more than 20% of Korea's total population and in 2012 created 23% of Korea's overall GDP.

10. The European Union agrees with the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that the application of one of the sub-paragraphs of Article 2.1 is not in itself determinative as regards "specificity". The European Union therefore disagrees with Korea's argument that a finding of non-specificity under Article 2.1(b) should lead to a finding of non-specificity also under Article 2.2.

11. With respect to Article VI:3 of the GATT1994 and Article 19.4 of the SCM Agreement, the European Union recalls that both provisions require a direct link between the levy of countervailing duties with respect to the product under investigation and the determination that a subsidy is found with respect to "such" (i.e. the same) product. In light of these provisions and previous case law, Members must accurately determine the per unit subsidy amount with respect to the product in question and not exceed that amount. However, in practice it may be very difficult to establish if a subsidy is clearly "tied" in law or in fact to the production or sale of a particular product. If the subsidy is not tied to any particular product, it may be presumed that the company allocated this benefit across its entire production.

12. Regarding the issue whether the tax credits in the case at hand were "tied" to Samsung's digital appliances, the European Union considers that one relevant element to consider could be whether the *eligibility criteria* for the subsidy are linked – i.e. tied - to the product in question. Other elements to consider could be whether *the use of the subsidy* is limited - i.e. tied - to the product in question or whether Samsung *in casu* did actually use the tax credits for its digital appliances.

13. Regarding the issue whether the subsidy is to be allocated to Samsung's local or worldwide activities, the European Union considers that relevant elements to consider could be whether the subsidy was granted with respect to R&D activities conducted in Korea or with respect to R&D activities also outside Korea and whether Samsung used the tax credits for its Korean or worldwide production.

ANNEX C-5

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. In this appellate proceeding, Japan will focus on the requirements of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement and the USDOC's methodologies concerning the application of the said provision. In doing so, Japan would particularly like to address the systemic issues arising out of the USDOC's continued use of zeroing when determining dumping and calculating margins of dumping by referring to the second sentence of Article 2.4.2.

2. To start with the overview of the relevant provisions of the Anti-Dumping Agreement and the understanding of dumping and margins of dumping as a background, Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement recognise dumping when "a product" is introduced into the commerce of an importing Member at less than its normal value. Through a number of prior WTO disputes, the Appellate Body has established that dumping and margins of dumping within the meaning of Article VI of the GATT 1994 and the Anti-Dumping Agreement do not pertain to individual transactions or individual models/sub-types of a product, but to a product under investigation as a whole. The Appellate Body also ruled that such interpretation 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. On this basis, the Appellate Body has consistently held zeroing to be inconsistent with the Anti-Dumping Agreement.

3. Article 2.4.2 of the Anti-Dumping Agreement sets forth three comparison methodologies for establishing the existence of margins of dumping. While the W-W and T-T comparison methodologies under the first sentence "shall normally" be used, an investigating authority may use the exceptional W-T comparison methodology under the second sentence if the requirements of its pattern clause and explanation clause are met. As clarified by the Appellate Body, the second sentence is an instrument to "unmask" "targeted dumping", i.e. dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.

4. Regarding the interpretation of the pattern clause, a "pattern" must be of export prices that differ significantly "among different purchasers, regions or time periods". In other words, export prices for *some* purchaser (or region or time period) must differ significantly from export prices for *other* purchasers (or region or time period). Further, the Appellate Body in *US – Zeroing (Japan)* explained that the export prices that fall within the relevant pricing pattern "must be found to differ significantly from other export prices."

5. In order to evaluate whether observed price differences are "significant[]", one needs to examine whether the observed price differences are "important, notable, consequential" in the context of the specific case at hand. Thus, as the Panel correctly found, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances, including the nature of the product and market in question. In addition, since an exporter generally does not sell its product at a uniform price across different purchasers, regions and time periods, the term "significantly" implies that price differences must go beyond the kind of price variations that "normally" exist in the market.

6. As to the explanation clause, 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 "taken into account appropriately" by the methodologies set forth in the first sentence of Article 2.4.2, which "shall normally" be used. Thus, an "explanation" has to be provided as to the fact that observed variations in export prices are not a mere reflection of factors or pricing patterns that normally exist or otherwise the methodologies contemplated in the first sentence cannot be used to determine an appropriate margin of dumping. Japan agrees with the Panel's finding to that effect.

7. On the other hand, Japan does not agree with the Panel's finding that the investigating authority need not provide an explanation as to why the T-T comparison methodology cannot take into account appropriately the price differences. The combination of the negative form ("cannot") and the conjunction "or" in the second sentence clearly indicate that the investigating authority must address both the W-W *and* the T-T comparison methodology under the explanation clause.

8. The appropriate scope of the application of the W-T comparison methodology under the second sentence should be determined by considering not only the term "pattern" in isolation but also its context, including, *inter alia*, its explanation clause as well as the first sentence. Since the W-W and T-T comparison methodologies under the first sentence cover situations where all export transactions are taken into account, it appears natural to limit the application of the W-T comparison methodology under the second sentence in a manner necessary and appropriate to unmask the "three kinds of" targeted dumping, i.e. dumping targeted purchasers, regions or time periods. This reading is consistent with the use of the term "may" in the second sentence, as well as the Appellate Body's explanation in *US – Zeroing (Japan)*.

9. Regarding the permissibility of zeroing under the second sentence of Article 2.4.2, neither that provision nor other provisions of the Anti-Dumping Agreement contain any language suggesting that an investigating authority is allowed to depart from the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-specific, and not transaction-specific, concepts. Zeroing is also at odds with, and goes far beyond, the role and function of the second sentence of Article 2.4.2 to unmask the "three kinds of" targeted dumping. Furthermore, the mathematical equivalence argument does not warrant an interpretation that zeroing is permitted. While this argument rests on the assumption that W-W and W-T comparison methodologies always or normally use the exact same set of pricing data (i.e. normal value(s) and export prices), such assumption finds no basis in the Anti-Dumping Agreement.

10. Finally, with respect to the application of the second sentence of Article 2.4.2 to the specific methodology adopted by the USDOC, the DPM relies solely on mechanical and inflexible criteria such as +0.8 or −0.8, and 33% in order to determine whether export prices "differ significantly" from one another. Thus, the DPM fails to consider the prevailing factual circumstances on a case-by-case basis, which is inconsistent with the second sentence of Article 2.4.2. In addition, the DPM fails to identify a pattern of export prices which differ significantly "among different purchasers, regions or time periods", because it aggregates unrelated price variations *across* different purchasers, regions *and* time periods, and because it takes into account price variations among different *models* of a single product as constituting a "pattern".

ANNEX C-6

EXECUTIVE SUMMARY OF NORWAY'S THIRD PARTICIPANT'S SUBMISSION

THE USE OF ZEROING

1. The Panel found that the United States' use of zeroing when applying the "weighted-average-to-transaction" methodology is both "as applied" and "as such" inconsistent with the second sentence of Article 2.4.2 and Article 2.4 of the *Anti-Dumping Agreement*. The United States seeks review of these findings. Norway argues that the Panel's findings on these issues should be upheld.

2. In line with previous Appellate Body Reports, Norway holds that "dumping" and "margins of dumping" cannot occur at the level of individual transactions. The Appellate Body has emphasized that the concepts have the same meaning throughout the *Anti-Dumping Agreement* and for all types of proceedings. All intermediate comparison results must be aggregated in order to establish the margin of dumping for the product as a whole and for each individual exporter. The negotiation history referred to by the United States furthermore only shows that some Members were concerned about the use of zeroing when applying the comparison methodology in question. A permission of applying zeroing when using said methodology cannot be deducted.

3. Furthermore, the use of zeroing while applying the "weighted-average-to-transaction" methodology distorts certain facts related to the investigation and contains an inherent bias, making a positive determination of dumping more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the *Anti-Dumping Agreement*.

ANNEX C-7

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

1. The Panel correctly applied the Appellate Body's numerous rulings that the terms "dumping" and "margin of dumping" are exporter-specific concepts that require that all sales from each exporter be included so that the determination of dumping can be made on the product as a whole. The practice of "zeroing", which disregards export transactions made at prices above normal value, is necessarily inconsistent with the Appellate Body's repeated determinations concerning the meaning of the terms "dumping" and "margin of dumping".

2. Viet Nam therefore disagrees with the United States' claim that zeroing can be applied in some cases under the guise of the second sentence of Article 2.4.2 of the Anti-dumping Agreement. The United States' claim is based on a strained and improper reading of isolated words within the second sentence of Article 2.4.2. Moreover, the United States' peculiar justification because of a concept of "mathematical equivalence" is neither required by the Anti-dumping Agreement, nor correct as a matter of fact.

3. Viet Nam agrees with Korea's arguments that the Panel's acceptance of "zeroing", even when limited to the combination of sales in the W-W subgroup and those in the W-T subgroup, is inconsistent with the Anti-dumping Agreement. Viet Nam submits that the panel's conclusion in this respect is fundamentally inconsistent with the terms "dumping" and "margin of dumping" as repeatedly enunciated by the Appellate Body. Further, Viet Nam believes that there is nothing in either the language or the "object and purpose" of Article 2.4.2 that compels such an inconsistent result.

ANNEX D

PROCEDURAL RULING

ANNEX D-1

PROCEDURAL RULING OF 9 MAY 2016

1. On 5 April 2016, the United States and Korea jointly addressed a letter ("joint request") to the Chairman of the Appellate Body, requesting that the Division that would hear the appeal in this dispute adopt, pursuant to Rule 16(1) of the Working Procedures, additional procedures for the protection of business confidential information (BCI) on the record of this dispute.

2. The United States and Korea requested the Appellate Body to adopt additional procedures for the protection of BCI on the basis of the BCI procedures adopted by the Panel and attached draft procedures to their joint request. They explained that BCI procedures in this appeal would serve "the interest of fairness and orderly procedure in the conduct of an appeal", according to Rule 16(1) of the Working Procedures.

3. The United States and Korea stated that the BCI procedures adopted by the Panel were necessary to enable the parties to submit to the Panel BCI that was previously treated as confidential in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute. They requested additional protection of BCI allowing third parties and their government employees to have access to BCI and requiring non-disclosure to officers or employees of enterprises engaged in the production, export or import of the products that were the subject of the investigations at issue. They requested that BCI be identified in documents and that documents containing BCI be marked as such. They further requested that parties making oral statements containing BCI be required to inform the Division, and that the Division ensure that only persons entitled to access BCI are in the room to hear the statements. They proposed that no BCI be disclosed in the Appellate Body Report. They proposed that the Appellate Body provide the participants with a confidential version of the draft Appellate Body Report and give each of them the opportunity to review the Report prior to its circulation to verify and ensure that the Appellate Body does not inadvertently disclose any information that contains BCI. Korea and the United States also proposed that these additional procedures contain further requirements: (i) to treat the information designated as BCI as confidential; (ii) not to disclose the information to non-authorized persons under the procedures; and (iii) to use the information only for the purposes of the dispute.

4. On 8 April 2016, the European Union addressed a letter to the Chairman of the Appellate Body commenting on the joint request. The European Union expressed the view that BCI procedures at the appellate stage should not be based on the Panel's BCI procedures, which it considered were, in certain respects, superseded by recent rulings by the Appellate Body. The European Union recalled recent Appellate Body decisions on the issues of BCI and argued that BCI procedures at the appellate stage should not define BCI by reference to the definition that was adopted by the Panel, which in turn referred to the definition adopted in the underlying municipal proceedings. Moreover, the European Union argued that BCI procedures at the appellate stage should provide for the possibility of review by the Appellate Body of the designation of information as BCI proposed by the participants, either at the request of any participants or third participants or on its own motion.

5. On 19 April 2016, the United States filed its Notice of Appeal. In a letter communicated to the Appellate Body on the same day, the United States sought guidance from the Appellate Body on how to proceed with filing its appellant's submission, which contained information that was designated as BCI in the panel proceedings. In a letter issued on the same day, the Chair of the Appellate Body on behalf of the Division informed the United States and the other participants that, pending a final decision on the joint request, the Division had decided to provide provisional additional protection to information marked as BCI in the United States' appellant's submission and in an eventual other appellant's submission by Korea. On 19 April 2016, the United States filed its appellant's submission. Korea filed a Notice of Other Appeal and an other appellant's submission on 25 April 2016. Both submissions contain information marked as BCI.

6. On 21 April 2016, the Chair of the Appellate Body addressed a letter on behalf of the Division hearing the appeal in this dispute to the participants, asking them to further substantiate

why certain information contained in their submissions and in the Panel record warranted special protection at the appellate stage beyond that already provided under the confidentiality standards set out in Articles 17.10 and 18.2 of the DSU, and the Rules of Conduct. Korea and the United States responded to this request with separate communications on 26 April 2016.

7. Korea noted that its other appellant's submission contained information regarding one of the Korean exporters' sales volumes and values, costs of production, including R&D expenditures, and other financial information, whose disclosure could cause this exporter to suffer competitive harm. Korea pointed out that this information is not in the public domain and was provided by the exporter under the expectation that it will be adequately protected. Korea further argued that the information for which Korea and the United States jointly requested additional protection met the criteria identified by the Appellate Body in its Procedural Ruling in *EC and certain member States — Large Civil Aircraft* and that the additional protection requested by Korea and the United States would not impinge on the duties of the Appellate Body or on the rights of the third participants.

8. The United States noted that there was no disagreement between the parties concerning whether certain information constituted BCI, and that there was no basis to doubt that the information was confidential as contemplated under Article 6.5 of the Anti-Dumping Agreement. The United States further noted that the information related to sensitive commercial data, such as sales and production data, tax information, and research and development expenses for the submitting companies, and that any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies submitting the information.

9. The United States considered that the additional protection sought by the parties, although important, was minimal and would not hinder the participation by third participants or the work of the Division in this appeal. The United States recalled that, in essence, this protection amounted to a requirement to appropriately identify and mark submissions or statements containing BCI, including when BCI is submitted by a party or third party that did not originally provide the information to the Panel, and a restriction that would preclude access to BCI by individuals representing competitor companies in order to avoid harm to the originator of the information.

10. On 26 April 2016, the Division invited the third participants to provide further comments on the joint request by Korea and the United States of 5 April 2016 and on their subsequent communications of 26 April 2016. The European Union recalled its communication of 8 April 2016 and noted that Articles 17.10 and 18.2 of the DSU already imply the protection jointly requested by Korea and the United States. The European Union considered what was requested by Korea and the United States less in the nature of "additional protection" and more in the nature of clarifications and elaborations of the protection already provided by the existing general rules. China did not provide substantive comments on the joint request and stated that it had no objection to the joint proposal of the parties for additional protection of BCI.

11. We recall that in *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered that the DSU and the *Rules of Conduct* already provide for confidentiality, and that any additional protection must be justified. The Appellate Body stated that, while "[p]articipants requesting particularized arrangements have the burden of justifying that such arrangements are *necessary* in a given case adequately to protect certain information"[1], it is the task of the WTO adjudicator and not of the parties to determine whether additional protection in the form of BCI procedures is called for. The Appellate Body considered in that dispute that the WTO adjudicator should decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection.[2]

12. The Appellate Body also stated in *EC and certain member States – Large Civil Aircraft* that "the determination of whether the particular information that was submitted deserved additional protection and the particular degree of such protection" should be based on objective criteria, which "could include, for example: whether the information is proprietary; whether it is in the public domain or protected; whether it has a high commercial value for the originator of the

[1] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10.

[2] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market".[3]

13. In *China – HP-SSST*, the Appellate Body stated that "[i]n determining the scope and content of such procedures, the panel must consider the effect they may have on the exercise by the panel of its adjudicative duties under the DSU and other covered agreements, the parties' rights to due process, the rights of the third parties, and the rights and systemic interests of other WTO Members."[4] The Appellate Body noted that any "additional procedures adopted by a panel to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the relevant provisions of the DSU and other covered agreements (including the Anti-Dumping Agreement)."[5] The Appellate Body stated that an obligation rested upon the panel to adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential.[6] We further note that the panel in *China – HP-SSST* removed, in a preliminary ruling, from its initial procedures for the protection of BCI, the requirement that a party must provide prior written authorization from the entity that submitted the confidential information in the underlying anti-dumping proceedings when submitting such information to the Panel.[7]

14. In *China – HP-SSST*, the Appellate Body also considered that the treatment of information as confidential by an investigative authority in domestic proceedings should not be conflated with "the confidential treatment of information provided *by a WTO Member to a panel or the Appellate Body in the context of WTO dispute settlement proceedings*"[8], and that "whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO panel".[9]

15. Bearing in mind the above-mentioned rulings by the Appellate Body on the issue of additional protection of BCI, we have decided to accord additional protection to the information, which has been designated as BCI in the submissions to the Appellate Body and in the panel record. As Korea and the United States have explained in their joint requests and substantiated further in their subsequent written clarifications, the information for which additional protection is sought relates to sensitive commercial data of the companies concerned in these proceedings. Korea noted, inter alia, that its other appellant's submission contained information marked as BCI regarding one of the exporters' sales volumes and values, costs of production, including R&D expenditures, and other financial information whose disclosure could cause this exporter to suffer competitive harm. The United States in turn submitted that the information marked as BCI in its appellant's submission related to sensitive commercial data, such as sales and production data, tax information, and research and development expenses of the submitting companies and that any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies submitting the information.

16. The additional BCI protection is provided according to the following terms:

17. No person may have access to information, which has been designated as BCI in the submissions to the Appellate Body and in the panel record, except a member of the Appellate Body

[3] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[4] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 8-9).

[5] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9).

[6] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311.

[7] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.26-7.29. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.305.

[8] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.313. (emphasis original)

[9] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.316.

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

18. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant or third participant shall have responsibility in this regard for its employees as well as any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

19. A participant or third participant that submits a document containing BCI to the Appellate Body, including in written submissions and oral statements, shall clearly identify such information in the document. The participant or third participant shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[…]]. The first page or cover of the document shall state "Contains business confidential information on pages XXX", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party or third party that intends to make an oral statement containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

20. The Appellate Body 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 Appellate Body may, however, make statements of conclusion drawn from such information.