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

(DS464)

RESPONSES OF THE UNITED STATES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES RELATED TO COUNTERVAILING DUTY ISSUES

June 19, 2015

TABLE OF REPORTS

Short Form	Full Citation
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
EC – Large Civil Aircraft (Panel)	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
US – Anti-Dumping and Countervailing Duties (China) (Panel)	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
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – FSC (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000
US – Large Civil Aircraft (2nd Complaint)(AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Large Civil Aircraft (2nd Complaint) (Panel)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R

TABLE OF EXHIBITS

Exhibit No.	Description
USA-100	Response of Samsung Electronics Co., Ltd. to the U.S. Department of Commerce's February 15, 2012 Questionnaire, *Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea* (April 10, 2012) (excerpts)
USA-101	Verification of the Questionnaire Responses Submitted by LG Electronics, Inc. (LG) and ServeOne, Inc. (ServeOne), *Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea* (October 22, 2012) (excerpts)

5 SUBSIDY CLAIMS

Allocation of RSTA Article 10(1)(3) subsidies

5.1. Which legal entity received the RSTA Article 10(1)(3) tax credits? Does that entity engage in production and/or sales outside of Korea?

1. The following companies received RSTA Article 10(1)(3) tax credits in 2011: Samsung Electronics Co., Ltd. (SEC); Samsung Gwangju Electronics Co., Ltd. (SGEC), which was merged into SEC effective January 1, 2011; Samsung Electronics Service (SES); Samsung Electronics Logitech (SEL); and ServeOne.[1] Each of those entities was a legal corporation that filed a separate tax return during the period of investigation.[2] The U.S. Department of Commerce ("USDOC") found SGEC, SES, and SEL to be cross-owned affiliates of SEC (*i.e.*, the company under investigation) and attributed tax credits bestowed upon those entities to SEC.[3] The USDOC made the same finding for ServeOne and LG Electronics Inc. (LG), and likewise attributed ServeOne's tax credits to LG.[4]

2. Among the Samsung group of entities that received subsidies, only SEC engaged in production activities of any kind during the 2011 period of investigation.[5] Moreover, in its questionnaire responses, Samsung confirmed that "SEC is the only Samsung Group company that manufactured, produced or exported subject merchandise during the calendar 2011 POI."[6] SEC also confirmed that "SEC performed all LRW production operations at its Gwangju, Korea facility."[7] Thus, none of the Samsung entities that received RSTA Article 10(1)(3) tax credits appears to have carried out any production of subject large residential washers outside of Korea during the POI.

3. SEC reported total revenue that included sales of merchandise produced outside of Korea.[8]

---

[1] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers from Korea ("Washers Final CVD I&D Memo"), at 11-12 (Exhibit KOR-77).
[2] Samsung April 9, 2012 QR, Ex. 5A (SEC), 5B (SGEC), 5C (SES), and 5D (SEL) (Exhibits KOR-72 and USA-73) (BCI); LG April 9, 2012 QR, Ex. 15 (Exhibit USA-75) (BCI). SGEC filed its own tax return for tax year 2010, but did not publish separate financial statements for 2011 (*i.e.*, its results were part of SEC's unconsolidated financial statements). *See* Samsung April 9, 2012 QR, at 5 n.6 (Exhibit USA-100).
[3] Washers Final CVD I&D Memo, at 4-5 (Exhibit KOR-77).
[4] Washers Final CVD I&D Memo, at 3-4 (Exhibit KOR-77). LG itself did not receive subsidy benefits under RSTA Article 10(1)(3) because it was in a tax loss position in 2011. Washers LG CVD Verification Report, at 9 (Exhibit USA-101). ServeOne did not engage in production. Washers Final CVD I&D Memo, at 3 (Exhibit KOR-77).
[5] Washers Final CVD I&D Memo, at 4-5 (Exhibit KOR-77).
[6] Samsung April 9, 2012 QR, at 2, Ex. 1 (Exhibit USA-100).
[7] Samsung April 9, 2012 QR, at 3, Ex. 1 (Exhibit USA-100) (emphasis supplied).
[8] Samsung August 30, 2012 QR, at 2 (Exhibit USA-56) (BCI).

5.2. The United States asserts at paragraph 70 of its oral statement at the first meeting that "the effects of R&D subsidies are particularly difficult to trace". (i) Does RSTA Article 10(1)(3) provide for R&D subsidies? In other words, does RSTA Article 10(1)(3) subsidize R&D activity? (ii) Is there any requirement that the tax saving resulting from RSTA Article 10(1)(3) should be used for activity?

4. As a threshold matter, the United States notes that its statement at the first panel meeting was made in the alternative, on the grounds that "even on a purely effects-based reasoning," Korea's overseas attribution theory fails.[9] Korea has confirmed that this attribution theory is not grounded in the bestowal of subsidies, but is instead based on the possible overseas effects of R&D activities conducted in Korea. As discussed in the U.S. second written submission, this effects-based theory has no basis in the text of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") or *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), much less the facts relating to the bestowal of RSTA Article 10(1)(3) subsidies.[10]

5. As the United States has explained, even if one were to adopt Korea's effects theory, the results of R&D activities are notoriously difficult to trace, and may not materialize for years (if ever).[11] Korea would require investigating authorities to conduct a jurisdiction-by-jurisdiction inquiry into how R&D activities affect production across the globe, and force those authorities to prove that these effects are limited to one jurisdiction – a standard that is virtually impossible to meet.[12]

6. RSTA Article 10(1)(3) is not an "R&D subsidy" to the extent that it does not require that the tax savings that a company receives be used for a particular activity, much less R&D activity. Instead, the relevant provisions of RSTA Article 10(1)(3) confer tax credits based on a comparison between the aggregate of all research and human resources development expenditures incurred by the company in the past fiscal year, and the annual average of those expenses in the preceding four years. This amount may be further adjusted by carry-forwards and deferrals, based on compliance with Korea's Minimum Tax Law.[13]

7. Contrary to Korea's assertion, these past expenditures are not "retroactively reduced"[14] once the pool of RSTA Article 10(1)(3) subsidy is bestowed (*i.e.*, once the tax return is filed and credits are actually received). The program may in a sense "reward" a company like Samsung for increasing its research and human resource development spending within the territory of Korea over previous annual averages, but it does not actually reduce those costs – which have already been incurred.[15]

---

[9] U.S. Opening Statement at the First Panel Meeting, para. 70.
[10] U.S. Second Written Submission, paras. 345-358.
[11] U.S. Second Written Submission, para. 352.
[12] U.S. Second Written Submission, para. 354.
[13] U.S. Second Written Submission, para. 340.
[14] Korea First Written Submission, para. 297.
[15] *Cf. US – FSC (AB)*, para. 131 (costs associated with marketing products "have already been incurred and the amount of these costs is not altered by the income tax").

5.3. Is the benefit from a tax credit subsidy the amount of tax credit earned in a given year, or the amount of tax credit claimed in that year (regardless of an amount carried forward)?

8. The benefit from a tax credit subsidy is the amount of tax credit claimed in a given year. By contrast, the mere calculation of a possible tax credit, based on qualifying investments, does not give rise to a subsidy. The hypothetical "earning" of such a credit does not, in and of itself, yield either a financial contribution or benefit.

9. Article 1.1(a)(1)(iii) of the SCM Agreement explains that a financial contribution exists where "government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)." As the Appellate Body has explained, "the 'foregoing' of revenue 'otherwise due' implies that less revenue has been raised by the government than would have been raised in a different situation."[16]

10. Likewise, the term "benefit" in Article 1.1(b) of the SCM Agreement refers to the extent to which a financial contribution places a recipient in a better position than it would have been absent the contribution.[17] The Appellate Body has explained that a benefit "encompasses some form of advantage" that is conferred as a consequence of a financial contribution such that the recipient is "better off" than it would have been otherwise.[18]

11. The earning of a tax credit does not affect the amount of revenue that the government actually foregoes – and thus does not confer a financial contribution, much less a benefit – unless and until it is claimed by a taxpayer. It is only when a taxpayer claims the credit in its tax return that its actual tax liability is affected, thereby reducing the revenue that would otherwise be collected. At this point, a subsidy exists and has been bestowed.

12. This is apparent with respect to RSTA Article 10(1)(3). Under this program, a company such as Samsung may be able to calculate a hypothetical entitlement to tax credits, based on the difference between qualifying research and human resources development expenditures in the preceding tax year and the annual average expenditures over the preceding four years. But the company may decide not to take this credit for a variety of reasons, such as tax planning considerations or because it is in a tax loss situation. The taxpayer also may decide to defer some or all of these credits, in order to comply with Korea's Minimum Tax Law – and even then may not ultimately claim or make use of those credits.[19]

13. Thus, the earning of a tax credit does not, in and of itself, confer a subsidy. And the amount of the subsidy – *i.e.*, the benefit conferred on the recipient – is the amount of credits actually *claimed* by the taxpayer.

---

[16] *US – FSC (AB)*, para. 90 (emphasis in original).
[17] *Canada – Aircraft (AB)*, paras. 153-154, 157.
[18] *Canada – Aircraft (AB)*, paras. 153-154, 157.
[19] U.S. Second Written Submission, para. 314; U.S. Responses to the First Set of Panel Questions, paras. 129-131.

14. We note that, during the USDOC's investigation, all interested parties appeared to agree with the preceding interpretation. Samsung defined the "benefit from {RSTA Article 10(1)(3)}" as "a reduction of taxes, subject to Korea's minimum tax provision,"[20] and the Government of Korea ("GOK") did not object or propose an alternative definition at any time during the investigation.

Disproportionality

5.4. In its reply to Panel question No. 3.24, paragraph 209, the United States refers to the possibility that a Member might design a subsidy programme with eligibility criteria that disproportionately benefit a group of large companies, by virtue of the fact that they are more likely to engage in the qualifying activity and thus receive a greater amount of subsidy. Could such a design be taken into account when assessing de jure specificity, or when assessing de facto specificity in light of the use of the programme by "a limited number of certain enterprises", or the "predominant use" of the programme by certain enterprises?

15. In general, *de jure* specificity principles would not capture the type of scenario outlined above. Article 2.1(a) of the SCM Agreement focuses on whether the granting authority, or the legislation pursuant to which the granting authority operates, "explicitly limits access to a subsidy to certain enterprises." As the panel explained in *US – Large Civil Aircraft (2nd Complaint)*, "[a]ccording to the ordinary meaning of the term 'explicit,' not just any limit on access to a subsidy will render it specific . . . Rather, the limitation must 'distinctly express all that is meant; leaving nothing merely implied or suggested.' The limitation must be 'unambiguous' and 'clear.'"[21]

16. Thus, Article 2.1(a) addresses situations involving express, unambiguous limitations on access – not situations in which eligibility criteria yield an outcome that disproportionately benefits certain enterprises. The latter scenario is squarely addressed by Article 2.1(c).

17. For instance, if access to a subsidy was expressly limited to companies engaged in an activity that was clearly exclusive to a particular industry (e.g., the manufacture of automotive parts), *de jure* specificity would be readily apparent. In such a situation, benefits would not "disproportionately" benefit one industry, as access would be limited *exclusively* to that industry. In such a case, it would not be meaningful or necessary to address specificity under Article 2.1(c).

18. But as the Appellate Body's findings in *US – Large Civil Aircraft (2nd Complaint)* demonstrate, a program can easily favor certain companies that are in a better position to avail themselves of program benefits, without explicitly excluding other users that enjoy only a fraction of total subsidy benefits.[22] In that dispute, the Industrial Revenue Bond ("IRB")

[20] Samsung April 9, 2012 QR at 3, Ex. 22 (Exhibit KOR-72).
[21] *US – Large Civil Aircraft (2nd Complaint) (Panel)*, para. 7.190.
[22] *US – Large Civil Aircraft (2nd Complaint) (AB)*, paras. 883-884.

program was, in principle, "broadly available to enterprises in Wichita."[23] The eligibility criteria permitted any company that engaged in the qualifying activity (*i.e.*, property development) to receive subsidy benefits.[24] The program was not *de jure* specific, and access to benefits was not expressly limited to "certain enterprises."[25] Nonetheless, given the amount of qualifying activity that they engaged in, two companies (Boeing and Spirit) received disproportionately large amounts of subsidy, resulting in a finding of *de facto* specificity.[26]

19. Likewise, the two other forms of *de facto* specificity analysis identified in the Panel's question – *i.e.*, "use of a subsidy program by a limited number of certain enterprises" and "predominant use by certain enterprises" – may not capture the design noted above in all cases. With respect to the first factor, the Appellate Body has explained that the phrase "limited number" is "meant to convey a finite and limited quantity of 'certain enterprises,'" and that a "limited quantity" of enterprises or industries "must be found to have used the subsidy programme."[27] But a program may have numerous users, while disproportionately benefitting a small portion of them.

20. The same is true of the second factor identified in the Panel's question – *i.e.*, "predominant use." The ordinary meaning of the term "predominant" includes "constituting the main or strongest element; prevailing" and "most frequent or common."[28] Thus, application of the second factor in Article 2.1(c) "requires consideration of whether the subsidy programme in issue is mainly or most frequently used by 'certain enterprises.'"[29]

21. When applied to a particular case, the predominant use and disproportionately large factors of Article 2.1(c) may exhibit a degree of overlap. The facts may indicate that an enterprise or group thereof is the main or most frequent "user" of a program, for example, through the amounts received. The same enterprise or group of enterprises may also receive benefits in disproportionately large amounts. But this need not always be the case.

5.5. In its reply to Panel question No. 3.24, paragraph 209, the United States refers to the possibility that a Member might design a subsidy programme with eligibility criteria that disproportionately benefit a group of large companies, by virtue of the fact that they are more likely to engage in the qualifying activity and thus receive a greater amount of subsidy. Please give an example.

22. The following is a hypothetical example intended to illustrate the scenario outlined above:

---

[23] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 883.
[24] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 883.
[25] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 861; *US – Large Civil Aircraft (2nd Complaint) (Panel)*, para. 7.743.
[26] *US – Large Civil Aircraft (2nd Complaint) (AB)*, paras. 871-889.
[27] *US – Carbon Steel (India) (AB)*, para. 4.378.
[28] *US – Large Civil Aircraft (2nd Complaint) (Panel)*, para. 7.746 (quoting *New Shorter Oxford English Dictionary* (1993), p. 2321, and *Webster's Online Dictionary*).
[29] *US – Large Civil Aircraft (2nd Complaint) (Panel)*, para. 7.746.

23. A granting authority offers tax rebates to companies based on the value of goods (imports or exports) that they ship through a port. In principle, this subsidy is open to any company operating within the jurisdiction of the granting authority. And in practice, several thousand companies from across the nation ship goods through this port, such that thousands of companies receive subsidy benefits. However, two of the largest companies in the nation have extensive facilities near the port, and receive very large amounts of subsidy, based on the high volume and value of goods that they ship through the port. The amount of subsidy that they receive is a large percentage of the total awarded under the subsidy program and dwarfs that received by the average recipient. Although not explicit in the applicable legislation, the program through its design of eligibility criteria disproportionately benefits the group of the two largest companies.

24. The facts in this hypothetical would support a finding of *de facto* specificity. For example, despite open and objective eligibility criteria and a large number of users, the subsidies were conferred in disproportionately large amounts on two large enterprises. As with RSTA Article 10(1)(3), it would be inappropriate to immunize these subsidies from scrutiny under the SCM Agreement by virtue of the large size of these recipients, or the fact that they engage in more qualifying activity. And as in *US – Large Civil Aircraft (2nd Complaint)*, the fact that these enterprises are in a better position "to avail themselves of [subsidy] benefits" should not avert a finding of disproportionality.[30]

5.6. Please comment on Korea's argument, at paragraph 260 of its second written submission, that the United States conflates the formula that a company uses to calculate the tax credit that it earns in a particular year with the amount that a company may claim on its tax return, and that the amount of the Article 10(1)(3) tax credit that a company earns in a particular year is calculated using a formula that is common to all taxpayers.

25. Korea's argument has no basis in law or fact, and should be rejected.

26. *First*, the United States has never "conflated" the amount of credit that a taxpayer may hypothetically "earn" or be entitled to seek with the amount actually claimed on a tax return. As the United States has explained, companies may or may not seek RSTA Article 10(1)(3) credits that they are theoretically entitled to, but if they do, they must calculate the amount of tax credits for which they are eligible based on one of four formulas. They may further adjust the resulting figure when claiming their tax credits according to the requirements of Korea's Minimum Tax law and the companies' discretionary tax planning decisions.[31] Thus, the amount "earned" may differ from the amount claimed in a tax return.

---

[30] U.S. Opening Statement at the Second Panel Meeting, paras. 50-52 (quoting *US – Large Civil Aircraft (2nd Complaint) (AB)*, paras. 883-887). *See also US – Large Civil Aircraft (2nd Complaint) (Panel)*, paras. 7.306-7.309, 7.341-7.344 (City of Everett tax on gross revenues, which provided a preferential rate for companies of revenue greater than $6-8 billion, was "used by a limited number of certain enterprises," and thus *de facto* specific; the only company within the City of Everett to earn more than $6-8 billion was Boeing).

[31] U.S. First Written Submission, para. 379; U.S. Responses to the First Set of Panel Questions, paras. 129, 160, 172, 211; U.S. Second Written Submission, para. 234.

27. *Second*, Korea is wrong when it asserts that the amount of "benefit" within the meaning of Article 1 of the SCM Agreement is equal to the amount of credits earned, but not claimed on a tax return.[32] As discussed above in response to Panel Question No. 5.3, the earning of a tax credit under RSTA Article 10(1)(3) does not, in and of itself, confer a subsidy. The amount of the subsidy – *i.e.*, the benefit conferred on the recipient – is the amount of credits actually claimed by the taxpayer under RSTA Article 10(1)(3).

28. *Third*, Korea's focus on the amount of credits earned, but not claimed, is at odds with the text of Article 2.1(c) of the SCM Agreement. This provision refers to the "granting" of disproportionately large amounts of "subsidy."[33] Of course, no subsidy under Article 10(1)(3) can exist or be "granted" unless and until it is claimed in a tax return.

29. *Fourth*, Korea's proposed focus on the earning of credits would not be administrable in many cases, rendering it impossible to conduct a disproportionality inquiry. For instance, the GOK only provided aggregate information concerning the amounts of credit *claimed* under the RSTA Article 10(1)(3) program.[34] Information concerning the amount of credits *earned* by companies was only available in individual confidential tax returns. Apart from those provided by LG and Samsung, these confidential returns were unavailable to the USDOC.[35] Thus, the USDOC was not in a position to compare the amount of credit earned by LG and Samsung with the total amount of tax credits earned by other program participants.

30. *Fifth*, Korea's focus on the existence of an alleged common formula is premised on a fundamental misreading of Article 2.1. As discussed in the U.S. submissions, use of a common formula to calculate benefits might indicate the existence of "objective criteria" under Article 2.1(b); but the disproportionality inquiry under Article 2.1(c) applies "notwithstanding" any appearance of non-specificity under Articles 2.1(a) or (b). Likewise, the disproportionality inquiry cannot be reduced to the question of whether subsidies are distributed automatically, without the exercise of discretion – an issue that is addressed through a separate analysis under Article 2.1(c) (*i.e.*, "the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy").[36]

31. *Finally*, here, contrary to Korea's assertion, there is no "formula that is common to all taxpayers."[37] As discussed above and in the U.S. submissions, under RSTA Article 10(1)(3), companies may elect to apply one of four different formulas when calculating tax credits, subject to possible deferrals and carry-forwards to comply with Korea's Minimum Tax law.[38]

---

[32] Korea Second Written Submission, para. 260 ("[T]he amount of the 'benefit' within the meaning of Article 1.1 of the SCM Agreement in this hypothetical situation is KRW100, which was earned under the 10% tax credit program, not KRW 90, which is the actually claimed amount in a particular tax year.").
[33] *See* U.S. Opening Statement at the Second Panel Meeting, para. 55.
[34] GOK April 9, 2012 QR, at 116 (Exhibit KOR-75) (BCI) (listing the total amount of "Deducted Amount of Tax").
[35] GOK April 9, 2012 QR, at 110 (Exhibit KOR-75) (BCI).
[36] *See, e.g.*, U.S. Second Written Submission, paras. 228-233.
[37] Korea Second Written Submission, para. 260.
[38] *See, e.g.*, U.S. Second Written Submission, para. 234.

Designated geographical region

5.9. Would a subsidy that is expressly limited to enterprises that will acquire new facilities in any part of France other than Paris be de jure specific within the meaning of Article 2.1(a) of the SCM Agreement? Please explain.

32. The Panel's question poses a geographically limited subsidy and asks about the application of Article 2.1(a) of the SCM Agreement in isolation from Article 2.2. However, Article 2.2 makes clear 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" (italics added). Thus, based on the mandatory language of Article 2.2, a geographically limited subsidy is to be addressed through Article 2.2 and found to be specific on that basis.

33. As the panel explained in *US – Anti-dumping and Countervailing Duties (China)*, Article 2.2 addresses a "particular case of specificity, on the basis of geographic limitations."[39] The panel explained that "regional specificity appears in its own article (Article 2.2), separate from the general provisions containing the respective definitions of *de jure* and *de facto* specificity" – *i.e.*, Article 2.1.[40] Thus, where a fact pattern presents the "particular case" of geographic limitations, it would be appropriate to apply the provisions of the SCM Agreement that directly address that particular case – Article 2.2.

5.10. Can one describe an enterprise that receives a subsidy in order to acquire new facilities in a region as being "located" in that region?

34. Yes. As discussed in the U.S. submissions, an enterprise can be "located" in a variety of places for purposes of Article 2.2 of the SCM Agreement, including the site of its facilities.[41] The fact that the facilities are "new" is of no moment. The enterprise in this hypothetical is "located" at the facilities that it acquires.

35. The Panel's question suggests that the subsidy is provided before the facilities are acquired (*i.e.*, "in order to acquire"). Yet the timing of when the enterprise receives the subsidy has no bearing on whether the subsidy is regionally specific. Whether an enterprise receives the subsidy *before* or *after* acquiring the new facilities should not dictate whether a subsidy is deemed specific for purposes of Article 2.2.

36. For instance, an authority may provide cash grants to companies once they commit to building manufacturing facilities within a designated geographic region – whether or not the companies already have a presence in the region. Indeed, the goal of the program may be to stimulate companies to "locate" for the first time in that region. This is a classic example of a regionally specific subsidy, and access to the program is therefore limited to the companies that "locate" in the region.

[39] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.134.
[40] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.134.
[41] U.S. Second Written Submission, paras. 273-284; U.S. Responses to the First Set of Panel Questions, paras. 142-150.

37. A contrary interpretation would invite ready circumvention of subsidy disciplines. To avoid scrutiny under the SCM Agreement, an authority could simply provide subsidies before – as opposed to after – acquisition of facilities is complete. Once again, the timing and modality of subsidy disbursal should not dictate the outcome under Article 2.2.

38. In any event, this timing question is not presented by the facts at issue here. RSTA Article 26 subsidies are conferred as tax credits, based on expenses incurred in the previous tax year. At the time the subsidy is granted – i.e., when the credits are claimed on the tax return to reduce the recipient's tax due at that time – the recipient enterprise has already incurred the qualifying expenses (*i.e.*, investments in "newly-acquired facilities").[42] In other words, when the subsidy is granted, the recipient has already acquired the facilities in question and is "located" at those facilities.

5.11. ***Please comment on Korea's argument, at paragraph 357 of its second written submission, that in EC and certain member States – Large Civil Aircraft, "the recipient company (Airbus Spain), and not just its facilities or investments, was located in a designated geographical region within the jurisdiction of the granting authority (ERDF)".***

39. Korea's characterization of the panel's analysis in *EC – Large Civil Aircraft*, at paragraph 357 of its second written submission, is inaccurate and misleading.

40. As an initial matter, we note that the panel's analysis of various regional programs – in Germany, Spain, and the UK – does not support Korea's flawed interpretation of Article 2.2 of the SCM Agreement. In *EC – Large Civil Aircraft*, the panel evaluated numerous grant programs pertaining to different regional designations and administered by authorities with varying levels of jurisdiction.[43] In *every instance*, the panel described the subsidies as grants to Airbus Germany, Airbus Spain/EADS-CASA, or Airbus UK for a "manufacturing site," "facility," or "plant."[44] The panel based its specificity analysis on the presence of Airbus facilities in the relevant territory, and not on whether the facility was a manufacturing site, design site, or head office.[45]

---

[42] U.S. Responses to the First Set of Panel Questions, paras. 212-213.

[43] *EC – Large Civil Aircraft (Panel)*, paras. 7.1206-7.1212.

[44] *EC – Large Civil Aircraft (Panel)*, paras. 7.1206-7.1212.

[45] *EC – Large Civil Aircraft (Panel)*, paras. 7.1235-7.1237 and 7.1241-7.1243. For the same reasons, Korea's criticism of the U.S. description of the Nordenham grants is groundless. Korea Second Written Submission, para. 357. The Nordenham grant was awarded by the government of the German Land of Lower Saxony, and co-financed by the German government and the ERDF. As the panel explained, "eligibility for the grant is restricted to those *companies located in* specifically designated areas, both under the EU wide regional programme and the German 'Gemeinschaftsaufgabe.'" *EC – Large Civil Aircraft (Panel)*, para. 7.1206 (emphasis supplied). Critically, the panel's specificity analysis was premised on the location of "Airbus Germany's existing *manufacturing site* in Nordenham." *Id.*, para. 7.1206 (emphasis supplied); *see also id.*, para. 7.1243 ("grants for the construction of manufacturing and assembly facilities in Nordenham, Germany" are specific subsidies). Thus, the panel clearly treated the manufacturing site in Nordenham as a location of Airbus as a "company," and did not address the location of Airbus Germany's head office.

41. The panel examined approximately ten grants in Spain, most of which were conferred by the Spanish central government for less-developed regions in Spain, and the remainder of which were granted by provincial authorities for underdeveloped regions within their jurisdiction.[46] The various "designated regions" do not appear to include Madrid, where Airbus's headquarters in Spain is located.[47] Indeed, the panel does not even mention the location of the company's head office in Spain. Yet the panel still found that, in all but one case, the grants were regionally specific based on the location of Airbus manufacturing facilities – *i.e.*, they were "provided to enterprises in designated geographical regions within the territory of the respective granting authorities."[48]

42. Three of the ten Spanish grants were co-financed by the European Regional Development Fund ("ERDF"): (1) a grant authorized by the Andalusian government and co-financed by the ERDF to EADS-CASA[49] for its "new facility at Sevilla"; (2) a grant to Airbus Spain authorized by the Andalusian government and co-financed by the ERDF "for the Puerto Real facility"; and (3) a grant approved by the government of Castilla-La Mancha and co-financed by the ERDF to Airbus Spain for investment in a "plant in Illescas, Toledo."[50]

43. The panel undertook a separate specificity analysis for the ERDF component of the funding, observing that "the ERDF is the granting authority . . . for the portions of these grants which it financed."[51] The panel found that "the ERDF-financed portions of these grants was therefore provided to enterprises in designated geographical regions within the territory of the granting authority."[52] But here, again, the analysis is driven by the location of Airbus manufacturing facilities within designated regions. The analysis is not tied to the location of the head office in Madrid, much less the overall headquarters of Airbus in Toulouse, France.[53]

---

[46] The Spanish government conferred subsidies based on the location of Airbus facilities in Sevilla, La Rinconada, Ilescas (Toledo), and Puerto Real, pursuant to the Spanish Law 50/1985 on less favourable geographical zones. The government of Andalusia conferred subsidies on Airbus with respect to its facility in Puerto Real, pursuant to a regional aid scheme for the most depressed areas within Andalusia. Likewise, the government of Castilla-La Mancha conferred subsidies on Airbus for a facility in Ilescas (Toledo). *EC – Large Civil Aircraft (Panel)*, paras. 7.1207-7.1211.

[47] *See* http://www.airbus.com/tools/contacts (last visited 17 June 2015).

[48] *EC – Large Civil Aircraft (Panel)*, para. 7.1235.

[49] CASA was a Spanish aerospace entity that carried out Airbus-related activities. In 2000 CASA was merged into the EADS structure. In 2001 CASA's LCA activities were transferred to Airbus Spain, the Spanish subsidiary of the overall Airbus entity, Airbus SAS. *See, e.g.*, *EC – Large Civil Aircraft (Panel)*, paras. 7.183-7.184 & n.2056.

[50] *EC – Large Civil Aircraft (Panel)*, paras. 7.1209, 7.1236.

[51] *EC – Large Civil Aircraft (Panel)*, para. 7.1236.

[52] *EC – Large Civil Aircraft (Panel)*, para. 7.1236.

[53] The panel report does not indicate whether, for purposes of ERDF co-financing, a different "designated region" was employed based on EU-level principles, or if the ERDF funding was premised on the same designated regions selected by the Spanish authorities (in which case, Madrid would not appear to fall within a designated region). In any event, the point is moot, as the panel's specificity analysis did not address the location of Airbus headquarters, but was instead focused on the location of Airbus "facilities" and "plants."

5.12. ***Please comment on Korea's assertion, at paragraph 87 of its oral statement at the first substantive meeting, that the "designation" of a geographical region must be made affirmatively.***

44. Korea's assertion has no basis in the text of Article 2.2 of the SCM Agreement. The term "designate" means to "[p]oint out, indicate, specify . . . [c]all by name or distinctive term; name, identify, describe, characterize."[54] Article 2.2 does not qualify the term "designate," and it is clear that a granting authority may "[p]oint out," "indicate," or "specify" a region in a variety of ways. In particular, Article 2.2 does not contain the word "affirmative," and Korea attempts to read into this provision language that does not exist.

45. To the extent that Korea is suggesting that a designation must always be *de jure* and explicit, this argument is incorrect. In contrast with Article 2.1(a), Article 2.2 does not contain the term "explicit." As the panel observed in *US – Anti-dumping and Countervailing Duties (China)*, regional specificity under Article 2.2 can be demonstrated on either a *de jure* or *de facto* basis.[55]

46. In any event, the enforcement decree for RSTA Article 26 explicitly and "affirmatively" indicates a designated geographical region – *i.e.*, the area "out of overcrowding control region of the Seoul Metropolitan Area."[56] The eligible region is set out in express, unambiguous terms, and Korea has never suggested that there is any question about the existence, scope, or boundaries of this geographic region. The fact that the decree fixes these boundaries by referring to another region (the Seoul overcrowding region) is of no moment, and the effect of the designation is the same. Korea's argument would privilege one form, not specified in the agreement text, over another equally explicit form achieving the identical result in substance, and should be rejected.[57]

5.13. ***Please comment on Korea's assertion, at paragraph 365 of its second written submission, that "the issue before the panel in US – Anti-dumping and Countervailing Duties (China) was substantially different from the issue raised in these proceedings".***

47. Korea's attempt to distinguish the panel's analysis in *US – Anti-dumping and Countervailing Duties (China)* is unavailing.

48. In its second written submission, Korea dismisses the panel's observation in that dispute that, for purposes of Article 2.2 of the SCM Agreement, a "designated geographical region" can

---

[54] U.S. First Written Submission, para. 407, n.502 (quoting *New Shorter Oxford English Dictionary* (1993), p. 645).
[55] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.134; *see* U.S. First Written Submission, para. 424; U.S. Second Written Submission, para. 294.
[56] GOK April 9, 2012 QR, at 142 (Exhibit KOR-75) (BCI).
[57] *See* U.S. Second Written Submission, para. 294; U.S. First Written Submission, para. 425. Korea's argument would invite easy circumvention of subsidy disciplines. A granting authority need only describe a designated region by language of exclusion, rather than inclusion (*i.e.*, access to a subsidy program is limited to the area "outside" other parts of its territory). The Panel should not countenance an interpretation that would permit subsidies to evade scrutiny under the SCM Agreement by means of such a linguistic trick.

be "any identified tract of land within the jurisdiction of a granting authority."[58] Korea characterizes the panel's findings as irrelevant, on the grounds that *US – Anti-dumping and Countervailing Duties (China)* involved the provision of land use rights within an industrial park.[59]

49. But the panel provided a legal interpretation – not a factual assessment – and its findings cannot be distinguished based on the facts in that dispute. The panel's observation appears as the conclusion to a discrete section of its report entitled, "'Designated geographical region' in Article 2.2 of the SCM Agreement."[60] The panel described the issue addressed in that section as a "question of legal interpretation" – specifically, China's argument that "a 'designated geographical region' in the sense of Article 2.2 of the SCM Agreement must necessarily have some sort of formal administrative or economic identity."[61] The panel rejected this argument, observing that it could find in the text of Article 2.2 "no limitation of the kind advanced by China."[62] The panel also rejected China's argument based on Article 8 of the SCM Agreement.[63] The panel concluded by finding that "a 'designated geographic region' in the sense of Article 2.2 of the SCM Agreement can encompass any identified tract of land within the jurisdiction of a granting authority."[64]

50. The panel's conclusion in *US – Anti-dumping and Countervailing Duties (China)* is thus equally applicable to arguments raised by Korea in this dispute. Like China, Korea attempts to graft restrictions onto Article 2.2 that have no basis in the text of that provision. As discussed above, Korea asserts that any geographic region must be "affirmatively" designated, and that large regions are excluded from the scope of Article 2.2.[65] Yet, as in *US – Anti-dumping and Countervailing Duties (China)*, based on the text of Article 2.2, one can find "no limitation of the kind advanced by" Korea.[66]

For further discussion, we refer the Panel to paragraphs 421-430 of the U.S. first written submission and paragraphs 292-297 of the U.S. second written submission.

---

[58] Korea Second Written Submission, para. 365; *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.144.
[59] Korea Second Written Submission, para. 365.
[60] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, paras. 9.140-9.144.
[61] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.140.
[62] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.140.
[63] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, paras. 9.141-9.143.
[64] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.144.
[65] Korea Second Written Submission, para. 365. Korea attempts to distinguish the panel's findings on the basis that "RSTA Article 26 imposes no requirements as to the physical location of the enterprises." *Id.* As explained in the U.S. submissions, this is demonstrably false, as access to RSTA Article 26 subsidies is expressly limited to companies that acquire facilities within – and thus are "located" within – a designated geographic region. *See, e.g.*, U.S. Second Written Submission, paras. 285-289. Korea further asserts that the industrial park at issue in *US – Anti-dumping and Countervailing Duties (China)* was "a clearly defined geographical area that was affirmatively identified, and that was easily distinguishable from the jurisdiction of the granting authority." Korea Second Written Submission, para. 365. But as discussed above, in the U.S. response to Panel Question 5.12, the designated geographic region in RSTA Article 26 was explicitly and, indeed, affirmatively identified, and its boundaries are "easily distinguishable" from the areas that fall outside its scope (*i.e.*, the Seoul overcrowding region).
[66] *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.140.