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

(DS464)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. As it did in its first written submission, Korea continues to offer the Panel highly charged rhetoric[1] rather than sound legal reasoning. Korea also continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law.

2. The U.S. first written submission demonstrates why Korea's claims fail. Statements and written filings Korea has made since filing its first written submission have not improved Korea's case. As we have shown in previous U.S. submissions, statements, and responses to the Panel's questions, and as we elaborate further in this submission, Korea still has failed to establish that the United States has breached any provision of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement"), the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"), or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

3. This submission is organized as follows: in section II, we address Korea's claims related to the challenged antidumping measures, and in section III, we address Korea's claims related to the challenged countervailing duty measures.

4. With respect to Korea's claims under the AD Agreement, section II.B addresses Korea's "as applied" claims related to the U.S. Department of Commerce's ("USDOC") final determination in the antidumping investigation of large residential washers from Korea. Section II.B.1 provides further arguments related to what we call the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, and section II.B.2 provides further arguments related to what we call the "explanation clause" of the second sentence of Article 2.4.2. We demonstrate that, in arguments it has presented since filing its first written submission, Korea still has failed to establish that the USDOC acted inconsistently with Article 2.4.2 by finding, in the washers antidumping investigation, that the conditions of the "pattern clause" and the "explanation clause" were met.

5. Then, sections II.B.3 and II.B.4 further discuss how the alternative, average-to-transaction comparison methodology provided in Article 2.4.2 of the AD Agreement is to be applied. We demonstrate that Korea still has not shown that the USDOC's application of the average-to-transaction comparison methodology to all sales in the washers antidumping investigation or the USDOC's use of zeroing in connection with its application of the alternative comparison methodology is inconsistent with Article 2.4.2 or any other provision of the AD Agreement.

6. Section II.C presents additional arguments related to Korea's claims concerning the so-called "differential pricing methodology," as well as the USDOC's application of a differential pricing analysis in the preliminary results of the first administrative review of the washers antidumping order. We show that Korea's claims continue to lack any merit.

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[1] *See, e.g.*, Oral Statement of the Republic of Korea at the First Meeting of the Panel, paras. 1, 2, 31 (March 10, 2015) ("Korea Opening Statement at the First Panel Meeting").

7. With respect to Korea's challenge to the USDOC's CVD determination, section III.A discusses Korea's claim with respect to the USDOC's conclusion that RSTA Article 10(1)(3) subsidies were *de facto* specific. As the USDOC found, Samsung and LG received overwhelmingly disproportionate amounts of subsidy under this program. We demonstrate that, in an attempt to overcome this evidence, Korea mischaracterizes the USDOC's determination and the applicable legal standard. And we show that Korea's reliance on explanations offered by the parties for the distribution of subsidies – *i.e.*, the "common formula" argument and "size defense" – is misplaced, as these arguments are legally and factually untenable.

8. In section III.B, we discuss Korea's second specificity claim. Korea criticizes the USDOC's finding that RSTA Article 26 subsidies were regionally specific, within the meaning of Article 2.2 of the SCM Agreement. As we explain, Korea's claim rests on a strained, results-driven interpretation of the term "enterprise" in Article 2.2, and a flawed portrayal of the RSTA Article 26 program. Despite the various legal theories deployed by Korea to attack the USDOC's finding, the facts confirm that this program imposes a geographic limitation on access to subsidies, and thus falls squarely within Article 2.2.

9. In section III.C, we address Korea's "tying" claim. We describe Korea's attempt to re-invent and re-cast this theory, based on the alleged effects of expenses incurred by Samsung and its internal records. As we explain, this expense-driven theory has no grounding in the bestowal and attribution of subsidies. We also demonstrate that Korea's belated attempt to introduce materials from separate antidumping investigations is improper, as most of these materials are not on the record of the washers CVD investigation. And we explain that cost accounting principles used in the antidumping context have no bearing on the attribution of subsidies.

10. Finally, section III.D addresses Korea's "overseas effects" attribution theory. We explain that this theory – which is premised on the possible knock-on effects of R&D activities carried out in Korea by a Korean company – has no basis in the text of the SCM Agreement or GATT 1994, or the bestowal of subsidies. We then explain that Korea's reliance on an antidumping investigation of refrigerators manufactured in Mexico does not support, and ultimately undermines, Korea's claim.

II. KOREA'S CLAIMS UNDER THE AD AGREEMENT ARE WITHOUT MERIT

A. Introduction

11. The U.S. first written submission explains in detail the reasons why the Panel should conclude that the measures challenged by Korea are not inconsistent with Article 2.4.2 of the AD Agreement or any of the provisions of the covered agreements.[2] Instead of addressing the merits of the legal issues in dispute, Korea resorts to empty rhetoric. For example, Korea asserts that the United States has undertaken "disingenuous efforts to engage in practices – such as zeroing – that the WTO has repeatedly condemned."[3] Korea further contends that the United States

[2] *See* First Written Submission of the United States of America (Confidential), paras. 40-331 (November 24, 2014) ("U.S. First Written Submission").
[3] Korea Opening Statement at the First Panel Meeting, para. 1.

"blur[s]"[4] and "twists"[5] issues, and "distorts the meaning"[6] of the Appellate Body's findings. Despite this rhetoric, Korea's legal arguments remain fatally flawed.

12. As we have demonstrated, and as we elaborate further in this section, the interpretations that the United States proposes are those that result from the proper application of the customary rules of interpretation of public international law. Korea's proposed interpretations, on the other hand, are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely.

13. The United States observes that, while Korea and a number of the third parties attack the *Nails* test applied by the USDOC in the washers antidumping investigation, as well as the differential pricing analysis applied by the USDOC in the preliminary results of the first administrative review of the washers antidumping order, neither Korea nor any of those third parties describes how, in their view, an investigating authority *should* discern whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods. In contrast, the USDOC, through its application of both the *Nails* test in the washers antidumping investigation and a differential pricing analysis in the preliminary results of the first administrative review, has undertaken a rigorous, holistic examination to determine whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods, and it has done so in a manner that gives effect to both the "pattern clause" and the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.

14. As we did in the U.S. first written submission, we address below Korea's claims related to the "pattern clause" and the "explanation clause" of the second sentence of the AD Agreement, as well as Korea's claims related to how the exceptional, average-to-transaction comparison methodology may be applied, including the extent of its application and the use of zeroing. We also address Korea's claims related to the so-called "differential pricing methodology." We focus the discussion in this submission on arguments Korea has made since it filed its first written submission.

15. For the reasons given below, the United States continues to urge the Panel to engage in a thorough interpretative analysis in accordance with the customary rules of interpretation of public international law. We remain confident that doing so will lead the Panel to conclude that Korea's claims are without merit, and the measures challenged by Korea are not inconsistent with Article 2.4.2 of the AD Agreement or any of the provisions of the covered agreements.

B. Korea's "As Applied" Claims Related to the Washers Antidumping Investigation Are without Merit

1. Korea's Arguments Related to the Interpretation and Application of the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Are without Merit

[4] Korea Opening Statement at the First Panel Meeting, para. 2.
[5] Korea Opening Statement at the First Panel Meeting, para. 31.
[6] Korea Opening Statement at the First Panel Meeting, para. 33.

16. The U.S. first written submission demonstrates that the phrase "a pattern of export prices which differ significantly among different purchasers, regions or time periods" in the second sentence of Article 2.4.2 of the AD Agreement – the "pattern clause" – means 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.[7] The U.S. first written submission further explains that, while the "pattern clause" of the second sentence of Article 2.4.2 has a qualitative component, an investigating authority is not required to conduct a separate examination of *why* export prices differ among different purchasers, regions, or time periods.[8] Finally, the U.S. first written submission shows that the USDOC's determination in the washers antidumping investigation that there existed a pattern of export prices that differed significantly among different purchasers, regions, or time periods is not inconsistent with the second sentence of Article 2.4.2.[9]

17. In its first written submission, Korea presents only one argument in support of its request that the Panel find that the USDOC's determination in the washers antidumping investigation is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement. Specifically, Korea complains that the USDOC "evaluated whether the prerequisites for invoking [the alternative comparison methodology] had been met exclusively through the use of a computational analysis of the difference in exporters' prices."[10] That is, Korea asks the Panel to fault the USDOC for not addressing so-called qualitative aspects in its analysis of the alleged "pattern." However, what Korea really means is that the USDOC did not consider *why* export prices differ among different purchasers, regions, or time periods, which is something the USDOC was not required to examine, per the terms of the "pattern clause" of the second sentence of Article 2.4.2.[11]

18. In its opening statement at the first panel meeting and in its responses to the Panel's questions, Korea advances additional arguments against the USDOC's determination in the washers antidumping investigation.[12] While Korea acknowledges that "there is no single 'right way' to determine a 'pattern'" and that "[t]he text does not specify any specific method,"[13] Korea nevertheless proceeds to elaborate rigid, specific requirements that it contends Article 2.4.2 of the AD Agreement imposes on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. As explained below, the obligations Korea asks the Panel to find are not supported by the text of the second sentence of Article 2.4.2.

a. The "Pattern Clause" Does Not Require Investigating Authorities To Analyze Export Sale Transactions on an Individual Basis

[7] *See* U.S. First Written Submission, paras. 55-69.
[8] *See* U.S. First Written Submission, paras. 70-89
[9] *See* U.S. First Written Submission, paras. 90-99.
[10] First Written Submission of Korea (Confidential), paras. 148-153 (September 29, 2014) ("Korea First Written Submission").
[11] *See* U.S. First Written Submission, paras. 70-89
[12] *See* Korea Opening Statement at the First Panel Meeting, para. 24; Answers of Korea to Written Questions by the Panel (Confidential), paras. 33-52, 59-87 (March 31, 2015) ("Korea Responses to the Panel's First Set of Questions"); Exhibit KOR-92.
[13] Korea Responses to the Panel's First Set of Questions, para. 71.

19. Korea argues that the second sentence of Article 2.4.2 of the AD Agreement "requires the authority to evaluate actual export prices."[14] Korea further argues that the USDOC "did not evaluate actual export prices as required by the second sentence to find a 'pattern of export prices.' Instead the USDOC evaluated only averages of those export prices, not the actual export prices themselves."[15] Korea contends that "[t]his use of average prices rather than actual prices not only ignored the explicit requirement of Article 2.4.2, but also ignored basic principles of data analysis and common sense."[16] Korea is incorrect on several grounds.

20. As an initial matter, when the USDOC undertook analyses pursuant to the "pattern clause" in the washers antidumping investigation, it took into account all of the "actual export prices" reported by respondents during the period of investigation. As explained in the U.S. first written submission and in response to the Panel's first set of questions, the USDOC applied what we refer to as the *Nails* test in the washers antidumping investigation.[17] The *Nails* test involves calculating a standard deviation of the weighted-average export prices to each purchaser, region, or time period during the period of investigation based on the variance between each of those weighted-average export prices.[18] Accordingly, Korea simply is incorrect when it suggests that the USDOC did not "evaluate actual export prices."[19]

21. Put another way, Korea's proposed dichotomy between an examination involving "actual" export prices and an examination involving averages of certain sets of export prices is a false dichotomy. Any average of export prices will, in fact, be based on "actual," individual export prices.

22. Korea also is incorrect when it contends that the "pattern clause" of the second sentence of Article 2.4.2 requires investigating authorities to examine export prices on an individual basis.[20] Contrary to Korea's arguments, the text of the second sentence of Article 2.4.2 of the AD Agreement actually supports the opposite proposition. While the second sentence of Article 2.4.2 permits an investigating authority to compare an average normal value with the "prices of *individual* export transactions,"[21] later in the same sentence, the investigating authority is tasked with finding a "pattern of export prices," not a pattern of *individual* export prices. The presence of the term "individual" as a modifier of "export transactions" and the absence of the same term – or any modifier at all – in connection with "export prices" in the same sentence is a compelling basis to conclude that Article 2.4.2 does not require that a pattern be based on individual export prices. Nothing in the text of the second sentence of Article 2.4.2 prohibits the use of weighted averages in connection with an investigating authority's analysis of a "pattern" within the meaning of the "pattern clause."

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[14] Korea Responses to the Panel's First Set of Questions, para. 72.
[15] Korea Responses to the Panel's First Set of Questions, para. 47.
[16] Korea Responses to the Panel's First Set of Questions, para. 50.
[17] *See* U.S. First Written Submission, paras. 93-97; Responses of the United States to the Panel's First Set of Questions to the Parties, paras. 12-26 (March 31, 2015) ("U.S. Responses to the Panel's First Set of Questions").
[18] The sales are weighted by quantity.
[19] Korea Responses to the Panel's First Set of Questions, para. 72.
[20] *See* Korea Responses to the Panel's First Set of Questions, paras. 72-73; Exhibit KOR-92.
[21] Emphasis added.

23. Additionally, the "pattern clause" requires the investigating authority to find "a pattern of export prices which differ significantly *among different* purchasers, regions or time periods."[22] Accordingly, the proper focus is not on individual export prices *per se*, or on differences between individual export prices *within* a given purchaser, region, or time period, but on differences in export prices *among different* purchasers, regions, or time periods.

24. Korea likewise is incorrect when it argues that the use of average prices rather than so-called "actual prices" "ignored basic principles of data analysis and common sense."[23] The standard deviation measures the extent of the differences within a set of numbers. Calculating the standard deviation enables the USDOC to determine what a "normal" range of weighted-average export prices is for the period of investigation, and whether certain weighted-average export prices are lower than that norm. As indicated above, the set of numbers (*i.e.*, the weighted-average export prices) that the USDOC considered included all of the export sales during the period of investigation. The USDOC calculated the weighted-average export prices and the standard deviation on a model-specific basis, *i.e.*, by "CONNUM." A CONNUM is based upon the product's physical characteristics.

25. The USDOC did not look to price variance (*i.e.*, as quantified by the standard deviation) at the transaction-specific level because the second sentence of Article 2.4.2 is concerned with export prices that "differ significantly *among* different purchasers, regions or time periods."[24] In other words, the relevant export price variance to be considered is the variance among purchasers (or regions or time periods), not among specific transactions. Using weighted-average export sales prices allows the USDOC to disregard variations *within* a purchaser (or region or time period) and focus instead on uncovering a pattern of export prices which differ significantly *among* groups. The USDOC was not required to calculate the standard deviation using either a variance calculated based on individual export prices or a variance calculated based on weighted-average export prices. The USDOC did not calculate the standard deviation incorrectly in the washers antidumping investigation.

26. A simple example illustrates why Korea's proposed interpretation is untenable. Suppose the domestic industry had alleged that a specific purchaser has been "targeted." In response to this allegation, the investigating authority might examine whether prices to the alleged "target" (Purchaser A) differ significantly from prices to a "non-targeted" purchaser (Purchaser B) or purchasers (Purchaser C, Purchaser D, etc.). In the simplest case, there is one sales transaction to each purchaser and there is a single export price for each purchaser. Simply comparing the export prices will reveal the extent to which they differ among purchasers.

27. However, suppose Purchaser A had three export sale transactions, and paid $100 in each transaction, while Purchaser B had three export transactions and paid $95, $100, and $105 for identical merchandise in its three transactions. There is no relevant difference in pricing between the two purchasers. Both paid the same total of $300 for identical merchandise, and both paid the same weighted-average price of $100. There are numerous combinations of the three prices

[22] Emphasis added.
[23] Korea Responses to the Panel's First Set of Questions, para. 50.
[24] Emphasis added.

that could produce a weighted-average price of $100. However, distinguishing between the individual prices each paid is unnecessary. As long as both purchasers paid the same weighted-average price of $100, or $300 in total, for the three sales, no purchaser is being targeted and there is no pattern of prices that differ significantly among different purchasers. Using purchaser-specific weighted averages allows the investigating authority to disregard price variation *within* the sales to each purchaser and focus on meaningful price variation *among* (*i.e.*, across) the purchasers.

28. In a typical case, there likely will be multiple individual transactions with various prices for each purchaser, region, or time period. In addition to price differences, different transactions may differ in terms of quantity, per unit price, date, payment terms, or in other ways. The investigating authority must decide how to compare these multiple sets of individual transaction prices. Article 2.4.2 provides no specific guidance in this regard, as Korea agrees.[25] Transaction-to-transaction comparisons of export prices would be difficult in practice because it may be unclear which transaction pairs should be compared, and there may be cases involving thousands or hundreds of thousands of transactions. Because of these practical difficulties, and in order actually to assess differences in export prices "among different" purchasers, regions, or time periods, the USDOC based the *Nails* analysis applied in the washers antidumping investigation on weighted-average export prices to purchasers, regions, or time periods.

29. Korea's proposed transaction-based variance calculation, on the other hand, would not only be difficult to administer in most cases (if not impossible), but, as we have explained, it also is at odds with the text of the second sentence of Article 2.4.2, which requires an investigating authority to find "a pattern of export prices which differ significantly *among different* purchasers, regions or time periods."[26]

b. The "Pattern Clause" Does Not Require Investigating Authorities To Utilize any Particular Statistical Analysis

30. Korea objects to the USDOC's alleged "misuse of the standard deviation in the *Nails* test,"[27] and, in addition, Korea advances a numbers of statistics-based arguments. Korea's statistical arguments are without merit. As discussed below, the "pattern clause" does not require the use of any specific type of statistical analysis, and the USDOC has not misused standard deviations. Further, although the USDOC did, in a generic sense, analyze certain statistics, *i.e.*, weighted-average export prices, in the washers antidumping investigation, the "pattern clause" does not require the use of formal statistical techniques.

31. Before turning to the substance of Korea's statistical arguments, we offer three initial observations. First, we note that Korea largely presents its statistical argumentation in Exhibit KOR-92. Korea characterizes Exhibit KOR-92 as an "affidavit"[28] of an "expert."[29] Whatever

[25] *See* Korea Responses to the Panel's First Set of Questions, para. 71.
[26] Emphasis added.
[27] Korea Responses to the Panel's First Set of Questions, para. 73; *see also* Exhibit KOR-92.
[28] Korea Opening Statement at the First Panel Meeting, para. 24; Korea Responses to the Panel's First Set of Questions, paras. 50, 73; *see also* Exhibit KOR-92.
[29] Korea Opening Statement at the First Panel Meeting, paras. 7, 17.

credentials the author of that document may have, he is not an impartial observer in this dispute. Indeed, he worked on behalf of the Korean respondents in the washers antidumping investigation.[30] The arguments in Exhibit KOR-92 were prepared for the Government of Korea, just as every other Korean submission in this dispute is prepared for the Government of Korea. Accordingly, Exhibit KOR-92 cannot be viewed as "evidence" from an impartial or independent source. Rather, it is part of Korea's legal argumentation, just the same as any other argumentation presented by Korea in its written submissions, oral statements, and responses to the Panel's questions in this dispute. In other words, Exhibit KOR-92 simply is Korea's argument presented in a different form.

32. Second, the premises of Korea's statistical arguments are flawed. As a legal matter, the term "significantly" in the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to utilize statistical analyses when examining export prices to determine whether there exists "a pattern of export prices that differ significantly among different purchasers, regions or time periods." The term "significantly" is not modified by the word "statistically," or at all, and thus should not be read as conveying a specialized, statistical meaning of the word "significant," or as requiring an investigating authority to utilize statistical analysis.

33. Furthermore, while the term "statistically" is not used in the second sentence of Article 2.4.2, it is used elsewhere in the AD Agreement. Article 6.10 of the AD Agreement, for instance, provides that, where it would be impracticable to determine individual dumping margins for all exporters or producers, the investigating authority may, *inter alia*, limit its examination "by using samples which are *statistically* valid."[31] In addition, footnote 13 of the AD Agreement provides that, when determining industry support in the case of a fragmented industry involving an exceptionally large number of producers, investigating authorities may use "*statistically* valid sampling techniques."[32] The presence of the term "statistically" in these other provisions of the AD Agreement and the absence of that or any similar term in the second sentence of Article 2.4.2 of the AD Agreement is strong contextual support for the conclusion that the term "significantly" in the "pattern clause" does not mean that an investigating authority is required to utilize the kind of complex statistical methodology for which Korea argues.

34. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.[33] Nothing in the second sentence of Article 2.4.2 compels

[30] *See* Exhibit KOR-92, para. 5.
[31] Emphasis added.
[32] Emphasis added.
[33] In fact, several Members that are third parties to this dispute have considered the application of the alternative average-to-transaction comparison method, including Canada and the European Union. *See* Canada Border Services Agency, *Certain Liquid Dielectric Transformers Originating In or Exported From the Republic of Korea; Statement of Reasons* (March 21, 2014), pp. 30-31 (Exhibit USA-69); Canada Border Services Agency, *Certain Hot-Rolled Carbon Steel Plate and High-Strength Low-Alloy Steel Plate from the Federative Republic of Brazil, the Kingdom of Denmark, the Republic of Indonesia, the Italian Republic, Japan, and the Republic of Korea; Statement of Reasons* (May 2, 2014), pp. 26-27 (Exhibit USA-70); Council of the European Union, Council Implementing Regulation No. 78/2013, of 17 January 2013, para. 31(Exhibit USA-35). The United States understands that Brazil has applied the alternative, average-to-transaction comparison methodology as well. Furthermore, like the United States, the

an investigating authority to undertake a statistical analysis, or to undertake a particular statistical analysis even if it chooses to utilize certain statistical tools. Indeed, Korea itself acknowledges that "there is no single 'right way' to determine a 'pattern'" and that "[t]he text does not specify any specific method."[34] Following Korea's own reasoning, an investigating authority is not obligated under the AD Agreement to employ a statistical analysis, let alone the specific type of statistical probability analysis for which Korea advocates. Accordingly, the basic legal premise of Korea's arguments is flawed.

35. The basic logical premise of Korea's arguments is equally flawed. Korea contends that the *Nails* test applied by the USDOC in the challenged antidumping investigation is not suitable to perform a particular type of statistical analysis.[35] However, the *Nails* test does not involve the type of statistical analysis discussed by Korea. In particular, the standard deviation part of the *Nails* test is not aimed at pursuing Korea's preferred statistical goal of finding statistical outliers with respect to individual sales to a particular customer, or in a particular time period, or to a particular region.[36] Rather, the USDOC used the standard deviation as a tool in its *Nails* test for determining whether the average export price to the alleged target is sufficiently low in relation to the average export price for all of the exporter's transactions, such that it may be indicative of a "pattern" within the meaning of the "pattern clause."[37]

36. Furthermore, as noted above, in the washers antidumping investigation, the USDOC's approach to examining a "pattern" within the meaning of the "pattern clause" took into account all export sales by the respondent during the period of investigation. Because the USDOC based its analysis on all export prices and not a sample of export prices, statistical inferences of the type discussed by Korea are not relevant to the issues in dispute. Korea is discussing a particular type of statistical issue, which is involved when calculations are based on sample data selected from a larger population of data. In that situation, the calculations based on that sample (*e.g.*, of the mean) are estimates of the actual values for the population as a whole. Associated with each estimate is a measure of the statistical significance (*i.e.*, reliability) of that estimate with respect to the actual, uncalculated value based on the entire population of data. This statistical significance represents the potential sampling error, or noise, which is present whenever a value (*e.g.*, mean) of a population of data is estimated based on a sample of that data. However, such statistical issues are not involved in the specific type of analysis used by USDOC in the *Nails* test. In particular, the USDOC includes all export prices in its analysis, and thus there is no sampling error present in the USDOC's analysis nor related issues of statistical significance. Korea's statistical criticism of the *Nails* test simply is inapposite.

European Union and Australia have not allowed offsets to mask dumped sales. *See* U.S. Opening Statement at the First Panel Meeting, para. 19.

[34] Korea Responses to the Panel's First Set of Questions, para. 71.

[35] *See* Exhibit KOR-92.

[36] *See* Exhibit KOR-92.

[37] *See* Issues and Decision Memorandum accompanying *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,988 (December 26, 2012), at 22 ("Washers Final AD I&D Memo") (Exhibit KOR-18).

37. Third, we note that Korea contends that the *Nails* test is "biased towards finding evidence of targeted dumping."[38] This contention is baseless, and rather ironic. Indeed, immediately following the USDOC's first application of the *Nails* test, the *domestic industry* in the United States challenged the test, arguing before the U.S. Court of International Trade ("USCIT") that the USDOC used a "statistically invalid methodology" and that the test "overlook[s] obvious targeting."[39] In sustaining the USDOC's application of the *Nails* test, the USCIT explained that, although the test "may create a standard that *is more difficult to satisfy than domestic industry would have preferred*, the nails test does not violate any statute and is not otherwise arbitrary and capricious."[40] Additionally, despite Korea's claim of bias, in a number of instances in which the USDOC applied the *Nails* test, the USDOC did not find a pattern of prices that differed significantly, and thus did consider applying the alternative comparison methodology.[41]

38. Turning to Korea's substantive statistical arguments, Exhibit KOR-92 sets forth several criticisms of the USDOC's application of the *Nails* test in the washers antidumping investigation. Korea's criticisms are without merit.

39. Korea first asserts that the USDOC "ignores actual market prices" because "actual transaction prices are replaced with a single average price."[42] Korea goes on to explain that:

> [T]he USDOC's decision to compute average prices, per se, is not the issue. There are many legitimate uses of weighted average prices in the course of an anti-dumping investigation. The serious violation of standard statistical practice and any rational approach to data analysis is what the USDOC then does with the weighted average prices once they are computed.[43]

The problem, in Korea's view, is that the use of weighted-average export prices leads the USDOC to calculate a purportedly "incorrect standard deviation."[44]

40. As we have already demonstrated, the second sentence of Article 2.4.2 of the AD Agreement does not prohibit the use of weighted-average export prices in the examination of a

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[38] Exhibit KOR-92, para. 9.
[39] *Mid Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (Ct. Int'l Trade 2010) (Exhibit USA-63).
[40] *Mid Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (Ct. Int'l Trade 2010) (emphasis added) (Exhibit USA-63).
[41] *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerators From Mexico*, 76 Fed. Reg. 67,688, 67,692 (November 2, 2011) (Exhibit USA-68) (explaining that the USDOC applied average-to-average comparisons to Electrolux because it did not find pattern of prices that differ significantly among the purchasers, regions or time periods), *unchanged in Notice of Final Determination of Sales at Less than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 Fed. Reg. 17,422, 17,424 (March 26, 2012) (Exhibit USA-64); *Certain Stilbenic Brighteners from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 17,027, 17,028 (March 23, 2012) (explaining that the USDOC applied average-to-average comparison methodology because the portion of sales that passed both pattern and gap test was insufficient to establish a pattern of export prices that differ significantly among purchasers, regions or time periods) (Exhibit USA-66).
[42] Exhibit KOR-92, para. 24 *et seq*.
[43] Exhibit KOR-92, para. 33.
[44] *See* Exhibit KOR-92, paras. 34-43; *see also id*., paras. 9-12.

"pattern" within the meaning of the "pattern clause" of that provision. For the *Nails* test, calculating the standard deviation based on the weighted-average export prices for different purchasers, regions, or time periods is, indeed, a far more logical approach than using the variance of individual transactions, and using weighted averages allows the USDOC to identify export prices that differ significantly *among*, rather than *within*, *different* purchasers, regions, and time periods.

41. Additionally, Korea complains that "[t]he *Nails* test purportedly is about detecting outliers but the first step is to essentially wash away all information about possible outliers."[45] As explained above, however, the *Nails* test is not aimed at finding statistical outliers with respect to particular sales to a single customer, to a single region, or in a single time period. Rather, the USDOC used the standard deviation to determine whether the average export price to the alleged "target" (be it customer, region, or time period) is sufficiently low in relation to the average export price for all of the exporter's transactions, such that it may be indicative of a "pattern."[46] Accordingly, Korea's argument that the USDOC acted inconsistently with the second sentence of Article 2.4.2 by using weighted-average export prices to calculate the standard deviation used as part of its application of the *Nails* test fails because it rests on flawed premises.

42. Korea's second criticism of the *Nails* test relates to the gap test.[47] Korea contends that the gap test is "statistically" invalid because it "excludes" from the analysis weighted-average export prices paid by groups that were not allegedly targeted if those export prices are lower than the allegedly targeted group's weighted-average export price.[48] Korea claims that "drop[ping] low priced customers biases the gap test" because "whenever there are excluded customers the USDOC's gap is too small," which "increases the likelihood that the alleged target will pass the gap test."[49] Similarly, Korea argues that omitting the lowest priced export sales leads to bias because doing so means that "the alleged target's average price is only compared to a higher priced non-targeted customers [sic]."[50]

43. Once again, Korea's argument rests upon statistical assumptions for particular statistical models. However, as discussed above, a test of statistical significance of the type proposed by Korea is inapposite. Furthermore, the AD Agreement does not require investigating authorities to employ this type of statistical analysis when determining the existence of a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

44. In the washers antidumping investigation, the gap between the weighted-average export price paid by the allegedly targeted purchaser (or in the allegedly targeted region or during the allegedly targeted time period) at issue and the next higher weighted-average price of export

[45] Exhibit KOR-92, para. 24.
[46] *See* Washers Final AD I&D Memo, at 22 (Exhibit KOR-18).
[47] *See* Exhibit KOR-92, paras. 44-53.
[48] Exhibit KOR-92, para.47.
[49] Exhibit KOR-92, para. 50.
[50] Exhibit KOR-92, para. 50.

sales to a non-targeted purchaser (or region or time period) exceeded the average price gap for the non-targeted group.[51]

45. In doing so, the USDOC actually addressed the criticism Korea advances in the context of the washers antidumping investigation and rejected the argument that the significant difference requirement may only be established in one particular methodological way. The USDOC explained that, "[w]e do not agree with the respondent's argument that our gap test is flawed because it does not consider the weighted-average sales prices of non-targeted groups that are below the weighted-average sales price of the allegedly targeted group. In addition, the respondents do not demonstrate why the significant-difference requirement can only be met by the use of gaps that both 'look up' and 'look down.'"[52]

46. Korea similarly has made no such demonstration in this dispute. Instead, Korea engages in a misguided attempt to demonstrate that the gap test is not an appropriate tool for conducting a particular type of statistical significance analysis, which was never the purpose for which the USDOC used the gap test – or the *Nails* test. Korea has failed to demonstrate that the USDOC's approach is inconsistent with the "pattern clause" of the second sentence of Article 2.4.2, which, as we have demonstrated, requires investigating authorities to employ rigorous analytical methodologies and view the data holistically to ascertain whether a pattern of differences in export prices exists, and whether the price differences among different purchasers, regions, or time periods are significant.

47. Korea's third criticism of the *Nails* test relates to the standard deviation test, which is the first step of the *Nails* test applied by the USDOC in the washers antidumping investigation.[53] Korea argues that "there is also a serious problem with the USDOC using a 1 standard deviation as the threshold for determining whether a customer (or region or time) is an outlier."[54] Korea asserts that "[t]here is a large statistics literature on outlier detection" and "[t]he statistics literature does not support the 1 standard deviation threshold because it implies too many 'small price differences' are affirmed to be targeted dumping. More common in statistics is to use two or three standard deviation threshold."[55]

48. Once again, and for the same reasons given above, Korea's argument fails because it rests on the flawed premises that the USDOC was required by Article 2.4.2 of the AD Agreement to apply a particular type of statistical significance analysis and that the USDOC was, in fact, attempting to do so. Neither premise is correct.

49. Furthermore, the implication of Korea's argument that "significantly different" in a certain statistical sense must mean a difference of at least two standard deviations is that the export price to the alleged target would be viewed as statistically different from the average or mean price, for a given model, only when the export price to the alleged target is at least two times the standard deviation below the mean price. However, the export price that is two or

[51] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18).
[52] Washers AD Final I&D Memo, at 21 (Exhibit KOR-18).
[53] *See* Exhibit KOR-92, paras. 71-72.
[54] Exhibit KOR-92, para. 71.
[55] Exhibit KOR-92, para. 71.

more standard deviations below the mean price is highly unlikely to be observed. This is a direct consequence of the fact that, assuming normal probability distributions, which Korea appears to,[56] the probability of observing the export price to the alleged target in the tail of the normal distribution that is two or more standard deviations below the mean is just 2.5 percent. In other words, Korea defines the requisite pattern of export prices as a low-probability event; one which occurs by chance. However, nothing in the text of the AD Agreement suggests such a definition. Indeed, the term "pattern" suggests something which is more than a mere chance observation, and Korea's assertion that any pattern must be made up of outliers essentially precludes an investigating authority from identifying a "pattern."

50. The standard deviation and mean[57] are statistical concepts used in connection with the *Nails* test that the USDOC applied in the washers antidumping investigation. However, the USDOC did not use those calculated values as part of the type of probability-based statistical test discussed by Korea. Rather, the USDOC used standard deviation as a transparent, objective metric to identify those sales that are low priced and, thus, may be "targeted." As the USDOC explained in response to respondents' arguments to use greater than one standard deviation in the washers antidumping investigation:

> We consider the price threshold of one standard deviation below the average market price as a reasonable indicator of a price difference that may be based on targeted dumping because (1) it is a measure of "low" relative to the spread or dispersion of prices in the market in question, and (2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others …, and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others….
>
> . . . the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted prices within the observed data. Therefore, the Department believes that one standard deviation, rather than two standard deviations, is a better measurement to distinguish potentially targeted prices using this test.[58]

51. Korea seeks to replace the USDOC's balanced approach with one of the extremes noted above by the USDOC, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is Korea's insistence on the use of a particular type of statistical analysis, which the AD Agreement does not require.

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[56] *See* Exhibit KOR-92, para. 62.
[57] "Mean" is a concept that is used in a variety of applications such as mathematics, statistics, etc. Korea does not challenge the use of mean in the USDOC's analysis.
[58] Washers Final AD I&D Memo, at 22 (Exhibit KOR-18).

52. Korea explains that it "is not arguing that an authority cannot set up a framework of thresholds as a starting point for its determinations," but Korea argues that "the authority must be open to suggestions that other thresholds make more sense in the context of a particular product and industry."[59] Korea accepts that the one standard deviation and 33 percent thresholds of the *Nails* test "might be reasonable starting points," but Korea asserts that the USDOC "simply refused to consider any alternatives."[60] Korea's assertion is baseless. The USDOC did consider LG's and Samsung's arguments for different thresholds in the washers antidumping investigation. However, the USDOC found that the respondents' arguments, which were not based on any features specific to washers or the washer industry,[61] were not compelling.[62]

53. As we have explained, the standard deviation test used in connection with the *Nails* test is not aimed at finding statistical outliers with respect to sales to individual customers or regions, or in specific time periods, as Korea appears to suggest. Rather, the standard deviation test is used to determine whether the weighted-average export price to the alleged target is sufficiently low in relation to the weighted-average export price for all of the exporter's transactions that it may be indicative of a pattern of "targeted dumping." Yet again, Korea's arguments fail because they rest on flawed premises, they are contrary to logic, and they are inconsistent with the terms of the second sentence of Article 2.4.2 of the AD Agreement.

c. The "Pattern Clause" Does Not Require Investigating Authorities To Examine Why Export Prices Differ Significantly

54. In addition to its new arguments about the use of weighted-average export prices and statistical methodology, Korea reiterates its original argument that "the process to determine whether the price differences really are 'significant' and actually constitute a 'pattern' should involve both qualitative and quantitative aspects."[63] Korea's claim in this regard – *i.e.*, that the USDOC's examination of a "pattern" in the washers antidumping investigation is inconsistent with the "pattern clause" of Article 2.4.2 of the AD Agreement because the USDOC did not examine what Korea terms "qualitative aspects" – continues to lack merit.

55. Korea explains that it "is not suggesting that the authority must consider the exporter's subjective intent in setting export prices."[64] The United States welcomes Korea's agreement that, as we have demonstrated, the "pattern clause" of the second sentence of Article 2.4.2 establishes no such requirement.[65] However, Korea simply attempts to reframe its original argument to establish that the investigating authority must consider *why* export prices differ significantly among different purchasers, regions, or time periods. In Korea's view, even after

[59] Korea Responses to the Panel's First Set of Questions, para. 87.
[60] Korea Responses to the Panel's First Set of Questions, para. 87.
[61] Washers Final AD I&D Memo, pp. 13-14 (Exhibit KOR-18).
[62] Washers Final AD I&D Memo, p. 22 (Exhibit KOR-18).
[63] Korea Opening Statement at the First Panel Meeting, para. 23; *see also id*., para. 25; Korea Responses to First Set of Panel Questions, paras. 33-36, 51, 60-61, 66-70, 75, 77-78, 82, 88-91, 110-112; Exhibit KOR-92, paras. 80-87 (criticizing *Nails* test for "fail[ing] to consider any industry characteristics affecting pricing for all market participants").
[64] Korea Opening Statement at the First Panel Meeting, para. 26; *see also* Korea Responses to the First Set of Panel Questions, para. 88.
[65] *See* U.S. First Written Submission, paras. 86-88.

the investigating authority has found a pattern, the investigating authority must then conduct a second, independent investigation of what those differences mean and why they exist.[66]

56. Regardless of whether Korea frames its argument in terms of discerning an exporter's *intent* or identifying *reasons* for the pattern of export prices that differ significantly, nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. We further note that certain third parties agree that the second sentence of Article 2.4.2 does not require an investigating authority to discern why such patterns arise.[67] That said, to the extent qualitative aspects are relevant in a particular case, the USDOC would examine them to discern *how* the export prices differ from each other. In other words, the USDOC would assess whether export prices differ in a way that qualitatively is notable or important, and thus is "significant."[68]

57. As demonstrated in the U.S. first written submission, Korea's proposed interpretation of the "pattern clause" would read the quantitative dimension out of the term "significantly," necessitating an exclusive focus on Korea's understanding of the qualitative dimension.[69] The Panel asked Korea about the U.S. argument and, not surprisingly, Korea denies that its proposed interpretation would have such an effect.[70]

58. More telling than Korea's denial, though, is Korea's response to a different Panel question. The Panel asked the parties whether lower prices during key holiday seasons are not evidence of prices that differ by period, as envisaged by the second sentence of Article 2.4.2?[71] Korea responds, "No. Lower prices during the holiday season might be prices that 'differ' by period, but they are not prices that 'differ significantly' by period under the second sentence of Article 2.4.2."[72] Importantly, Korea asserts that "[e]ven a large difference is not necessarily significant."[73] In other words, in Korea's view, any numerical difference in export prices can be explained away. Export prices can be found to "differ significantly" only if they are found to differ "significantly" in a qualitative sense, as Korea understands that concept. The quantitative difference between the export prices, in Korea's view, does not matter. Korea's proposed interpretation is untenable, and, as we have explained,[74] it is inconsistent with prior Appellate Body findings regarding the meaning of the term "significantly."[75]

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[66] *See, e.g.*, Korea First Panel Question Responses, para. 61; Korea Opening Statement at the First Panel Meeting, para. 26; *see also* China Third Party Panel Question Responses, para. 4.
[67] *See, e.g.*, Brazil Third Party Panel Question Responses, page 3 ("it seems that there is nothing in the text of the Anti-Dumping Agreement that suggests that the investigating authority is compelled to assess why certain export prices were significantly lower for certain regions, purchasers or time periods"); EU Third Party Submission, para. 40.
[68] *See* U.S. First Written Submission, para. 81; U.S. Opening Statement at the First Panel Meeting, paras. 30-31.
[69] *See* U.S. First Written Submission, para. 76.
[70] *See* Korea Responses to the Panel's First Set of Questions, paras. 67-70.
[71] *See* Panel Question 2.1.
[72] Korea Responses to the Panel's First Set of Questions, para. 33.
[73] Korea Responses to the Panel's First Set of Questions, para. 35.
[74] *See* U.S. First Written Submission, paras. 76-78.
[75] *See US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.

59. Korea seeks support for its argument in injury determinations made by the U.S. International Trade Commission ("USITC").[76] Korea asserts that it is "well known" that many technology products have prices that fall sharply over the product's life cycle as new products are introduced,[77] and that "[d]iscounting is prevalent in the [washers] market, particularly during promotion events."[78] Such factual assertions, however, do not go to the qualitative question of *how* export prices differ. Moreover, Korea's argument ignores that deliberately setting one's export prices lower at certain times of the year is evidence that would tend to *confirm* that the exporter's pricing behavior formed a "pattern of export prices which differ significantly" among different time periods.[79]

60. Indeed, in discussing the issue of holiday pricing in its final injury determination, the USITC noted that, "[a]lthough all responding producers and importers engaged in discounting, responding purchasers reported that LG and Samsung offered larger discounts than GE or Whirlpool."[80] The USITC also found that "pervasive subject import underselling depressed domestic like product prices to a significant degree."[81] Thus, in the context of the washers antidumping investigation, evidence suggests that LG and Samsung took the lead in setting export prices that differed significantly among different time periods, such as the holiday promotion periods to which Korea draws the Panel's attention.

61. Korea asserts that the USDOC "does not so much as try to consider qualitative aspects in regards to why prices differ."[82] As noted above, though, to the extent qualitative aspects are relevant in a particular case, the USDOC would examine them to discern *how* the export prices differ from each other.[83] This is consistent with the U.S. Statement of Administrative Action, which provides that, "in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."[84] In the washers antidumping

[76] *See* Korea Responses to the Panel's First Set of Questions, paras. 35-36.
[77] Korea Responses to the Panel's First Set of Questions, para. 35 (citing *DRAMS and DRAM Modules from Korea*, Inv. No. 701-TA-431 (Final), USITC Pub. 3616 (Aug. 2003), p. I-11 (Exhibit KOR-101)).
[78] Korea Responses to the Panel's First Set of Questions, para. 36; Exhibit KOR-102 at PDF p. 3.
[79] *See* U.S. First Written Submission, para. 88; *see also* U.S. Responses to the Panel's First Set of Questions, paras. 1, 7, 60. The same would be true of evidence demonstrating that an exporter deliberately set export prices lower to certain purchasers or regions.
[80] *See Certain Large Residential Washers from Korea and Mexico*, Inv. Nos. 701-TA-488 and 731-TA-1199-1200 (Final), USITC Pub. 4378 (Feb. 2013), p. 22 (Exhibit USA-67).
[81] *See Certain Large Residential Washers from Korea and Mexico*, Inv. Nos. 701-TA-488 and 731-TA-1199-1200 (Final), USITC Pub. 4378 (Feb. 2013), pp. 36, 44-46 (Exhibit USA-67).
[82] Korea Opening Statement at the First Panel Meeting, para. 25. Korea attempts to support this contention by referring to "at least 14 different cases" where the USDOC purportedly "rejected arguments about changing costs." Korea Responses to the Panel's First Set of Questions, para. 60; Exhibit KOR-104. We note that none of the determinations to which Korea refers, all of which *post-date* the final determination in the washers AD investigation, are before the Panel. *See* Exhibit KOR-104. Furthermore, Korea's argument that an investigating authority must "at least address and consider the reasons for price differences in a particular case" simply is not supported by the text of the second sentence of Article 2.4.2. Korea Responses to the Panel's First Set of Questions, para. 61.
[83] *See* U.S. First Written Submission, para. 81; U.S. Opening Statement at the First Panel Meeting, paras. 30-31.
[84] Statement of Administrative Action for the Uruguay Round Agreements Act, located in Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required

investigation, the USDOC considered and responded to "qualitative" arguments made by LG and Samsung, explaining that it is not required to "opine on the reasons for such price differences."[85]

62. For the reasons we have given, the Panel should find that the USDOC's decision in the washers antidumping investigation not to examine why export prices differed significantly was not inconsistent with the "pattern clause" of Article 2.4.2 of the AD Agreement.

d. The USDOC's Application of the "Pattern Clause" in the Washers AD Investigation Is Not Inconsistent with the "Fair Comparison" Requirement of Article 2.4 of the AD Agreement

63. In its opening statement at the first panel meeting, Korea contends that, "[w]hen an investigating authority determines whether there are 'significant' differences in export prices that constitute a 'pattern,' the process of making that determination must also be fair pursuant to Article 2.4."[86] Korea further argues that "the U.S. ignores the basic principle that even an exceptional method must be fair."[87]

64. The implication of Korea's arguments is unclear. On their face, Korea would appear to be claiming that the USDOC acted inconsistently with Article 2.4 of the AD Agreement when it decided not to consider the reasons why export prices differed significantly among different purchasers, regions, or time periods. Any attempt by Korea to advance such a claim, however, must fail.

65. As a threshold matter, Korea's panel request includes no claim under Article 2.4 of the AD Agreement regarding the USDOC's methodologies for applying the second sentence of Article 2.4.2 of the AD Agreement.[88] Korea's panel request includes claims under Article 2.4 only in relation to zeroing.[89] Accordingly, no Article 2.4 claim against the USDOC's application of the "pattern clause" is within the Panel's terms of reference.

66. Additionally, any such claim would be without merit. While Article 2.4.2 of the AD Agreement is "subject to the provisions governing fair comparison in paragraph 4," Article 2.4 of the AD Agreement provides that "a fair comparison shall be made between the export price and the normal value." In other words, Article 2.4 establishes certain rules for making a comparison between *export price and normal value* under any of three comparison methodologies described in Article 2.4.2 – average-to-average, transaction-to-transaction, and average-to-transaction. However, Article 2.4 does not address how an investigating authority is to determine the existence of a "pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2. Such a determination would not involve comparing export price to normal value. Rather, the inquiry under the second sentence of Article 2.4.2 involves

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Supporting Statements, H. DOC. 103-316(I), 103d Cong. 2d Sess. (September 27, 1994), at 843 (p. 7 of the PDF version of Exhibit KOR-5).

[85] Washers AD Final I&D Memo, pp. 23-24 (Exhibit KOR-18).

[86] Korea Opening Statement at the First Panel Meeting, para. 22.

[87] Korea Opening Statement at the First Panel Meeting, para. 22.

[88] *See* Panel Request, sections III and IV.

[89] *See* Panel Request, sections I and II.

examining only whether *export prices* differ significantly among different purchasers, regions, or time periods. Accordingly, the detailed terms of Article 2.4 have no bearing on the application of the "pattern clause" of the second sentence of Article 2.4.2.

67. For example, it is to be expected that an investigating authority may need to compare the export price paid during one time period with the export price paid during another time period, particularly if the investigating authority is assessing whether export prices differ significantly *among different time periods*, as contemplated by the second sentence of Article 2.4.2 of the AD Agreement. Of course, once the investigating authority determines which of the three comparison methodologies provided in Article 2.4.2 it will use to determine the existence of margins of dumping, the comparison between the export price and normal value, regardless of the comparison methodology used, would "be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time," consistent with the requirements of Article 2.4 of the AD Agreement.

68. In any event, nothing about the USDOC's application of the "pattern clause" in the washers antidumping investigation was not "fair." As we have demonstrated, in that investigation, the USDOC employed a rigorous analytical approach and viewed the data holistically to ascertain whether a pattern of differences in export prices exists, and whether the price differences among different purchasers, regions, or time periods are significant.[90]

2. Korea's Arguments Related to the Interpretation of the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Are without Merit

69. The U.S. first written submission demonstrates that a proper application of the customary rules of interpretation of public international law leads to the conclusion that what we call the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement[91] requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2.[92]

70. The U.S. first written submission further demonstrates that the explanation that the USDOC provided in the washers antidumping investigation as to why significant differences in export prices cannot be taken into account appropriately by the use of the average-to-average or

[90] *See* U.S. First Written Submission, paras. 90-99.
[91] The "explanation clause" sets forth the second condition for utilizing the alternative comparison methodology provided in the second sentence of Article 2.4.2 of the AD Agreement. The "explanation clause" provides that an investigating authority may resort to the alternative comparison methodology only "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."
[92] *See* U.S. First Written Submission, paras. 100-112.

transaction-to-transaction comparison methodologies is not inconsistent with the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.[93]

71. In its statements at the first panel meeting and in its responses to the Panel's questions, Korea offers the Panel no compelling reason to find that the USDOC's explanation in the washers antidumping investigation is inconsistent with the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement. Below, we address several of the arguments Korea has made subsequent to its first written submission.

a. Korea's Arguments Related to the Term "Appropriately" Lack Merit

72. In its opening statement at the first panel meeting, Korea argues that the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement requires that "the investigating authority must provide the specific reason why it must resort to the 'exception,' as well as why it was *not possible at all* to account for these differences using the normal comparison methods."[94] In Korea's view, "[o]nly when the differences 'cannot be taken into account' can the authority invoke the exception."[95] In making these arguments, Korea reads the term "appropriately" out of the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement. Accordingly, Korea's proposed interpretation is incompatible with the principle of effectiveness and cannot be accepted.[96]

73. As demonstrated in the U.S. first written submission, the word "appropriately" is linked contextually with the word "cannot." It is not the case that the investigating authority must explain why it is not possible *at all* to take into account significantly differing export prices using one of the two normal comparison methodologies. Rather, the investigating authority must explain why the significant differences in export prices cannot be taken into account in a manner that is "proper," "fitting", or "suitable" using one of the normal comparison methodologies, given, *inter alia*, the particular circumstance of the "pattern clause" condition having been met.[97]

74. In its responses to the Panel's questions, Korea appears to read the term "appropriately" back into the "explanation clause," though it reads that term in untenable ways. First, Korea argues that the term "appropriately" requires "some qualitative assessment of the objective circumstances of a particular product and industry."[98] Korea explains that "[t]he key point is the 'explanation' should have some connection to why the price differences were 'significant' in a particular case and why they constituted a 'pattern.'"[99] Korea's argument is divorced from the text of the second sentence of Article 2.4.2.

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[93] *See* U.S. First Written Submission, paras. 125-144.
[94] Korea Opening Statement at the First Panel Meeting, para. 28 (emphasis added).
[95] Korea Opening Statement at the First Panel Meeting, para. 28.
[96] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[97] *See* U.S. First Written Submission, paras. 108-109.
[98] Korea Responses to the Panel's First Set of Questions, para. 89 (emphasis in original).
[99] Korea Responses to the Panel's First Set of Questions, para. 91.

75. The "explanation clause" requires the investigating authority to explain why the "pattern" that it has already found to exist cannot be taken into account "appropriately" by one of the normal, symmetrical comparison methodologies. The presence in the "explanation clause" of the term "appropriately," which is connected contextually to the terms "cannot" and "by the use of a weighted average-to-weighted average or transaction-to-transaction comparison," also in the "explanation clause," does not alter the meaning of the terms of the "pattern clause," which separately sets forth a distinct condition for resorting to the alternative, average-to-transaction comparison methodology. Korea's proposed reading of the term "appropriately" simply is nonsensical.

76. Korea also asserts that "the second sentence of Article 2.4.2 recognizes the [the average-to-average] comparison (particularly with [the transaction-to-transaction] comparison as an alternative) can *appropriately* reflect … normal price variations in most cases."[100] Korea further asserts that "[t]his same logic holds *regardless of the size of the price differences*."[101] In Korea's view:

> Whether the normal variation of prices is plus/minus 1% or plus/minus 10%, if those price variations are normal commercial behavior for a product and industry, then the W-W comparison method can *appropriately* take them into account.[102]

Korea reasons from these assertions that "[i]f export prices are following normal commercial considerations – *whatever their trends or variations* – and a basic W-W comparison shows the exports prices to have complied with Article 2, then there is no reason to sanction those prices with antidumping measures."[103]

77. With these arguments, Korea makes clear its view that "whatever their trends or variations" and "regardless of the size of the price differences," the normal comparison methodologies can take into account "appropriately" any "pattern of export prices which differ significantly among different purchasers, regions, or time periods." This plainly is yet another attempt by Korea to read the second sentence of Article 2.4.2 out of the AD Agreement entirely, using the term "appropriately" as leverage to do so. Yet again, however, Korea's proposed interpretation is inconsistent with the principle of effectiveness and it is at odds with the Appellate Body's recognition that the second sentence provides Members a means to "unmask targeted dumping"[104] in "exceptional"[105] situations. Korea asks the Panel to find that such exceptional situations simply never would arise.

78. Finally, Korea argues along similar lines that "[t]he term 'appropriately' indicates that an adjustment of the W-W method might be sufficient to allow the W-W method to take differences into account with the W-W method, without the need to resort to the W-T comparison

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[100] Korea Responses to the Panel's First Set of Questions, para. 107 (emphasis added).
[101] Korea Responses to the Panel's First Set of Questions, para. 108 (emphasis added).
[102] Korea Responses to the Panel's First Set of Questions, para. 108 (emphasis added).
[103] Korea Responses to the Panel's First Set of Questions, para. 109 (emphasis added).
[104] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[105] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.

method."[106] Korea offers no explanation, however, for why the presence of the term "appropriately" in the second sentence of Article 2.4.2 may be read as altering the application of the comparison methodologies set forth in the first sentence of Article 2.4.2. Korea fails to explain why the term "appropriately" should lead an investigating authority to make additional or different adjustments to normal value or export price beyond those provided in Article 2.4 of the AD Agreement. Korea continues to avoid any discussion of how making such adjustments would serve the purpose of unmasking dumping which is being masked by a pattern of export prices that differ significantly. In short, this is simply another attempt by Korea to deprive the second sentence of Article 2.4.2 of any meaning.

79. For these reasons, Korea's arguments related to the term "appropriately" in the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement lack merit.

b. The USDOC Took Into Account the Particular Factual Circumstances in the Washers Antidumping Investigation

80. Korea argues that an investigating authority's "explanation," within the meaning of the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement, "is not sufficient unless it takes into account the particular factual circumstances of an individual case."[107] The United States agrees with this proposition. Korea further argues, however, that the USDOC "does not make any effort to consider particular circumstances."[108] With this, we do not agree. Korea's contention is baseless.

81. We recall that the Appellate Body has found that the second sentence of Article 2.4.2 of the AD Agreement permits Members to use the alternative, average-to-transaction comparison methodology to "unmask targeted dumping."[109] It is logical, then, for an investigating authority, in its effort to comply with the terms of the "explanation clause," to examine the extent to which dumping would be masked by a normal comparison methodology, in contrast to the alternative comparison methodology, as it considers whether a normal comparison methodology can "take into account appropriately" the pattern of export prices that differ significantly.

82. This is what the USDOC did in the washers antidumping investigation. The USDOC, based on information provided by the respondents, determined what the margins of dumping would have been for LG and Samsung, both using the normal average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology. The USDOC compared the results and discerned that there was a "meaningful difference" in the margins of dumping calculated using the different methodologies.[110] This supported the USDOC's conclusion that the average-to-average comparison methodology could not take into account appropriately the pattern of export price differences observed for each respondent. As the USDOC explained, "the average-to-average comparison method conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to

[106] Korea Responses to the Panel's First Set of Questions, para. 144.
[107] Korea Responses to the Panel's First Set of Questions, para. 89.
[108] Korea Responses to the Panel's First Set of Questions, para. 98; *see id.*, para. 92.
[109] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[110] Washers Final AD I&D Memo, p. 20 (Exhibit KOR-18).

the targeted group with high-priced sales to the non-targeted group."[111] In this way, the USDOC explained why, within "the factual context of a particular case," *i.e.*, the washers antidumping investigation, the average-to-average comparison methodology could not take into account appropriately the pattern of export prices that differ significantly.[112]

83. Korea complains that comparing the result of the average-to-transaction comparison methodology (with zeroing) and the result of the average-to-average comparison methodology (without zeroing) is insufficient, because, Korea argues, "[t]he use or non-use of zeroing cannot constitute a permissible 'explanation.'"[113] However, as demonstrated in the U.S. first written submission, and as discussed further below, 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.[114] Thus, comparing the results of the application of a normal comparison methodology (without zeroing) and the alternative comparison methodology (with zeroing) to determine whether there is a meaningful difference between them is a logical and informative means of ascertaining whether the normal comparison methodology can take into account appropriately the pattern of significantly differing export prices that has been found and that might be indicative of masked dumping.

84. Korea suggests that the USDOC "has always found the change in the margin to be sufficient without any standard or any explanation."[115] This simply is not true. In numerous instances, the USDOC applied the *Nails* test and found a pattern of export prices that differed significantly, but nonetheless the USDOC explained that the average-to-average comparison methodology could take into account appropriately such differences. Accordingly, the USDOC applied the normal average-to-average comparison methodology.[116]

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[111] Washers AD Preliminary Determination, p. 46,395 (Exhibit KOR-32); *see also* Washers Final AD I&D Memo, p. 20 (Exhibit KOR-18).
[112] Korea First Panel Question Responses, para. 98.
[113] Korea Opening Statement at the First Panel Meeting, para. 29.
[114] *See* U.S. First Written Submission, paras. 154-262.
[115] *See, e.g.,* Korea Responses to the First Set of Panel Questions, para. 102.
[116] *See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Preliminary Results of Administrative Review; 2010-2011*, 77 Fed. Reg. 73,428 (December 10, 2012), and accompanying Preliminary Decision Memorandum at 19 (finding a pattern of export prices that differed significantly by time period existed for Green Packing, but holding that A-A can account for the observed price differences because A-A "does not mask dumping" because there is "no meaningful difference" between the weighted-average margins calculated using A-A and A-T, and thus applying A-A to all sales), *unchanged in Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 Fed. Reg. 35,245 (June 12, 2013); *see also Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 Fed. Reg. 24,885, 24,888 (applying average-to-average methodology because "no difference in the margin or yields a difference in the margin that is so insignificant relative to the size of the resulting margin as to be immaterial"), *unchanged in Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Determination of Sales at Less Than Fair Value*, 75 Fed. Reg. 59,223, 59,225-59,226 (September 27, 2010); *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From Mexico*, 77 Fed. Reg. 17,422, 17,424 (March 26, 2012), and accompanying Issues & Decision Memorandum at 18 (similar, for LG and Samsung); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final*

85. For example, in the USDOC's antidumping investigation of refrigerators from Mexico, the USDOC found for respondents Samsung and LG (*i.e.*, the *same* respondents in the washers antidumping investigation that is the subject of this dispute) that:

> [W]hile we found a pattern of prices that differed significantly for certain time periods pursuant to section 777A(d)(1)(B) of the Act, we determined that the differences can be taken into account using the average-to-average methodology. Therefore, we applied the standard average-to-average methodology to all U.S. sales made by Samsung and LGEMM.[117]

86. This result is not atypical. While it may be the case that there is a pattern of export prices that differ significantly among different purchasers, regions, or time periods, it may also be the case that all such differing export prices nevertheless are above normal value, so that both the average-to-average and average-to-transaction comparison methodologies would lead to a finding of no dumping. Alternatively, it may be the case that all of the export prices are below normal value, and thus no "masking" of dumping is occurring, and the weighted average dumping margin calculated under both the average-to-average and average-to-transaction comparison methodologies would be the same. Apart from these two cases, it may also be the case that the amount of "masking" is not meaningful, or that the amount of dumping found is relatively small, such that the normal average-to-average comparison methodology can also account for significant differences in export prices.

87. In exceptional situations, however, where there is a pattern of export prices that differ significantly, with higher export prices above normal value and lower export prices below normal value, it is possible, as the Appellate Body has recognized, that dumping may be "masked."[118]

Determination of Critical Circumstances, in Part, 77 Fed. Reg. 63,791, 63,793 (October 17, 2012) (similar, for Wuxi Suntech and Trina); *Drawn Stainless Steel Sinks From the People's Republic of China: Investigation, Final Determination*, 78 Fed. Reg. 13,019, 13,021 (February 26, 2013) (similar, for Superte and Dongyuan); *Carbon and Certain Alloy Steel Wire Rod From Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 Fed. Reg. 28,190 (May 14, 2013), and accompanying Issues & Decision Memorandum at 8 (similar, for Deacero); *Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Revocation of Order (in Part); 2011-2012*, 78 Fed. Reg. 42,497 (July 16, 2013), and accompanying Issues & Decision Memorandum at 11-12 (similar, for Marine Gold and Thai Union); *Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 77 Fed. Reg. 74,171 (December 13, 2012), and accompanying Issues & Decision Memorandum at 2 (applying "targeted dumping" analysis to RZBC and continuing to apply average-to-average methodology); *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from Mexico*, 77 Fed. Reg. 76,288, 76,291 (December 27, 2012) (similar). All of the cited determinations are publicly available on the Internet and the relevant findings have been quoted or paraphrased above. The United States would be pleased to provide copies of the determinations if doing so would be of assistance to the Panel, or were Korea to contest the accuracy of the U.S. summaries of these determinations.

[117] *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From Mexico*, 77 Fed. Reg. 17,422, 17,424 (March 26, 2012) (Exhibit USA-64); *see also* accompanying Issues and Decision Memorandum, at 18 (Exhibit USA-65).

[118] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

88. As explained in the U.S. first written submission,[119] that was the case in the washers antidumping investigation. The USDOC established that Samsung's weighted average dumping margin was more than 9 percentage points greater using the average-to-transaction comparison methodology, and, importantly, the difference changed the conclusion from a finding of no dumping (using the average-to-average comparison methodology) to an affirmative finding of dumping at a rate of 9.29 percent (using the average-to-transaction comparison methodology). Likewise, LG's weighted average dumping margin increased by approximately [[***]] percent when the average-to-transaction comparison methodology was used.[120] The USDOC concluded that these "meaningful" differences were evidence that "the average-to-average comparison methodology conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group."[121]

89. Korea observes that "an authority might find that in the context of a particular industry, the change in the result is very small and therefore the W-W comparison method can take price differences into account. Both the term 'appropriately' and common sense suggest that some differences in the margin are too small to worry about in the context of many other points of uncertainty in the overall calculations."[122] While the United States agrees with Korea's observation as a general matter, it certainly was not the case in the washers antidumping investigation that the "differences in the margin are too small to worry about."[123]

90. Finally, we note that the United States agrees with Korea's observation (and Brazil's) that the average-to-average comparison methodology "can appropriately reflect … normal price variations in most cases."[124] The United States further agrees with Korea that sometimes "no form of W-W comparisons can appropriately reflect the price differences otherwise found to meet the conditions of the second sentence."[125] It follows logically from Korea's observations that some manner of comparison is necessary to test whether the average-to-average comparison methodology or the average-to-transaction comparison methodology can more "appropriately" take into account a pattern of significantly differing export prices. Otherwise, it is unclear how an investigating authority could determine which methodology "takes into account" the "pattern" more "appropriately." It also is unclear what more, beyond such a comparative exercise, would be needed to satisfy the requirements of the "explanation clause."

91. For its part, and despite the Panel asking it to do so expressly, Korea has declined to put forward a proposal that *would* satisfy the requirements of the "explanation clause." Instead, Korea proposes an interpretation of the "explanation clause" that is so stringent that, if it were accepted, an investigating authority would never be able to meet the requirements of the

[119] *See* U.S. First Written Submission, paras. 125-128.
[120] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18); Final LG AD Calculation Memo, at Attachment 2, pg. 127 (p. 325 of the PDF version of Exhibit KOR-42).
[121] Washers AD Preliminary Determination, p. 46,395 (Exhibit KOR-32).
[122] Korea Responses to the Panel's First Set of Questions, para. 101.
[123] Korea Responses to the Panel's First Set of Questions, para. 101.
[124] Korea Responses to the Panel's First Set of Questions, para. 107; *see also* Brazil Third Party Executive Summary, para. 8.
[125] Korea Responses to the Panel's First Set of Questions, para. 93.

"explanation clause" and use the alternative, average-to-transaction comparison methodology. Once again, Korea is attempting to read the exceptional comparison methodology in the second sentence of Article 2.4.2 out of the AD Agreement.

c. The "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Does Not Require an Investigating Authority to Discuss Both the Average-to-Average and Transaction-to-Transaction Comparison Methodologies in Its "Explanation"

92. The U.S. first written submission demonstrates that an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" it provides pursuant to the second sentence of Article 2.4.2 of the AD Agreement.[126] Accordingly, the USDOC did not act inconsistently with the "explanation clause" of the second sentence of Article 2.4.2 when it discussed the average-to-average but not the transaction-to-transaction comparison methodology in connection with its explanation of why a normal comparison methodology could not take into account appropriately the pattern of significantly differing export prices that the USDOC had found.

93. Korea continues to argue that "the authority must always consider the possibility of a [transaction-to-transaction] comparison."[127] Korea now contends that:

> [R]egardless of what method any authority has chosen under the first sentence, when applying the second sentence the authority must again consider both alternatives. That is what the text of Article 2.4.2 requires. The authority has discretion to choose between them in the first instance, but then must again consider both comparison methods before turning to a W-T comparison as the exceptional method. The authority cannot ignore T-T comparisons when deciding whether to apply the second sentence.[128]

While Korea asserts that this "is what the text of Article 2.4.2 requires," Korea does not explain why that is the case. In fact, nothing in the text of Article 2.4.2 supports Korea's proposed interpretation.

94. 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."[129] The Appellate Body

[126] *See* U.S. First Written Submission, paras. 120-124.
[127] Korea Responses to the Panel's First Set of Questions, para. 113; *see also id*., para. 96; Korea Opening Statement at the First Panel Meeting, para. 30.
[128] Korea Responses to the Panel's First Set of Questions, para. 113.
[129] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

has further explained that it would be illogical if these two comparison methodologies were to yield "results that are systematically different."[130]

95. Logically, if the average-to-average and transaction-to-transaction 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.

96. The Appellate Body also has acknowledged 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."[131] A transaction-to-transaction comparison methodology may be particularly unsuitable, and could be quite burdensome, when there is a large number of sales transactions in both the home market and the export market. In any event, nothing in the first sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to apply both of the "normal" comparison methodologies in the course of a single antidumping investigation. This is confirmed by the use of the disjunctive term "or" between the descriptions of the two comparison methodologies in the first sentence of Article 2.4.2.

97. Further, Korea is incorrect that the presence of the word "or" in the *second* sentence of Article 2.4.2 mandates the opposite result. The word "or" in the second sentence could not be replaced with the word "and" because that would make no sense. The result of doing so would be that an investigating authority would be required to provide an explanation of "why such differences cannot be taken into account appropriately by the use of an average-to-average *and* transaction-to-transaction comparison." However, it is difficult to imagine why an investigating authority would ever have a practical need to use both an average-to-average comparison methodology and a transaction-to-transaction comparison methodology together in the same proceeding to calculate a single dumping margin for a given exporter. Furthermore, the first sentence of Article 2.4.2 does not contemplate that kind of a mixed application of the "normal" methodologies, as it affords investigating authorities the option of using the average-to-average comparison methodology "or" the transaction-to-transaction comparison methodology. Accordingly, the proper term to be used in the second sentence of Article 2.4.2 necessarily is "or."

98. An example may help illustrate this point. Imagine a senior partner at a law firm provides a junior attorney with a blue pen and a black pen and instructs the junior attorney to write a legal brief with either one of those pens, but the partner indicates that the junior attorney also could use a pencil if it is not possible to use either of the pens appropriately. The junior attorney explains that she cannot use the black pen because she might make mistakes that would need to be corrected, so the pencil, with the possibility of erasing, would be a better tool. There

[130] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[131] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

is no reason for the partner to press the junior attorney to explain why the blue pen also would be an inappropriate tool. While they are not identical, the black and blue pens would yield systematically similar results.

99. Thus it is with the average-to-average and transaction-to-transaction comparison methodologies. They are similar, but not identical tools, which the Appellate Body has found should not yield "systematically different" results.[132] The investigating authority may choose which of the "normal" tools to use and the first sentence of Article 2.4.2 does not require the investigating authority to use one comparison methodology over the other.

100. This interpretation is further supported by reading the two sentences of Article 2.4.2 as describing a logical progression, in which the investigating authority first selects whether to use the average-to-average comparison methodology or the transaction-to-transaction comparison methodology as a "normal" methodology under the first sentences. Then, the investigating authority examines whether there is a "pattern of export prices which differ significantly" and, if so, whether the "normal" methodology that the investigating authority has chosen cannot take such differences into account appropriately.

101. Reading the "or" in the second sentence this way gives meaning to the "or" in the first sentence and is consistent with the Appellate Body's observation that the average-to-average and transaction-to-transaction comparison methodologies should be interpreted as yielding results that are not "systematically different," with the investigating authority having the option of choosing between the two "normal" comparison methodologies.[133]

102. For these reasons, when the "explanation clause" is read in the context of Article 2.4.2 as a whole, an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" it provides pursuant to the "explanation clause" of the second sentence of Article 2.4.2.

3. The USDOC's Application of the Alternative Average-to-Transaction Comparison Methodology to All Sales in the Washers Antidumping Investigation Is Not Inconsistent with Article 2.4.2 of the AD Agreement

103. The U.S. first written submission demonstrates that the USDOC's application of the alternative, average-to-transaction comparison methodology to all sales in the washers antidumping investigation is not inconsistent with Article 2.4.2 of the AD Agreement.[134]

104. In its statements and responses to the Panel's questions, Korea offers little new argumentation to support its claim that the United States has breached the second sentence of Article 2.4.2 as a result of the USDOC's application of the alternative average-to-transaction comparison methodology to all sales in the washers antidumping investigation.

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[132] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[133] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[134] U.S. First Written Submission, paras. 145-153.

105. One paragraph of Korea's opening statement at the first panel meeting does, however, warrant a response. Korea asserts that, "[i]n *Washers*, the DOC found about 90% of the sales by the Korean exporters not to satisfy the criteria for imposing the W-T comparison, but still imposed both the W-T comparison and the zeroing remedy to all the sales."[135] The United States, in response to the Panel's question 2.9, has already addressed Korea's assertion.[136] Korea follows up its assertion, though, with a series of questions:

> If the sales have not been shown to meet the test for finding a "pattern" of prices that "differ significantly," how can they nevertheless be part of that pattern? Let's suppose that in an antidumping investigation of citrus fruits the investigating authority finds that oranges pass its test but grapefruits do not pass the test. How does finding that oranges pass the test justify imposing a remedy on both oranges and grapefruits?[137]

106. While Korea does not elaborate on the answers to its rhetorical questions, the questions themselves appear to suggest that Korea is arguing for the application of the alternative, average-to-transaction comparison methodology only to certain types or models of the product under investigation. However, applying the alternative, average-to-transaction comparison methodology on such a model-specific basis would appear to be directly contrary what the Appellate Body said about the so-called "targeted dumping" provision in *EC – Bed Linen*. There, the Appellate Body explained that the second sentence of Article 2.4.2 of the AD Agreement:

> 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. However, neither Article 2.4.2, second sentence, nor any other provision of the Anti-Dumping Agreement refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. It seems to us that, had the drafters of the Anti-Dumping Agreement intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation.[138]

107. The Appellate Body has already addressed Korea's contention and rejected it. Accordingly, the Panel should not find that the second sentence of Article 2.4.2 of the AD Agreement requires the application of the alternative, average-to-transaction comparison methodology on a model-specific basis, as Korea appears to suggest.

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[135] Korea Opening Statement at the First Panel Meeting, para. 32 (emphasis in original).
[136] *See* U.S. Responses to the Panel's First Set of Questions, paras. 68-70.
[137] Korea Opening Statement at the First Panel Meeting, para. 32.
[138] *EC – Bed Linen (AB)*, para. 62.

4. The USDOC's Use of Zeroing in Connection with Its Application of the Alternative, Average-to-Transaction Comparison Methodology in the Washers Antidumping Investigation Is Not Inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement

108. The U.S. first written submission demonstrates that an examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This 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.[139]

109. In its opening statement at the first panel meeting, Korea addresses at some length the U.S. arguments related to zeroing.[140] Korea further elaborates its arguments in response to questions from the Panel.[141] In light of Korea's extensive response to the arguments presented in the U.S. first written submission, the United States takes the opportunity in this submission to reply to Korea's response. This section addresses the arguments related to zeroing that Korea presents in its opening statement at the first panel meeting and in response to the Panel's questions. Where appropriate, rather than repeating arguments made in the U.S. first written submission, we draw the Panel's attention to the relevant portions of the U.S. first written submission that address Korea's arguments. The United States continues to rely on the arguments it has already presented.

110. Korea asserts that the United States "has basically two arguments. First, the Appellate Body ('AB') has never before ruled on the application of W-T pursuant to the second sentence. Second, because of mathematical equivalence, the second sentence must allow zeroing."[142]

111. As a threshold matter, Korea simply is incorrect that the United States advances only the two arguments that Korea identifies. While these are important arguments, the U.S. first written submission explains in detail why the interpretation of the second sentence of Article 2.4.2 proposed by the United States is that which results from a proper application of the customary rules of interpretation of public international law.[143] That is, a good faith examination of the ordinary meaning of the terms of the second sentence of Article 2.4.2 in their context and in light of the object and purpose of the AD Agreement[144] reveals that zeroing is permissible – indeed, it is necessary – in connection with the application of the exceptional, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2. This conclusion can

[139] *See* U.S. First Written Submission, paras. 154-264.
[140] *See* Korea Opening Statement at the First Panel Meeting, paras. 1-20.
[141] *See* Korea Responses to the Panel's First Set of Questions, paras. 133-162.
[142] Korea Opening Statement at the First Panel Meeting, para. 5.
[143] *See* U.S. First Written Submission, paras. 163-215.
[144] *See* Vienna Convention, Art. 31.

be confirmed by referring to documents from the negotiating history, which are discussed in the U.S. first written submission as well.[145]

112. Nevertheless, since Korea focuses its discussion on the two broad arguments that it identifies, we discuss Korea's treatment of each of those broad arguments in turn.

a. Korea's Arguments Concerning the Appellate Body's Zeroing Findings Lack Merit

113. Korea contends that the United States "has ignored the consistent jurisprudence of the WTO by undertaking disingenuous efforts to engage in practices – such as zeroing – that the WTO has repeatedly condemned."[146] As explained in the U.S. first written submission, the United States has complied with all previous recommendations and rulings adopted by the WTO Dispute Settlement Body related to zeroing, and the United States does not seek in this dispute to re-litigate previous interpretations of the AD Agreement.[147] The U.S. first written submission also establishes that, while it has addressed zeroing in numerous prior disputes involving different comparison methodologies, the Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met.[148] Korea's suggestion that the Appellate Body previously has answered the questions before the Panel in this dispute simply is without any foundation.

114. Korea also argues that the Appellate Body has previously "rejected" the mathematical equivalence argument.[149] The U.S. first written submission discusses at some length the Appellate Body's prior consideration of the mathematical equivalence argument and demonstrates that the Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection.[150]

115. Korea argues that "there is no basis in the text of Article 2.4 or the [Appellate Body's] interpretation of that provision to support the U.S. argument."[151] The U.S. first written submission reviews all of the Appellate Body's findings related to Article 2.4 of the AD Agreement in previous zeroing disputes and demonstrates that Korea overstates the Appellate Body's findings related to zeroing and Article 2.4 of the AD Agreement. We explain why the Panel should recognize the limited nature and application of the Appellate Body's previous findings related to zeroing and the "fair comparison" language in Article 2.4 of the AD Agreement.[152]

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[145] *See* U.S. First Written Submission, paras. 242-250.
[146] Korea Opening Statement at the First Panel Meeting, para. 1; *see id.*, paras. 2, 6, 8, 9.
[147] *See* U.S. First Written Submission, para. 44.
[148] *See* U.S. First Written Submission, paras. 157-158.
[149] Korea Opening Statement at the First Panel Meeting, para. 7; *see also*, *id.*, para. 16.
[150] *See* U.S. First Written Submission, paras. 216-241.
[151] Korea Opening Statement at the First Panel Meeting, para. 9.
[152] *See* U.S. First Written Submission, paras. 251-262.

116. Korea argues that the Appellate Body "has never said that the results of the symmetrical comparison methods (W-W and T-T) and the unsymmetrical comparison method (W-T) have to be different."[153] Korea further contends that the average-to-transaction comparison methodology "is a different method, but that does not mean the outcome must be different. In fact, the outcome may or may not be different, depending on the facts and assumptions used."[154]

117. Korea is correct, in part, but misses the point. Of course, the Appellate Body has never before found that the outcome of the average-to-average comparison methodology and the average-to-transaction comparison methodology *must* be different. It has never addressed that issue. More importantly, though, it is unlikely that the Appellate Body would ever make such a finding because, as Korea correctly observes, "the outcome may or may not be different, depending on the facts. . . ."[155]

118. As we have explained before, even if an investigating authority uses zeroing in connection with the alternative, average-to-transaction comparison methodology, as it should, there will be situations where the average-to-average and average-to-transaction comparison methodologies yield identical results. If individual export prices, despite differing significantly from each other, nevertheless are all above normal value, then both the average-to-average and average-to-transaction comparison methodologies would lead to a finding of no dumping, or a zero margin of dumping. Alternatively, if all of the export prices are below normal value, and thus no "masking" of dumping is occurring, the weighted average margin of dumping calculated under both the average-to-average and average-to-transaction comparison methodologies would be the same. In exceptional situations, however, where there is a pattern of export prices that differ significantly, with higher export prices above normal value and lower export prices below normal value, it is possible, as the Appellate Body has recognized, that dumping may be "masked."[156]

119. The logical extension of the Appellate Body's reasoning that the alternative, average-to-transaction comparison methodology is an exception[157] to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should *not* "lead to results that are systematically different"[158] – is that the alternative comparison methodology *should* "lead to results that are systematically different," *when the conditions for its use have been met*.

120. One of the conditions for the use of the alternative comparison methodology, of course, is that the pattern of export prices identified cannot be taken into account appropriately by one of the normal comparison methodologies. That may be the case in the exceptional situation in

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[153] Korea Opening Statement at the First Panel Meeting, para. 13; *see also*, *id.*, para. 12.
[154] Korea Opening Statement at the First Panel Meeting, para. 14.
[155] Korea Opening Statement at the First Panel Meeting, para. 14.
[156] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[157] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also*, *id.*, para. 97 ("[T]he methodology in the second sentence of Article 2.4.2 is an exception."); *see also US – Zeroing (Japan) (AB)*, para. 131 ("The asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which are normally to be used.").
[158] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

which there exists a pattern of export prices that differ significantly, with higher export prices above normal value masking lower export prices below normal value.

121. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology will always yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all, contrary to the principle of effectiveness, as well as prior findings of the Appellate Body.[159]

122. Korea contends that the "U.S. argument on effective treaty interpretation makes a flawed leap of logic."[160] Korea argues that:

> The comparison methods employed in both T-T and W-T are basically identical in the sense that individual export prices are compared in both methods. In this regard, W-T may be an exception to the two symmetrical comparison methods, but like T-T, it also relies on individual export prices. Moreover, if the use of zeroing is prohibited in the T-T comparison method that focuses on individual export prices, the use of zeroing in the W-T comparison method that also focuses on individual export prices must be prohibited as well.[161]

It is Korea's logic that is flawed, and Korea's argument bears no connection whatsoever to the text of Article 2.4.2 of the AD Agreement or prior Appellate Body findings.

123. It is crucial to recognize that, when the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, those interpretations, on a basic level, are rooted in the text of Article 2.4.2 of the AD Agreement. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions."[162] The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis."[163]

124. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met. Korea is incorrect, logically and legally, that the alternative comparison methodology's "focus[] on individual export prices" should lead to the conclusion that zeroing is prohibited under that methodology. Nothing in the text of Article 2.4.2 of the AD Agreement or the Appellate Body's prior interpretations of that provision supports Korea's proposed interpretation.

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[159] *See* U.S. First Written Submission, paras. 172-179.
[160] Korea Opening Statement at the First Panel Meeting, para. 15.
[161] Korea Opening Statement at the First Panel Meeting, para. 15.
[162] *See EC – Bed Linen (AB)*, para. 55.
[163] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

b. Korea Has Not "Broken" Mathematical Equivalence

125. The U.S. first written submission demonstrates that, if the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is prohibited, then that comparison methodology will, as a mathematical certainty, in every case, yield a margin of dumping that is identical to the margin of dumping calculated using the average-to-average comparison methodology (also without zeroing). We have referred this as the "mathematical equivalence" argument.[164]

126. The U.S. first written submission demonstrates mathematical equivalence using both hypothetical scenarios and the actual data from the washers antidumping investigation. We have shown that, even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the washers antidumping investigation, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results.[165] Likewise, we have demonstrated that mathematical equivalence results when the margins of dumping are calculated using the normal average-to-average and the alternative "mixed" comparison methodologies.[166]

127. We are now in a position to show, based on the preliminary results of the first administrative review of the washers antidumping order, which Korea has placed before the Panel, that even with all of the complexities inherent in an original investigation combined with the added complexity of using monthly weighted average normal values in an administrative review and the application of a "mixed" approach in applying an alternative comparison methodology, it remains the case that the actual preliminary result in the first washers antidumping administrative review, if zeroing is prohibited under both methodologies, would be that the average-to-average and the alternative, mixed comparison methodologies would yield mathematically equivalent results.

128. This can be seen by looking at the output of the USDOC's margin program for LG, as presented in the preliminary results margin calculation memorandum for LG.[167] LG is the only respondent for which the USDOC calculated a preliminary margin of dumping in the first administrative review based on reported sales.[168] The preliminary results calculation memorandum shows that, without zeroing, the total of the comparison results, both positive and negative values with no zeroing, would be the same under both the average-to-average comparison methodology and the alternative, mixed comparison methodology that ultimately was applied in the preliminary results.

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[164] *See* U.S. First Written Submission, paras. 181-215.
[165] *See* U.S. First Written Submission, paras. 209-214.
[166] *See* U.S. First Written Submission, paras. 232-240.
[167] *See* Preliminary Results Margin Calculation for LGE (dated March 2, 2015) ("Preliminary LG AD AR1 Calculation Memo") (Exhibit KOR-100).
[168] Samsung and Daewoo both failed to respond to the USDOC's questionnaire, and, consequently, there were no sales databases to analyze for these respondents. *See* Washers AD Administrative Review Preliminary Determination, 80 Fed. Reg. at 12,457 (p. 3 of the PDF version of Exhibit KOR-96).

129. Specifically, the total of the comparison results using the average-to-average comparison methodology is [[***]].[169] This is calculated by combining the total amount yielded by positive comparison results, [[***]], and the total amount of negative comparison results, [[***]].[170] Since the total of the comparison results is negative, the amount of dumping and consequently the margin of dumping are both zero, as the AD Agreement does not contemplate negative margins of dumping.

130. Under the alternative, mixed comparison methodology, the USDOC calculated total positive comparison results of [[***]] and total negative comparison results of [[***]].[171] As explained in the U.S. first written submission, the Panel will note that the total amounts yielded by positive and negative comparison results are different for each of the comparison methodologies, due to the way that the positive and negative results are grouped in the different methodologies.[172] However, when the total positive comparison results are combined with, or, in other words, are offset by, the total negative comparison results, the total of the comparison results would be [[***]], which is the same total calculated under the average-to-average comparison methodology.

131. This is further evidence of the veracity of mathematical equivalence, and further support for the U.S. request that the Panel make a factual finding that, if zeroing is prohibited under both the average-to-average and alternative comparison methodologies, then those two methodologies, or any alternative, mixed application of the average-to-transaction and average-to-average comparison methodologies, will yield mathematically equivalent results in all situations, given the two assumptions recognized by both Korea and the United States.

132. Korea argues that "the alleged mathematical equivalence is based wholly on assumptions the [United States] makes about how to apply the second sentence."[173] Korea suggests that "if one simply changes those assumptions, the equivalence collapses and the two comparison methods yield different results."[174] Korea attempts to support its contention with the arguments presented in Exhibit KOR-93.

133. However, as demonstrated in the U.S. first written submission,[175] the U.S. opening statement at the first panel meeting[176] and in response to a question from the Panel,[177] Korea's arguments about "assumptions" lack merit. Korea fails to explain why changing the calculation of the *normal value* used in the application of the normal average-to-average comparison methodology and the exceptional average-to-transaction comparison methodology would in any

[169] *See* Preliminary LG AD AR1 Calculation Memo, at Attachment 2, pg. 99 (p. 317 of the PDF version of Exhibit KOR-100).
[170] *See* Preliminary LG AD AR1 Calculation Memo, at Attachment 2, pg. 99 (p. 317 of the PDF version of Exhibit KOR-100).
[171] *See* Preliminary LG AD AR1 Calculation Memo, at Attachment 2, pg. 101 (p. 319 of the PDF version of Exhibit KOR-100).
[172] *See* U.S. First Written Submission, para. 206.
[173] Korea Opening Statement at the First Panel Meeting, para. 17.
[174] Korea Opening Statement at the First Panel Meeting, para. 16.
[175] *See* U.S. First Written Submission, paras. 164-166, 226-240.
[176] *See* U.S. Opening Statement at the First Panel Meeting, paras. 12-19.
[177] *See* U.S. Responses to the Panel's First Set of Questions, paras. 106-118.

way address a pattern of significantly differing *export prices* among different purchasers, regions, or time periods.

134. Additionally, Korea itself demonstrates that, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the washers antidumping investigation.[178]

135. The Panel asked Korea "[w]hy – other than to avoid mathematical equivalence – would an investigating authority consider the use of monthly weighted average normal values more appropriate than the use of an annual weighted average normal value?"[179] Korea responds by denying that possible changes to normal value are about avoiding mathematical equivalence.[180] Korea reveals, though, that avoiding mathematical equivalence is precisely what it is attempting to do – and that is all that it is attempting to do – when it argues just a few paragraphs later that "[o]nce one recognizes that there are some reasons to use a different normal value, mathematical equivalence *is broken*."[181] Korea attempts mightily to *break* mathematical equivalence, but expends no effort whatsoever to advance an interpretation of the second sentence of Article 2.4.2 that would give that provision meaning or permit investigating authorities to use the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."[182]

136. Furthermore, Korea simply is incorrect. Korea's arguments do not leave mathematical equivalence "broken." Korea suggests that "[t]he exception in the second sentence allowing use of the 'prices of individual export prices' can also be given meaning through more detailed adjustments to ensure price comparability."[183] Korea does not explain, however, what in the text of the second sentence of Article 2.4.2 of the AD Agreement supports its proposition that an investigating authority should make more or different "detailed adjustments to ensure price comparability" beyond what is contemplated by Article 2.4 of the AD Agreement, or why adjustments for the purpose of the alternative, average-to-transaction comparison methodology would be different from adjustments made when applying one of the normal comparison methodologies described in the first sentence of Article 2.4.2.

137. Additionally, if the same "adjustments" that Korea proposes were made to the weighted-average normal value(s) used for both the average-to-average comparison methodology and the

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[178] Exhibit KOR-93, Table 7, on page 11; paras. 13 and 23, and Tables 2 and 4. *See also* U.S. Responses to the Panel's First Set of Questions, para. 111. *See also* Brazil Responses to the Panel's Questions to the Third Parties, response to question 1.4 ("[I]f that is the case, and the normal value data is the same in both W-W and W-T methods, it would be difficult to discard the mathematical equivalence argument. This is so because in both comparison methods the same mathematical operations are made. The difference would lie in the sequence in which the operations are performed which, however, does not alter the final result, due to the commutative property of adding and multiplying").

[179] Panel Question 2.27(i).

[180] *See* Korea Responses to the Panel's First Set of Questions, para. 147.

[181] Korea Responses to the Panel's First Set of Questions, para. 150 (emphasis added).

[182] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

[183] Korea Opening Statement at the First Panel Meeting, para. 19; *see also* Korea Responses to the Panel's First Set of Questions, para. 140-141.

average-to-transaction comparison methodology, then the mathematical result still would be the same. Korea has neither demonstrated nor even argued that the results would be different. Korea simply proposes using one normal value (or multiple normal values) for one comparison and another (or other) normal value(s) for the other comparison, but there is no support for Korea's proposal in the text of Article 2.4.2 or anywhere in the AD Agreement.

138. Korea asserts that changing the basis of the normal value calculation, such as by using monthly normal values, would allow "a more precise comparison" of export prices that may be changing over time.[184] However, comparing export prices in one month to the monthly weighted-average normal value for that same month will not necessarily take into account appropriately the price differences.[185] Indeed, if offsets are provided, *i.e.*, if zeroing is prohibited, such a comparison still would mask the pattern of export prices which differ significantly. As Korea notes, the USDOC uses monthly average-to-average comparisons as the standard methodology in administrative reviews.[186] However, in the USDOC's experience in such administrative reviews, monthly average-to-average comparisons will not necessarily "unmask" masked dumping. This is because the monthly comparisons still are aggregated together to calculate the respondent's overall margin of dumping for the product as a whole, and offsets for negative intermediate comparison results allow higher-priced export sales made during distinct time periods to "mask" lower-priced export sales during other distinct time periods.[187]

139. Korea suggests that "[t]he United States argues that somehow the second sentence restricts [the] flexibility" to "switch[] from annual to monthly normal values."[188] The United States does not argue that the investigating authority's flexibility to use monthly normal values is limited by the terms of Article 2.4.2 of the AD Agreement. Korea simply has failed to explain the logic of changing the basis of the calculation of the weighted-average normal value as part of the effort to "unmask" dumping concealed by a pattern of significantly differing export prices. Korea still has offered no credible reason why an investigating authority would do that. And, as noted above, if the same "switch" were made for both the average-to-average and average-to-transaction comparison methodologies, the mathematical result of the two methodologies still would be the same. Korea has not argued or shown otherwise.

140. Finally, Korea asserts that "[t]he actual language of the second sentence refers to 'unmasking' in the sense of a more careful consideration of the actual export prices that are differing significantly."[189] Korea does not support this assertion with any discussion of the "actual language" of the second sentence of Article 2.4.2. Korea suggests that "on the export side that is precisely why the 'W' is turning into the 'T' – once the authority is considering individual export prices, those export prices that differ significantly have been distinguished

[184] Korea Responses to the Panel's First Set of Questions, para. 148.
[185] *See* AD Agreement, Art. 2.4.2, second sentence.
[186] Korea Responses to the Panel's First Set of Questions, paras. 149, 155.
[187] *See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 Fed. Reg. 9,668 (February 11, 2013) (Exhibit USA-71), and accompanying Issues and Decision Memorandum, at 13 (Exhibit USA-72).
[188] Korea Responses to the Panel's First Set of Questions, para. 158-159.
[189] Korea Responses to the Panel's First Set of Questions, para. 136.

from the others."[190] Korea contends that "[t]he 'unmasking' is thus the use of individual transactions for the export side of the comparison. None of this has anything to do with using zeroing to deny offsets."[191]

141. Korea's argument is difficult to follow. It appears, though, to be premised on Korea's erroneous belief that it has "broken" the mathematical equivalence argument.[192] However, to the extent that the Panel agrees with the United States that a prohibition on zeroing would result in mathematical equivalence between the average-to-average and average-to-transaction comparison methodologies in all cases, as we have shown it would, then Korea's argument fails. As we have demonstrated, simply changing the export price from a weighted average to individual export transactions does nothing to "unmask targeted dumping" if the investigating authority is then required, when aggregating the multiple comparison results, to offset the positive and negative comparison results.

142. For these reasons, and those we have given previously, Korea has not "broken" the mathematical equivalence argument.

C. Korea's Claims Regarding the "Differential Pricing Methodology" Are without Merit

143. Korea claims the existence of a measure that it describes as the "differential pricing methodology," and further claims that this measure is inconsistent with Article 2.4.2 of the AD Agreement "as such"[193] and as "ongoing conduct."[194] The U.S. first written submission demonstrates that Korea's claims are without merit.[195] In this submission, the United States focuses on arguments Korea has made since the filing of its first written submission. In making those arguments, Korea has given the Panel no reason to find that any so-called "differential pricing methodology" – or any measure in which the USDOC applied a differential pricing analysis – is inconsistent with Article 2.4.2 of the AD Agreement.

1. The "Differential Pricing Methodology" Is Not a Measure that Can Be Challenged "As Such"

144. The U.S. first written submission demonstrates that Korea cannot establish that the differential pricing methodology is a measure challengeable in WTO dispute settlement, "as such."[196] As we explain there, the sum total of the evidence that Korea adduced with its first written submission to support its claim that there exists a measure that can be called the "differential pricing methodology" consists of a handful of determinations by the USDOC,[197] a

[190] Korea Responses to the Panel's First Set of Questions, para. 136.
[191] Korea Responses to the Panel's First Set of Questions, para. 137.
[192] Korea Responses to the Panel's First Set of Questions, para. 150.
[193] *See* Korea First Written Submission, paras. 182-241; Korea Opening Statement at the First Panel Meeting, paras. 37-42.
[194] *See* Korea First Written Submission, paras. 180-181; Korea Opening Statement at the First Panel Meeting, paras. 43-46.
[195] *See* U.S. First Written Submission, paras. 269-329.
[196] *See* U.S. First Written Submission, paras. 270-281.
[197] *See* Korea First Written Submission, paras 184, 187-188.

notice seeking comments from the public "on the possible further development of its approach,"[198] and generic SAS programming code that the USDOC has made available on its web site.[199] In light of prior Appellate Body findings discussing what is needed to establish the existence of a measure, such evidence plainly is insufficient.[200]

145. Subsequent to the filing of Korea's first submission, Korea has attempted to supplement the record with just two additional exhibits.[201] The submission of these exhibits has not improved Korea's case.

146. Korea has provided the Panel Exhibit KOR-95, which purports to be an exhaustive list of determinations in which the USDOC has applied a differential pricing analysis. The U.S. response to question 2.30 from the Panel addresses Exhibit KOR-95 and demonstrates why the Panel should give no evidentiary weight to that exhibit or to Korea's assertion that the USDOC has applied the "DPA test" in all proceedings where the USDOC had any need to test U.S. prices since March 2013.[202]

147. Korea also has provided the Panel Exhibit KOR-94, which Korea characterizes as an "expert opinion."[203] As with the "affidavit"[204] of another "expert"[205] Korea has put forward, whatever credentials the author of Exhibit KOR-94 may have, she is not an impartial observer in this dispute. Indeed, she works for one of the law firms representing the Government of Korea in this dispute and one of the respondents in the proceedings before the USDOC.[206] The arguments in Exhibit KOR-94 were prepared for the Government of Korea, just as every other Korean submission in this dispute is prepared for the Government of Korea. Accordingly, Exhibit KOR-94 cannot be viewed as "evidence" from an impartial or independent source. Rather, it is part of Korea's legal argumentation, just the same as any other argumentation presented by Korea in its written submissions, oral statements, and responses to the Panel's questions in this dispute. In other words, Exhibit KOR-94 simply is Korea's argument presented in a different form.

148. Additionally, the arguments presented in Exhibit KOR-94 fail to establish the existence of any so-called "differential pricing methodology" measure. After providing a general explanation of what SAS programming code is,[207] Exhibit KOR-94 comments on the "generic" SAS code that Korea presented to the Panel in Exhibit KOR-24.[208] None of this constitutes new

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[198] *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720 (May 9, 2014) ("Differential Pricing Analysis Request for Comments") (Exhibit KOR-25).
[199] *See* Korea First Written Submission, para. 184 and Exhibit KOR-24.
[200] *See* U.S. First Written Submission, paras. 271-281.
[201] *See* Korea Opening Statement, paras. 38, 40 and Exhibits KOR-94 and KOR-95.
[202] *See* Korea Opening Statement at the First Panel Meeting, para. 40.
[203] Korea Opening Statement at the First Panel Meeting, para. 38.
[204] Korea Opening Statement at the First Panel Meeting, para. 24; Korea Responses to the Panel's First Set of Questions, paras. 50, 73; *see also* Exhibit KOR-92.
[205] Korea Opening Statement at the First Panel Meeting, paras. 7, 17.
[206] *See* Exhibit KOR-94, para. 2.
[207] *See* Exhibit KOR-94, paras. 6-16.
[208] *See* Exhibit KOR-94, paras. 18-25.

evidence, or evidence at all. Furthermore, the U.S. first written submission explains why the SAS code presented in Exhibit KOR-24 does not support Korea's argument.[209]

149. Exhibit KOR-94 then comments on the "actual SAS code language"[210] from *four* USDOC determinations and asserts, without evidentiary support, the *opinion* of the author that "the USDOC differential pricing test is a well-defined policy enshrined in the SAS code that is being applied consistently and without any material change in every antidumping proceeding before the USDOC."[211] Again, this "opinion" does not come from an objective observer of these proceedings.

150. In any event, it remains the case that Korea has presented the Panel little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be challenged "as such."[212] Korea invites the Panel, contrary to the admonition of the Appellate Body, simply to divine the existence of a measure in the abstract on the basis of such a string of cases, or repeated action.[213] The Panel should decline Korea's invitation, and should find that Korea has not established that any "differential pricing methodology" measure exists that may be challenged "as such."

2. The "Differential Pricing Methodology" Cannot Be Found Inconsistent with Article 2.4.2 "As Such" because It Does Not Result in a Breach of Article 2.4.2 of the AD Agreement

151. The U.S. first written submission demonstrates that, assuming *arguendo* that the Panel accepts Korea's claim that the "differential pricing methodology" is a measure that exists and can be subject to an "as such" challenge, for Korea to succeed in its "as such" claim against the alleged "differential pricing methodology" measure, Korea must demonstrate that the "differential pricing methodology" necessarily causes a breach of Article 2.4.2 of the AD Agreement, but Korea has failed to do so.[214]

152. The United States notes that the Appellate Body examined an "as such" claim recently, in *US – Carbon Steel (India)*.[215] There, the Appellate Body observed that an "as such" claim advanced by India called on the Appellate Body "to assess whether, pursuant to the authorization contained in the text of the measure, the investigating authority *is required to act inconsistently* with" a provision of the covered agreements.[216] The Appellate Body found that the measure at issue, on its face, did not require the investigating authority to act inconsistently with a provision of the covered agreements.[217]

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[209] *See* U.S. First Written Submission, paras. 279-280.
[210] Exhibit KOR-94, para. 30 (emphasis in original).
[211] Exhibit KOR-94, para. 33.
[212] *See US – Zeroing (EC) (AB)*, para. 204.
[213] *See US – Zeroing (EC) (AB)*, para. 204.
[214] *See* U.S. First Written Submission, paras. 282-290.
[215] *See US – Carbon Steel (India) (AB)*, paras. 4.463-4.483.
[216] *US – Carbon Steel (India) (AB)*, para. 4.464.
[217] *See US – Carbon Steel (India) (AB)*, para. 4.470

153. In *US – Carbon Steel (India)*, the challenged measure was a statutory provision, but India claimed that, "notwithstanding the innocuous appearances in the text of the measure, the evidence it submitted to the Panel record beyond the text of the measure" demonstrated that the investigating authority necessarily was precluded from taking action consistent with the requirements of the covered agreements.[218] The Appellate Body examined that evidence and disagreed. The Appellate Body observed that evidence submitted "suggest[ed] that the measure should be understood as a discretionary measure rather than a binding requirement,"[219] the evidence did "not appear to support the proposition that the measure at issue is mandatory,"[220] and the Appellate Body's review of all the evidence, including "in relation to particular instances of application,"[221] led it to conclude that the evidence did not "establish conclusively that the measure requires the USDOC to act inconsistently with the obligations" in the covered agreements.[222]

154. The Panel should apply to Korea's "as such" claim the same analysis that the Appellate Body applied to the "as such" claim in *US – Carbon Steel (India)*. Doing so should lead the Panel to conclude that Korea cannot prove that the "differential pricing methodology" necessarily results in a breach of Article 2.4.2 of the AD Agreement, and thus it cannot be found inconsistent with that provision, "as such."

3. The "Differential Pricing Methodology" Is Not "Ongoing Conduct"

155. The U.S. first written submission demonstrates that Korea's "ongoing conduct" claims in relation to the so-called "differential pricing methodology" are without merit.[223]

156. In its opening statement at the first panel meeting, Korea insists that its "ongoing conduct" claim is within the Panel's terms of reference, arguing that Korea's panel request "specifically included among its claims a challenge to the 'ongoing practice' concerning targeted dumping and differential pricing."[224] Korea contends that "[t]he DPA method did exist, which is why Korea was able to reference it specifically."[225]

157. As explained in the U.S. first written submission, the purported "ongoing conduct" "measure" cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures for which no final action had been taken at the time of Korea's panel request.[226] Measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU.[227] The mere fact

[218] *US – Carbon Steel (India) (AB)*, para. 4.471.
[219] *US – Carbon Steel (India) (AB)*, para. 4.474.
[220] *US – Carbon Steel (India) (AB)*, para. 4.477, 4.478.
[221] *US – Carbon Steel (India) (AB)*, para. 4.479.
[222] *US – Carbon Steel (India) (AB)*, para. 4.482, 4.483.
[223] *See* U.S. First Written Submission, paras. 320-329.
[224] Korea Opening Statement at the First Panel Meeting, para. 43.
[225] Korea Opening Statement at the First Panel Meeting, para. 43.
[226] U.S. First Written Submission, paras. 321-323.
[227] *See, e.g., US – Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); *Indonesia – Autos*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of a panel was not within the panel's terms of reference).

that Korea referenced an "ongoing conduct" claim "specifically" in its panel request does not summon an "ongoing conduct" measure into existence.

158. Korea further argues that the "jurisprudence on an ongoing conduct claim has already been established" by the Appellate Body.[228] Of course, the DSU governs what measures and claims may be subject to dispute WTO settlement. Nevertheless, as demonstrated in the U.S. first written submission, Korea cannot establish "ongoing conduct" even as that concept has been developed by the Appellate Body.[229] The facts in this dispute simply do not support the conclusion that the challenged practices "would likely continue to be applied in successive proceedings."[230] Not even one administrative review of the washers antidumping order has been completed. Thus, it is impossible for Korea to establish the "string of determinations, made sequentially. . . over an extended period of time"[231] that would be required, under the analysis articulated by the Appellate Body, to support its claims related to alleged "ongoing conduct."

4. The First Administrative Review of the Washers Antidumping Order Is Not Within the Panel's Terms of Reference

159. Korea suggests in its opening statement at the first panel meeting that "[t]he DPA test is subject to challenge, as applied, in the *Washers* administrative review."[232] Korea is incorrect.

160. In response to a question from the Panel, the United States has demonstrated that the two measures at issue in this dispute, the washers antidumping investigation and the first administrative review of the washers antidumping order, cannot be said to share the same "essence" or to "relate to essentially the same dispute" such that this would be an exceptional circumstance wherein a measure that did not exist at the time of panel establishment can be considered within the Panel's terms of reference.[233]

161. For the reasons we have given in response to the Panel's question, the Panel should find that the preliminary results of the first administrative review of the washers antidumping order are not within its terms of reference, and the Panel should make no findings with respect to Korea's claims that the preliminary results are inconsistent with the AD Agreement.

5. Korea's Substantive Claims Concerning the Differential Pricing Analysis Applied in the Preliminary Results of the First Washers Antidumping Administrative Review Lack Merit

162. As we have demonstrated, no "differential pricing methodology" measure exists, and thus no such measure can be found inconsistent with Article 2.4.2 of the AD Agreement, either "as such" or as "ongoing conduct." Additionally, we have shown that the preliminary results of the first administrative review of the washers antidumping order are not within the Panel's terms of

[228] Korea Opening Statement at the First Panel Meeting, para. 44.
[229] *See* U.S. First Written Submission, paras. 324-328.
[230] *US – Continued Zeroing (AB)*, para. 191.
[231] *US – Continued Zeroing (AB)*, para. 191.
[232] Korea Opening Statement at the First Panel Meeting, para. 46.
[233] U.S. Responses to the Panel's First Set of Questions, paras. 32-42, 84, 95.

reference, so those results, too, cannot be found inconsistent with Article 2.4.2, "as applied." Nevertheless, in order to be of assistance to the Panel, we address Korea's substantive arguments in this section.

163. There are a number of ways in which the analysis the USDOC applied in the first administrative review of the washers antidumping order differs substantially from the analysis the USDOC applied in the washers antidumping investigation.[234] First, under the differential pricing analysis applied in the preliminary results of the first administrative review, the USDOC did not require an allegation from the domestic industry identifying potential "targets," *i.e.* purchasers, regions, or time periods which were "targeted" with significantly different export prices.[235] Because such an allegation was not required, the USDOC's differential pricing analysis was not limited to just those alleged "targets" identified by the domestic industry.

164. Second, under the differential pricing analysis applied in the preliminary results of the first administrative review, the USDOC tested *each* purchaser, region, or time period against all other purchasers, regions, or time periods.[236] For export sales to each purchaser, region, and time period of comparable merchandise (*i.e.*, the test group), the USDOC calculated a Cohen's *d* coefficient, which quantifies the difference in the weighted-average export price to the test group with the weighted-average export price of export sales of comparable merchandise to all other purchasers, regions, or time periods (*i.e.*, the comparison group). The USDOC placed additional conditions on this intermediate comparison in that there must have been at least two export sales to both the test group and to the comparison group, and the export sales volume to the comparison group must have been at least five percent of the export sales volume to the test group.

165. In other words, the differential pricing analysis the USDOC applied in the first administrative review sought to identify a "pattern," but did not require a "target."[237] This reflects an understanding that a "target" is just one example of a "pattern." While the second sentence of Article 2.4.2 of the AD Agreement has been described as a provision that addresses "targeting" or "targeted dumping,"[238] the United States agrees with several of the third parties to this dispute, who have indicated their understanding that "targeted dumping" is a shorthand reference to the terms of the second sentence of Article 2.4.2.[239] However, the terms "targeting" and "targeted dumping" are not present in Article 2.4.2 or anywhere else in the AD Agreement. As it is written, the second sentence of Article 2.4.2 provides that investigating authorities are to examine "export prices" to determine whether there is "a pattern of export prices which differ significantly among different purchasers, regions or time periods."

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[234] *See* U.S. Responses to the Panel's First Set of Questions, paras. 44-58; *see also* Exhibit USA-36.
[235] *See generally* Washers AD Administrative Review Preliminary Decision Memo, at 7-9 (pp. 6-8 of the PDF version of Exhibit KOR-96).
[236] *See generally* Washers AD Administrative Review Preliminary Decision Memo, at 7 (p. 6 of the PDF version of Exhibit KOR-96).
[237] *See* Exhibit USA-36, p. 4.
[238] *US – Zeroing (Japan) (AB)*, para. 131.
[239] *See, e.g.*, China Third Party Panel Question Responses, para. 1; European Union Third Party Panel Question Responses, para. 1.

166. Under the "targeted dumping" approach that the USDOC applied in the washers antidumping investigation, the "target" concept focused only on lower-priced export sales. Underlying this approach was the understanding that lower-priced export sales that are below normal value may be evidence of "targeted dumping." However, Article 2.4.2 does not require this particular approach to a "pattern" analysis. Indeed, the "pattern clause" includes no reference to normal values, and no evidence of dumping would ever be considered as part of an examination pursuant to the "pattern clause."

167. In contrast, the differential pricing analysis that the USDOC applied in the preliminary results of the first administrative review looked for export prices to a purchaser, region, or time period which are either significantly higher or significantly lower than the export prices to other purchasers, regions, or time periods. The conceptual framework of that analysis is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2, which calls upon the investigating authority to find "export prices which differ significantly," but which does not require a focus either on lower-priced or higher-priced export sales.

168. Of course, either lower-priced or higher-priced export sales may be less than normal value and may constitute evidence of dumping. Similarly, either lower-priced or higher-priced export sales may also be greater than normal value and may mask the evidence of dumping exhibited by other export sales. Put succinctly, normal values and "dumping" are not relevant to the question of the existence of a pattern of export prices which differ significantly. A pattern of export prices which differ significantly does not provide evidence of dumping, nor does it indicate whether that evidence is being masked. Such a pattern only establishes that conditions exist in the export market in which "masked dumping" could occur.

169. Third, under the differential pricing analysis the USDOC applied in the preliminary results of the first administrative review, the results of the Cohen's *d* test were aggregated as part of the ratio test to determine the extent of the export prices which differ significantly among different purchasers, regions, or time periods.[240] In other words, the USDOC aggregated the results of the Cohen's *d* test among different purchasers, regions, or time periods found to pass the Cohen's *d* test without double counting those export sales that passed the Cohen's *d* test for more than one category, *i.e.*, by purchaser, region, or time period. The USDOC aggregated the results of the Cohen's *d* test in this manner so that it could consider the exporter's pricing behavior in the United States market for the product as a whole, *i.e.*, whether "a pattern" existed of export prices which differ significantly. This accorded with the USDOC's understanding that the Cohen's *d* test results reflected different aspects of an exporter's overall pricing behavior.[241]

170. For these reasons, the differential pricing analysis applied by the USDOC in the preliminary results of the first administrative review of the washers antidumping order cannot be considered merely a continuation of previous USDOC efforts to give meaning and effect to the second sentence of Article 2.4.2 of the AD Agreement, such as its application of the *Nails* test in the washers antidumping investigation. As the USDOC has recognized, differential pricing

[240] *See generally* Washers AD Administrative Review Preliminary Decision Memo, at 8 (p. 7 of the PDF version of Exhibit KOR-96).
[241] *See* U.S. Responses to the Panel's First Set of Questions, paras. 61-67.

remains a work in progress,[242] but the analysis applied in the preliminary results of the first administrative review reflects an approach that hues closely to the text of the second sentence of Article 2.4.2 of the AD Agreement.

171. As a result of its application of a differential pricing analysis in the preliminary results of the first administrative review of the washers antidumping duty order, the USDOC found that 47.12 percent of LG's export sales supported the conclusion that there did exist conditions indicative of a pattern of export prices that differed significantly among different purchasers, regions, or time periods.[243]

172. Applying the ratio test thresholds that we have described previously,[244] the USDOC thus considered whether to apply the average-to-transaction comparison methodology to those export sales passing the Cohen's *d* test and the average-to-average comparison methodology to the remainder of LG's sales.[245] The USDOC preliminarily found that applying the average-to-average comparison methodology to all of LG's sales could not account for the pattern found.[246] Specifically, the USDOC explained that applying the average-to-average comparison methodology to all of LG's sales would result in a margin of dumping below the *de minimis* threshold, whereas applying an alternative, mixed comparison methodology would result in a margin of dumping greater than the *de minimis* threshold.[247] Accordingly, in the preliminary results of the first administrative review, the USDOC calculated a margin of dumping for LG by employing the average-to-transaction comparison methodology for those export sales passing the Cohen's *d* test and the average-to-average comparison methodology for those export sales not passing the Cohen's *d* test.[248]

173. We recall that Korea's first written submission argues that the so-called "differential pricing methodology" is inconsistent, "as such," with the "pattern clause" and the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement for the same reasons that Korea argues that the USDOC's application of the *Nails* test in the washers antidumping investigation is inconsistent with those provisions. The U.S. first written submission demonstrates why Korea's arguments lack merit.[249] Korea also argues that the "differential pricing methodology" is inconsistent with the second sentence of Article 2.4.2, "as such," because it "leads the USDOC to apply the exceptional W-T comparison methodology to sales that do not meet the criteria for invoking the exception."[250] The U.S. first written submission demonstrates why Korea's arguments in this regard lack merit as well.[251] For the same reasons

[242] *See* Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,722 (Exhibit KOR-25).
[243] Preliminary LG AD Review Calculation Memo, at 1 (p. 9 of the PDF version of Exhibit KOR-96).
[244] *See* U.S. Responses to the Panel's First Set of Questions, paras. 55-58.
[245] Preliminary LG AD Review Calculation Memo, at 2 (p. 10 of the PDF version of Exhibit KOR-96).
[246] Washers AD Administrative Review Preliminary Decision Memo, at 9 (p. 8 of the PDF version of Exhibit KOR-96).
[247] Washers AD Administrative Review Preliminary Decision Memo, at 9 (p. 8 of the PDF version of Exhibit KOR-96).
[248] Washers AD Administrative Review Preliminary Decision Memo, at 9 (p. 8 of the PDF version of Exhibit KOR-96).
[249] U.S. First Written Submission, paras. 293-305.
[250] Korea First Written Submission, para. 198.
[251] U.S. First Written Submission, paras. 306-311.

given in the U.S. first written submission, these arguments made by Korea also lack merit as they relate to the preliminary results of the first administrative review of the washers antidumping order.

174. We further recall that the U.S. first written submission demonstrates that, with respect to certain additional complaints Korea advances, which purportedly are specific to the "differential pricing methodology," Korea has failed to present legal arguments and evidence sufficient to make a *prima facie* case of a breach of Article 2.4.2 of the AD Agreement.[252] In its first written submission, Korea premises its arguments related to what it calls "'vertical' variation,"[253] "'horizontal' variation,"[254] and "'cross-category' price variation"[255] exclusively on hypothetical scenarios that are entirely the invention of Korea. Korea makes no reference whatsoever in its first written submission to any actual evidence that any of its concerns have actually manifested themselves in any actual application of the "differential pricing methodology."

175. Korea has subsequently put before the Panel the preliminary results of the first administrative review of the washers antidumping order. Korea suggests that the issues it raises in its first written submission have manifested themselves in those results.[256] Below, we respond to Korea's substantive arguments as they relate to the preliminary results of the first administrative review of the washers antidumping order. In doing so, we do not intend to suggest that the United States accepts that, by placing the preliminary results before the Panel, Korea has now put forward evidence sufficient to demonstrate that the so-called "differential pricing methodology" is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement, "as such." As an evidentiary matter, the USDOC's application of an analysis in the preliminary results of just one administrative review would not approach what is needed to establish the existence of a "differential pricing methodology" measure or that such a measure breaches the AD Agreement, "as such." Additionally, in any event, as demonstrated below, Korea's arguments are without merit.

a. The USDOC's Application of a Differential Pricing Analysis in the Preliminary Results of the First Administrative Review of the Washers Antidumping Order Is Not Inconsistent with Article 2.4.2 of the AD Agreement Due to Any Alleged "Vertical Variation"

176. Korea's first written submission describes what Korea calls the "'vertical' variation problem."[257] Korea appears to suggest that it is concerned about so-called vertical variation in connection with the USDOC's application of a differential pricing analysis in the preliminary

[252] *See* U.S. First Written Submission, paras. 312-319.
[253] *See* Korea First Written Submission, paras. 217-221.
[254] *See* Korea First Written Submission, paras. 222-226.
[255] *See* Korea First Written Submission, paras. 227-233.
[256] *See, e.g.*, Korea Responses to the Panel's First Set of Questions, paras. 53-58.
[257] Korea First Written Submission, paras. 217-221.

results of the first administrative review of the washers antidumping order.[258] Korea's concerns are unfounded.

177. Korea contends that the differential pricing analysis the USDOC applied in the preliminary results of the first administrative review "never identifies a pattern of prices to any one purchaser [or region or time period] seen as a whole."[259] Korea asserts that the USDOC's "aggregation of 'passed' transactions occurs only at the level of individual models, i.e. it aggregates only those model-specific transaction groups for each purchaser (or region or time period) that had a Cohen's *d* statistic of greater than 0.8 or less than -0.8."[260] Korea argues that "[b]y failing to take into account all export prices of subject merchandise to a particular purchaser, the USDOC does not determine whether there is a 'pattern of export prices which differ significantly among different purchasers, regions or time periods'."[261]

178. The legal premise of Korea's vertical variation argument is flawed. Korea appears to assume that the "pattern clause" of the second sentence of Article 2.4.2 requires that any analysis of a "pattern" identify a "target." As explained above, however, such 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." Nothing in the text of the "pattern clause" requires the investigating authority to find that *all* of the export prices to one particular purchaser (or region or time period) differ significantly from the export prices to other purchasers (or regions or time periods). Nothing in the text requires a determination based on export prices to a purchaser (or region or time period) as a whole, as Korea appears to suggest.[262]

179. Additionally, Korea is incorrect when it suggests that the USDOC did not evaluate "*all* of the exporter's export prices for the product under investigation."[263] When it applied a differential pricing analysis in the preliminary results of the first administrative review of the washers antidumping order, the USDOC certainly examined *all* of LG's export prices for the product under investigation. As Korea itself points out, "each transaction is tested three times – once for purchaser, then again for time, and then again for region"[264] in the differential pricing analysis the USDOC applied.

180. Korea argues that "the reference to 'a pattern of export prices' in the second sentence of Article 2.4.2 should be understood to refer to a pattern of export prices *for the product under investigation*, and not to a 'pattern' that is discerned from the export prices for only certain models or sub-types of the product under investigation."[265] The United States agrees that the pattern to be determined is for the product under investigation as a whole, and that it must be assessed on an exporter-specific basis. However, as Korea agrees, "[a]n analysis of price

[258] Korea Responses to the Panel's First Set of Questions, para. 58.
[259] Korea First Written Submission, para. 217.
[260] Korea First Written Submission, para. 217.
[261] Korea First Written Submission, para. 218.
[262] *See* Korea First Written Submission, para. 217.
[263] Korea First Written Submission, para. 219 (emphasis in original).
[264] Korea Responses to the Panel's First Set of Questions, para. 86.
[265] Korea First Written Submission, para. 219.

variation at the level of individual models may be necessary to ensure that the analysis is based on export prices for comparable transactions."[266] Korea correctly observes that this is "an intermediate step in determining whether there is 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'."[267]

181. That is why, in the preliminary results of the first administrative review, after making comparisons between different purchasers, regions or time periods on a model-specific basis, the USDOC aggregated the results of these model-specific comparisons to establish that 47.12 percent of LG's export sales passed the Cohen's *d* test and that this supported the conclusion that there existed conditions indicative of a pattern of export prices that differed significantly among different purchasers, regions, or time periods.[268] Aggregating the results of the model-specific comparisons among different purchasers, regions, or time periods ensured that the "pattern" identified was for the product under investigation as a whole and was based on the exporter's overall pricing behavior in the U.S. market.

182. For these reasons, Korea's concern about so-called "vertical variation" lacks any foundation.

b. The USDOC's Application of a Differential Pricing Analysis in the Preliminary Results of the First Administrative Review of the Washers Antidumping Order Is Not Inconsistent with Article 2.4.2 of the AD Agreement Due to Any Alleged "Horizontal" or "Cross-Category" Variation

183. Korea's first written submission describes what Korea calls "horizontal" and "cross-category" variation.[269] Korea appears to suggest that it is concerned about these issues in connection with the USDOC's application of a differential pricing analysis in the preliminary results of the first administrative review of the washers antidumping order.[270] As with so-called "vertical variation," Korea's concerns are unfounded.

184. Korea contends that the USDOC's differential pricing analysis improperly combines price variation across different purchasers, regions and/or time periods to identify a pattern.[271] With these arguments, Korea appears to be challenging the "ratio test" component of the differential pricing analysis, in which the USDOC determined whether the total value of sales to purchasers, regions or time periods that pass the Cohen's *d* test account for more than 33 percent or 66 percent of the value of total sales. However, there is no textual support in Article 2.4.2 of the AD Agreement for Korea's contention.

185. Korea argues that, "for prices to 'differ significantly among different purchasers', there must be a significant difference between the export prices to one purchaser and the export prices

[266] Korea First Written Submission, para. 221.
[267] Korea First Written Submission, para. 221.
[268] Preliminary LG AD Review Calculation Memo, at 1 (p. 9 of the PDF version of Exhibit KOR-96).
[269] *See* Korea First Written Submission, paras. 222-233.
[270] Korea Responses to the Panel's First Set of Questions, para. 57.
[271] *See* Korea First Written Submission, paras. 222-233.

to all other purchasers."[272] Evidently, Korea would have an investigating authority examine the export prices for one purchaser, or for one region, or for one time period, in isolation when assessing whether a "pattern" exists within the meaning of the "pattern clause." Such an analysis, however, would be at odds with the text of the second sentence of Article 2.4.2, which directs investigating authorities to consider whether there exists a pattern of export prices which differ significantly "among" different purchasers, regions, or time periods. To identify "a pattern" for the exporter and product as a whole, it may be appropriate for an investigating authority to consider all of that exporter's export prices to discern whether significant differences in the export prices are exhibited collectively among different purchasers, or different regions, or different time periods. In other words, the text of the "pattern clause" of the second sentence of Article 2.4.2 contemplates a holistic analysis of the exporter's pricing behavior for the product as a whole, or, in other words, the very "horizontal" analysis to which Korea objects.

186. With respect to Korea's complaint about so-called "cross-category" variation, Korea's argument fails for the same reason that its "horizontal" variation argument fails. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 suggests that the significant export price differences among purchasers (or regions or time periods) cannot be cumulated with the significant differences in export prices among other categories (*i.e.*, purchasers, regions, or time periods) when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods."

187. When it applied the Cohen's *d* and ratio tests, the USDOC was considering the pricing behavior of the exporter in the United States market as a whole.[273] Accordingly, the results of the Cohen's *d* test by purchaser, region, or time period are not analogous to an aggregation of "apples and oranges," as asserted by Korea.[274] Rather, the results by purchaser, region, or time period are intermediate comparison results which represent different aspects of the exporter's overall pricing behavior. The differential pricing analysis that the USDOC applied, based on the Cohen's *d* and ratio tests, informed the USDOC whether there existed a pattern of prices that differ significantly for the exporter and product as a whole.

188. Nothing in the text of Article 2.4.2 of the AD Agreement requires an investigating authority to determine the existence of a pattern of prices that differ significantly by selecting only one of either purchaser, region, or time period. Likewise, the results of the differential pricing analysis, as contemplated by the second sentence of Article 2.4.2 of the AD Agreement, are used to determine whether a symmetrical comparison method is appropriate for calculating a single weighted-average dumping margin for the exporter and for the product as a whole. Korea's position here is inconsistent with its position with respect to zeroing, and it is inconsistent with the Appellate Body's guidance that a dumping margin must be exporter-specific and determined for the product as a whole. The USDOC's differential pricing analysis is consistent with the Appellate Body's guidance, as it considers significant export price differences for the product as a whole and for all the exporter's sales in the U.S. market.

[272] Korea First Written Submission, para. 224.
[273] *See* U.S. Written Responses to First Panel Questions, paras. 63-66.
[274] Korea First Written Submission, para. 203.

189. Furthermore, Korea is confusing the results of examining individual test groups within the Cohen's *d* test with the aggregation of these individual results within the ratio test to determine whether there exists a pattern of prices that differ significantly. It bears repeating that the Cohen's *d* test evaluates whether sales of comparable merchandise to a particular purchaser, region, or time period exhibit prices that are significantly different from sales to all other purchasers, regions, or time periods, respectively. The comparison results are then aggregated for the exporter and product as a whole to determine whether there exists a pattern of prices that differ significantly for that exporter. If such a pattern is found to exist, then the USDOC examines whether a symmetrical comparison method can account for such differences.

190. The purpose of the differential pricing analysis is to determine whether a symmetrical comparison method is an appropriate tool with which to measure an exporter's amount of dumping and margin of dumping. The USDOC undertakes a similar process when measuring the amount of dumping. Specifically, the USDOC makes comparisons between normal values and export prices for comparable merchandise, and then aggregates those intermediate comparison results to determine the amount of dumping for that exporter and for the product as a whole. In this way, the use of the Cohen's *d* and ratio tests as part of the USDOC's differential pricing analysis is in accord with prior findings of the Appellate Body elaborating the obligations set forth in Article 2.4.2 of the AD Agreement.

191. Lastly, we emphasize with respect to so-called "cross-category" variation that Korea has failed to adduce any evidence, either from the record of the preliminary results of the first administrative review of the washers antidumping duty order or as a general matter,[275] demonstrating that the USDOC "accumulates price differences from each category *even when individually they would not meet the second sentence*."[276] That simply is an unfounded assertion. It remains Korea's burden to make a *prima facie* case of WTO-inconsistency by "putting forward adequate legal arguments and evidence" to support its claim,[277] and Korea has failed to meet its burden.

c. The USDOC's Application of a Differential Pricing Analysis in the Preliminary Results of the First Administrative Review of the Washers Antidumping Order Is Not Inconsistent with Article 2.4.2 of the AD Agreement Due to Any Alleged "Systemic Disregarding"

192. As a final matter, Korea presents another argument based not on legal or factual analysis, but rather on rhetoric. In particular, Korea contends that differential pricing analysis used by the USDOC in certain proceedings amounts to "systemic disregarding."[278] As Korea explains its concern:

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[275] *See* Korea First Written Submission, paras. 227-233 (offering only hypotheticals authored by Korea, which are divorced from any particular USDOC proceeding, to illustrate the so-called "cross-category" variation problem.).
[276] Korea Opening Statement at the First Panel Meeting, para. 34 (emphasis added).
[277] *See Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.
[278] *See* Korea First Written Submission, paras. 237-241; *see also* Korea Opening Statement at the First Panel Meeting, paras. 35-36.

> In the DPA, the DOC calculates one margin for U.S. sales meeting the second sentence and another margin for all other U.S. sales. The DOC then combines the two margins to calculate a single AD rate. When it does so, the DOC does not take into account the fact that one of the margins may be negative. It simply disregards the negative margin and assigns a zero instead. In this way, the DOC evades DSB rulings that you cannot disregard offsets. What makes it worse is that the offset is from transactions not meeting the criteria of the second sentence.[279]

193. On its face, this "systemic disregarding" contention just amounts to another phrasing of Korea's argument that zeroing is always impermissible, including in connection with the application of the alternative comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. The U.S. first written submission demonstrates, however, that zeroing is permissible – indeed, it is necessary – when applying the alternative comparison methodology, if that "exceptional" comparison methodology is to be given any meaning.[280] We elaborate further on our arguments related to zeroing above in section II.B.4.

194. Additionally, we have shown that the application of the alternative, average-to-transaction comparison methodology (with zeroing) to all sales is not inconsistent with Article 2.4.2 of the AD Agreement.[281] We elaborate on our arguments in that regard above as well, in section II.B.3.

195. Because the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology to all sales is permissible, there is no basis for finding that what Korea calls "systemic disregarding" is impermissible. There simply is nothing in the text of the second sentence of Article 2.4.2 that supports Korea's claim.

196. Additionally, we note that the public, generic programming code that Korea has put before the Panel demonstrates that, in a mixed application of the average-to-transaction and average-to-average comparison methodologies, the USDOC does permit negative comparison results calculated using the average-to-average comparison methodology to offset positive comparison results also calculated with the average-to-average comparison methodology, for those sales not passing the Cohen's *d* test, up to the aggregate amount of those positive comparison results.[282] That is, the USDOC does not use zeroing in the application of the average-to-average comparison methodology in connection with its mixed application.[283]

197. Of course, the USDOC does use zeroing in the application of the alternative, average-to-transaction comparison methodology, for the reasons we have given previously.

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[279] Korea Opening Statement at the First Panel Meeting, para. 35. The United States understands that Korea's references to "margin" should be references to intermediate comparison results, since a margin of dumping may be calculated only on an exporter-specific basis and for the product as a whole. *See US – Stainless Steel (Mexico) (AB)*, para. 94.
[280] *See* U.S. First Written Submission, paras. 154-262.
[281] U.S. First Written Submission, paras. 145-153.
[282] *See* Korea First Written Submission, para. 239.
[283] *See* U.S. Responses to the Panel's First Set of Questions, para. 87.

198. When the results of the two comparison methodologies used in a mixed application are aggregated, it is necessary to ensure that the results of the average-to-transaction comparison methodology are not masked or offset by the results of the average-to-average comparison methodology, and the USDOC ensures that that does not happen by not offsetting a positive comparison result of the average-to-transaction comparison methodology with a negative comparison result of the average-to-average comparison methodology. Otherwise, the purpose of the asymmetrical comparison method, which is to "unmask" any concealed dumping, would be thwarted.

199. For these reasons, Korea's arguments relating to "systemic disregarding" are without merit, and the Panel should find that the USDOC's use of what Korea calls "systemic disregarding" is not inconsistent with the AD Agreement or the GATT 1994.

III. KOREA HAS FAILED TO DEMONSTRATE THAT THE USDOC'S COUNTERVAILING DUTY DETERMINATION IS INCONSISTENT WITH THE *SCM AGREEMENT* AND THE *GATT 1994*

A. Introduction and Overview

200. Korea's statements at the first Panel meeting, and its responses to the Panel's questions, confirm that it has failed to demonstrate that the USDOC's CVD determination is inconsistent with U.S. obligations under the GATT 1994 and SCM Agreement. Korea challenges the USDOC's determination that two subsidy programs were countervailable: (1) RSTA Article 10(1)(3), which provides tax credits to companies for investments in "research and human resources development"; and (2) RSTA Article 26, which provides tax credits for eligible investments in facilities. But the USDOC's determination complied with relevant WTO obligations, and each of Korea's arguments to the contrary is flawed as a matter of legal interpretation, logic, or fact.

201. Korea's first claim – *i.e.*, that RSTA Article 10(1)(3) subsidies are not *de facto* specific – is legally and factually untenable. In its first written submission, the United States described how the Government of Korea ("the GOK") conferred "disproportionately large amounts of subsidy" on Samsung and LG, within the meaning of Article 2.1(c) of the SCM Agreement. To overcome this showing, Korea mischaracterizes both the USDOC's determination and the applicable legal standard. In particular, Korea relies on arguments that were not accepted by the Appellate Body in *US – Large Civil Aircraft* – such as the argument that a disproportionality analysis must incorporate a "second ratio."

202. And Korea fails to cure the deficiencies in its purported explanations for the distribution of subsidies – *i.e.*, its "common formula" argument and "size defense." Use of a formula when calculating subsidies does not automatically render a resulting distribution "proportionate," and Korea's position is inconsistent with Article 2.1 of the SCM Agreement. Likewise, the fact that recipients such as Samsung and LG are "large" does not remotely explain the skewed distribution evident here. And it would be inappropriate to immunize large subsidy recipients from scrutiny under the SCM Agreement, by virtue of their size.

203. Korea's second specificity claim is equally flawed. Korea challenges the USDOC's finding that RSTA Article 26 subsidies were regionally specific, within the meaning of Article 2.2 of the SCM Agreement. But Korea grounds its argument in a strained interpretation of the term "enterprises" in Article 2.2, and mischaracterizes the RSTA Article 26 program. In the end, the facts are clear: RSTA Article 26 imposes a geographic limitation on access to subsidies, based on the physical location of an enterprise's facilities. As a result, these subsidies fall squarely within Article 2.2.

204. Likewise, there is no merit to Korea's assertion that the USDOC should have calculated the subsidy ratios for RSTA Article 10(1)(3) and 26 subsidies using a novel variation of the "tied" approach to attribution. At the first Panel meeting, Korea attempted to re-cast the basis for this approach, which it now grounds in the alleged effects of the expenses incurred and recorded by Samsung – and not the retroactive use or effects of subsidies. But this reinvented theory fares no better than its predecessor.

205. Critically, Korea's expense-driven theory has nothing to do with the *bestowal of subsidies*, and fails as a consequence. The granting authority – the GOK – never received or reviewed the expense records that Korea relies on. Accordingly, there is no basis to suggest that these formed the basis for its bestowal of subsidies.

206. Korea's belated attempt to introduce materials from separate antidumping investigations cannot rescue this theory. Most of these materials were not part of the administrative record in the washers CVD investigation, and none addresses the subsidy programs at issue here. They are also offered in support of an untenable, expense-driven legal theory, and have no bearing on subsidy attribution. Moreover, the cost accounting principles that are applied in the antidumping context cannot be grafted onto the SCM Agreement, which calls for a qualitatively different line of inquiry when attributing subsidies.

207. Equally without merit is Korea's assertion that the USDOC should have incorporated revenue from overseas manufacturing into the denominator of the subsidy ratio for RSTA Article 10(1)(3). This theory has no basis in the text of Article VI:3 of the GATT 1994 or Article 19.4 of the SCM Agreement, which focus exclusively on domestic production. And it has no bearing on RSTA Article 10(1)(3), which limits subsidies to *Korean* companies carrying out activity in *Korea*. As Korea itself admits, these subsidies are intended to boost *national* economic activities.

208. Once again, Korea relies on a theory that has no basis in the bestowal of subsidies. Korea grounds its overseas manufacturing theory in the possible overseas knock-on effects of Korean R&D activity, and argues that subsidies should be attributed to domestic production only if the investigating authority can prove that the effects of this R&D are limited to domestic production. As discussed below, this standard is unworkable, and effectively ensures that subsidies will be attributed to global manufacturing in every case. Finally, the USDOC's antidumping determination in Bottom Mount Refrigerator-Freezers from Mexico ("BMRF Mexico") does not support, and ultimately undermines, Korea's attribution theory.

B. The USDOC's Disproportionality Determination Is Consistent With Article 2.1(c) Of The SCM Agreement

209. In its submissions, the United States has explained at length the basis for the USDOC's determination that Korea conferred RSTA Article 10(1)(3) subsidies on Samsung and LG in disproportionately large amounts. We have explained the extreme disparity in the distribution of these subsidies, which – when considered alongside various contextual factors, such as the absence of restrictions on eligibility and large number of participants – deviated from what would be expected. We have also explained why these findings were consistent with the text of Article 2.1(c) of the SCM Agreement, as well as the Appellate Body's guidance.[284]

210. Korea has not and cannot rebut this showing. Bereft of viable legal or factual theories, Korea mischaracterizes the Appellate Body's guidance in *US – Large Civil Aircraft*, and relies heavily on U.S. arguments that the Appellate Body did not accept. Korea also mischaracterizes the USDOC's findings, arguing – among others things – that the USDOC adopted an "absolute size" test.[285] And Korea invokes untenable theories that the USDOC considered at length and rejected – such as its "common formula" argument and "size defense." These arguments do not withstand scrutiny.

1. Korea Mischaracterizes The Appellate Body's Approach In *US – Large Civil Aircraft*

211. In its submissions, Korea does not appear to contest the United States' interpretation of the text of Article 2.1(c).[286] Nor does Korea dispute that, in *United States – Large Civil Aircraft*, the Appellate Body stated that the disproportionality inquiry requires a two-step analysis – *i.e.*, to (1) identify the "amounts of subsidy granted," and (2) determine whether the amounts of subsidy are "disproportionately large."[287] As the Appellate Body found, the term "disproportionately large" in Article 2.1(c) suggest that "disproportionality is a relational concept that requires an assessment as to whether the amounts of subsidy are out of proportion or relatively too large."[288] This assessment requires analysis of:

> whether the actual allocation of the "amounts of subsidy" to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions of eligibility for that subsidy as assessed under Article 2.1(a) and (b). In our view, where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, a panel will be required to examine the reasons for that disparity so as ultimately to determine

[284] U.S. First Written Submission, paras. 339-402; U.S. Opening Statement at the First Panel Meeting, paras. 40-43; U.S. Responses to the First Set of Panel Questions, paras. 128-141, 151-174, 183-187, 204-211.
[285] Korea Opening Statement at the First Panel Meeting, para. 50.
[286] *See* U.S. First Written Submission, paras. 355-362.
[287] *US – Large Civil Aircraft (AB)*, para. 879; U.S. First Written Submission, para. 368.
[288] *US – Large Civil Aircraft (AB)*, para. 879.

> whether there has been a granting of disproportionately large amounts of subsidy to certain enterprises.[289]

212. But in its oral statements and response to Panel Question 3.1, Korea asserts that the Appellate Body also "endorsed" and "implicitly agreed with" the argument that a panel must base its determination on a "second ratio reflecting the expected distribution of the subsidy."[290] Korea further asserts that the Appellate Body accepted the U.S. argument that a large company does not receive disproportionate amounts of subsidy because it "engages in more eligible activity."[291]

213. Korea mischaracterizes the Appellate Body's findings. In its report, the Appellate Body first noted the undisputed amounts of subsidy granted under the program – *i.e.*, Boeing and Spirit received 69% of all IRBs granted by the City of Wichita.[292] The Appellate Body then found that the amounts of subsidy granted were contrary to what would be expected:

> IRBs are potentially available to all enterprises that seek to purchase, construct, or improve various types of commercial or industrial property. Thus, enterprises that would seek to have the City of Wichita issue IRBs on their behalf are those that intend to invest in property development. In any given year, not all enterprises in Wichita will be undertaking such property development, and, even if they were, they may not be inclined to fund such development through the IRB scheme. We therefore consider it likely that, although the legal basis for the allocation of IRBs may seemingly be broadly available to enterprises in Wichita, the enterprises that are actually in a position to avail themselves of IRB benefits at any given time represent only a subset of all enterprises in Wichita. Nevertheless, even if the benefits of IRBs are limited to those enterprises actually in a position to seek them, we would expect, on the basis of the conditions established for eligibility for IRBs, a wide distribution of those benefits across various sectors of the Wichita economy. . . . [293]
>
> Even taking into account the fact that not all enterprise in Wichita would, at any given time, wish to enjoy the benefits of IRBs in respect of property development, we would nonetheless expect that the allocation of such benefits over the 25-year period between 1979 and 2005 would have produced a wider distribution of those benefits across different sectors of the Wichita economy. The fact that Boeing and its successor received over two thirds of all IRB property tax abatements from the City of Wichita over a 25-year period, in our view, provides a reason to

[289] *US – Large Civil Aircraft (AB)*, para. 879.
[290] Korea Opening Statement at the First Panel Meeting, paras. 54-55; Korea Closing Statement at the First Panel Meeting, paras. 9-10; Korea Responses to the First Set of Panel Questions, paras. 167-172.
[291] Korea Responses to the First Set of Panel Questions, paras. 167-168.
[292] *US – Large Civil Aircraft (AB)*, paras. 881, 884.
[293] *US – Large Civil Aircraft (AB)*, para. 883 (emphasis supplied).

> believe that the IRB subsidies were granted in disproportionately large amounts to certain enterprises.[294]

214. In other words, the Appellate Body found that it would have expected a "wider distribution" of benefits, given open eligibility criteria and notwithstanding the fact that not every company would be in a position to take advantage of the program. In conducting this expectations analysis, the Appellate Body did not articulate a quantitative threshold or figure establishing, hypothetically, what a "proportionate" outcome might have looked like. Korea's assertion in this dispute – *i.e.*, that any expected distribution must be expressed in quantitative terms[295] – has no basis in the Appellate Body's findings, much less the text of Article 2.1(c).[296] Nor did the Appellate Body employ a "second ratio" here.

215. Having found that there was "reason to believe that the IRB subsidies were granted in disproportionately large amounts,"[297] the Appellate Body turned to the explanations offered by the parties. As the Appellate Body observed, "[w]here the actual distribution of a subsidy deviates materially from the expected distribution of that subsidy, a panel would need to examine the reasons provided by the parties to explain that outcome."[298]

216. The Appellate Body began this examination by considering the "second ratio" offered by the European Communities. At the panel stage, the United States and the European Communities both took the position that a second ratio should, in principle, be a part of the disproportionality inquiry in that dispute. The European Communities had argued (and the panel essentially accepted) that Boeing and Spirit's share of employment in Wichita provided confirmation that the distribution was disproportionate.[299]

217. On appeal, the United States accepted the concept of a second ratio as a part of the disproportionality analysis at issue, but opposed the particular second ratio offered by the European Communities. The United States argued that this employment ratio was "not informative," as IRBs were only available to those companies in a position to make investments in industrial or commercial property.[300]

218. The Appellate Body found that the European Communities' "second ratio" was not relevant, as it was not an explanation for the distribution: "We do not consider that the focus by the parties and the Panel on determining what share of employment Boeing and Spirit had within the Wichita economy is particularly relevant to the inquiry of whether the IRB subsidies granted to Boeing and Spirit were disproportionately large."[301]

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[294] *US – Large Civil Aircraft (AB)*, para. 884.
[295] *See, e.g.*, Korea Responses to the First Set of Panel Questions, para. 163, 175-178; Korea Opening Statement at the First Panel Meeting, paras. 54.
[296] *See* U.S. First Written Submission, para. 375; U.S. Responses to the First Set of Panel Questions, paras. 154-155.
[297] *US – Large Civil Aircraft (AB)*, para. 884.
[298] *US – Large Civil Aircraft (AB)*, para. 883.
[299] *US – Large Civil Aircraft (AB)*, paras. 885-886.
[300] *US – Large Civil Aircraft (AB)*, para. 886.
[301] *US – Large Civil Aircraft (AB)*, para. 886.

219. Next, the Appellate Body explained that it could not accept the United States' explanation based on qualifying investments. The United States argued that it would be fruitful to "take a look at 'qualifying investments' during the relevant period of time – that is, 'those companies that actually made investments in industrial or commercial property.'"[302] The Appellate Body recognized that, in theory, "examining qualifying investments" might provide a basis for an explanation for this distribution.[303] But the Appellate Body found that the United States did not, in fact, provide evidence in support of this explanation.[304]

220. The Appellate Body then considered the United States' final explanation, which was predicated on the significance of Boeing and Spirit to the Wichita economy. Korea is correct that, in this respect, the United States asserted a kind of "size defense."[305] As the Appellate Body observed, the United States argued that "the fact that Boeing and Spirit received a significant share of IRBs was 'unremarkable,' because Boeing was 'the largest private sector employer for the entire State of Kansas' and 'aircraft production has historically been the core industry of Wichita.'"[306] The United States further argued that "in the 1990s, Boeing's employment levels in Wichita exceeded 20,000 in some years with a payroll of approximately $1 billion."[307]

221. But the Appellate Body rejected this defense. Even taking into account Wichita's focus on aircraft manufacturing, the Appellate Body found that the United States had not offered evidence to support a finding that these two companies would be expected to receive two-thirds of IRB subsidies.[308] This argument was asserted at a "relatively high level of generality."[309] As the Appellate Body stated, "we do not see that the United States provided sufficient reasons supported by evidence to undermine the assessment that the granting to Boeing and Spirit of 69% of the amounts of IRB subsidy represents an allocation at variance from what would have been expected from the allocation of IRBs in accordance with their conditions for eligibility."[310]

222. In sum, the Appellate Body did not "endorse" or even suggest that a disproportionality analysis must include a "second ratio." The Appellate Body's analysis confirms that such a ratio would not be necessary, either in the context of assessing whether a distribution was contrary to expectations or in analyzing the parties' explanations for this distribution. The Appellate Body permitted the parties to frame their explanations in either qualitative or quantitative terms. And it affirmatively rejected the only second ratio offered on appeal (the European Communities' employment ratio), thereby confirming that a disproportionality finding may be sustained absent a second ratio. Thus, the Appellate Body did not "implicitly accept" that there must be a second ratio, and the United States did not offer such a ratio on appeal.

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[302] *US – Large Civil Aircraft (AB)*, para. 886.
[303] *US – Large Civil Aircraft (AB)*, para. 887.
[304] *US – Large Civil Aircraft (AB)*, para. 888.
[305] Korea Closing Statement at the First Panel Meeting, para. 8.
[306] *US – Large Civil Aircraft (AB)*, para. 881.
[307] *US – Large Civil Aircraft (AB)*, para. 881.
[308] *US – Large Civil Aircraft (AB)*, para. 888.
[309] *US – Large Civil Aircraft (AB)*, para. 888.
[310] *US – Large Civil Aircraft (AB)*, para. 888 (emphasis supplied).

2. Korea's Portrayal Of The USDOC's Investigation And Determination Is Inaccurate

223. Korea also misrepresents the USDOC's investigation and determination. In its response to Panel Question 3.1, Korea criticizes the USDOC for not seeking "any information pertaining to disproportionality."[311] And Korea portrays the USDOC as having employed an "absolute size analysis,"[312] whereby the USDOC's "sole focus" was "to simply determine the size of the benefit received by a particular respondent and then to compare it to the size of the benefit received by other companies."[313] None of this is true.

224. In its investigation, the United States asked for extensive amounts of information pertaining to disproportionality. As discussed in the U.S. response to Panel Question 3.1, the United States posed multiple questionnaires on a range of topics relating to disproportionality – including the structure, operation, and requirements of the RSTA Article 10(1)(3) program, and information relating to participants and distributions. Korea's assertion that the USDOC did not seek "any information" on disproportionality is simply incorrect.

225. Nor did the USDOC employ an "absolute size analysis" based on the information it received. The USDOC relied on all factual information on the administrative record, but noted in particular that two companies – Samsung and LG – received a combined total of [[***]] percent of all subsidies conferred under the RSTA Article 10(1)(3) program, and also that Samsung alone accounted for [[***]] percent of the total. Indeed, Samsung received more than [[***]] times the amount conferred on the average recipient.[314]

226. Although this is powerful evidence of disproportionality, it was not the "only evidence" that the USDOC took into account.[315] Contrary to Korea's assertion,[316] the USDOC also considered whether the distribution differed from what would be expected, based on a range of contextual factors. As discussed in the U.S. response to Panel Question No. 3.1(iv), the USDOC considered, among other things, the fact that the program had nearly 12,000 participants and lacked sectoral or other *de jure* restrictions on eligibility. The USDOC found that, when considered in light of these factors, the distribution was contrary to what would be expected, and indicated disproportionality.[317] These findings are consistent with Article 2.1(c) of the SCM Agreement and the Appellate Body's approach in *US – Large Civil Aircraft*.[318]

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[311] Korea Responses to the First Set of Panel Questions, para. 175.
[312] Korea Opening Statement at the First Panel Meeting, para. 50.
[313] Korea Responses to the First Set of Panel Questions, para. 175.
[314] *See* U.S. Responses to the First Set of Panel Questions, para. 139.
[315] Korea Responses to the First Set of Panel Questions, para. 176.
[316] Korea Opening Statement at the First Panel Meeting, para. 52.
[317] U.S. Responses to the First Set of Panel Questions, paras. 140-141.
[318] U.S. First Written Submission, paras. 364-375; U.S. Responses to the First Set of Panel Questions, paras. 139-141.

3. The USDOC Appropriately Rejected The Parties' Explanations For The Distribution Of RSTA Article 10(1)(3) Subsidies

227. Korea continues to cling to arguments that the USDOC appropriately considered and rejected – *i.e.*, its "common formula" argument and "size defense." Even when re-packaged for purposes of this WTO dispute, these arguments remain unconvincing, and should be rejected. Use of a formula when calculating subsidies does not automatically render a resulting distribution "proportionate," and Korea's position is inconsistent with Article 2.1 of the SCM Agreement. Likewise, the fact that recipients such as Samsung and LG are "large" does not explain the distribution evident here. And it would be inappropriate to immunize large subsidy recipients from scrutiny under the SCM Agreement, by virtue of their size.

a. The "Common Formula" Argument

228. Korea points to the fact that the "amount of the credit that Samsung received was solely determined based on the statutory formula," and argues that as a result its "subsidy is proportionate to the amount of its investment."[319] Korea goes so far as to assert that a disproportionality finding "was not possible because there is no dispute that Samsung received the same proportionate credit that all other companies received."[320] But there is nothing in Article 2.1 of the SCM Agreement to support the notion that, because a subsidy is conferred pursuant to the terms of a legal instrument, a finding of *de facto* specificity is precluded.

229. This "common formula" argument reflects a misreading of Article 2.1. As discussed in the U.S. first written submission, use of a common formula to calculate benefits might indicate the existence of "objective criteria or conditions" under Article 2.1(b).[321] But an authority may conduct *de facto* specificity analysis under Article 2.1(c) "notwithstanding any appearance of non-specificity" under Articles 2.1(a) or (b). As the Appellate Body explained in *US – Large Civil Aircraft*, "[t]he inquiry under Article 2.1(c) thus focuses on whether a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure."[322]

230. Likewise, the disproportionality inquiry cannot be reduced to the question of whether subsidies are distributed automatically, without the exercise of discretion.[323] Under Article 2.1(b), the existence of "objective criteria" may indicate non-specificity where "eligibility is automatic and [ ] such criteria and conditions are strictly adhered to." The exercise of discretion might also be relevant under the 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."

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[319] Korea Opening Statement at the First Panel Meeting, paras. 48, 50.
[320] Korea Responses to the First Set of Panel Questions, para. 165.
[321] U.S. First Written Submission, para. 377.
[322] *US – Large Civil Aircraft (AB)*, para. 877.
[323] U.S. First Written Submission, para. 378.

But the absence of discretion does not mean that specificity cannot be demonstrated through another analysis under Article 2.1(c), such as disproportionality.[324]

231. Nor is there merit to Korea's suggestion that the "expected" distribution of subsidies, for purposes of Article 2.1(c), is simply a function of following the statutory formula.[325] Under this interpretation, as long as authorities use a formula, any distribution that results is, by definition, "expected" and "proportionate." Here, Korea asserts that because eligible R&D investments are the input in the subsidy formulas, this means that, for Samsung, the resulting "subsidy is proportionate to the amount of its investment."[326]

232. Korea's position distorts the inquiry under Article 2.1(c). In *US – Large Civil Aircraft*, the Appellate Body did not state that the "expected" distribution is equal to whatever result emerges from application of a formula. This would essentially nullify the Appellate Body's admonition to consider whether the actual distribution deviates from what would be expected. In that case, the Appellate Body did not base its disproportionality findings on whether the IRB subsidies had been calculated correctly under the applicable formulas and criteria, or treat this as the basis for its expectations. Nor did the Appellate Body base its analysis on whether Boeing and Spirit's subsidies were "proportionate" to the amount of eligible investments that these companies made in commercial or industrial property.

233. Korea's argument would also invite ready circumvention of subsidy disciplines. As long as a Member disburses a subsidy based on a formula, the subsidy would be immune from scrutiny under the SCM Agreement – even if the formula is structured so as to yield outcomes that favor certain enterprises or industries. Any distribution would be automatically "expected" and "proportionate." It is difficult to reconcile such an outcome with the fact-based specificity inquiry envisioned in Article 2.1 and with the disciplines on subsidization embodied in the SCM Agreement.

234. Here, as well, RSTA Article 10(1)(3) does not even contain a single "common formula." RSTA Article 10(1)(3) offers four different formulas that companies may elect, depending on their size and investment history.[327] Companies may also defer or carry forward credits to comply with Korea's Minimum Tax Law. [328] As a result, it is incorrect for Korea to say that "[a]ny other company that made a similar sized investment would have received the same tax credit benefit" as Samsung.[329] And Samsung did not receive "the same proportionate credit that all other companies received,"[330] as Korea asserts.

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[324] U.S. First Written Submission, para. 378.
[325] *See, e.g.*, Korea Opening Statement at the First Panel Meeting, para. 51.
[326] Korea Opening Statement at the First Panel Meeting, paras. 48, 50; *see* U.S. Responses to the First Set of Panel Questions, paras. 169-172.
[327] U.S. First Written Submission, para. 379; U.S. Oral Statement at the First Panel Meeting, para. 58; U.S. Responses to the First Set of Panel Questions, paras. 129-130.
[328] U.S. Responses to the First Set of Panel Questions, para. 211.
[329] Korea Opening Statement at the First Panel Meeting, para. 50.
[330] Korea Responses to the First Set of Panel Questions, para. 165.

b. The "Size Defense" Fails To Explain The Disproportionality In Receipt Of Subsidies

235. Equally groundless is Korea's continued reliance on its "size defense." The fact that Samsung and LG are "large" companies does not explain the skewed distribution evident here. Nor can large size shield recipients from scrutiny under Article 2.1(c) of the SCM Agreement.

236. In its administrative case brief to the USDOC – which it submitted nearly two months after the record had closed – Samsung mentioned an argument based on size in passing:

> The Department's analysis is fundamentally flawed because it unjustly penalizes large, innovative enterprises for their success. A large profitable firm, by virtue of its size and revenue, will typically invest more in absolute terms in research and human resources development activities than smaller, less successful companies. Consequently, larger enterprises will receive more of a benefit in absolute terms than smaller companies.[331]

237. But this was the extent of Samsung's "size defense" before the USDOC – *i.e.*, that, in general, "large" companies will "typically" invest more in research and human resources development than "smaller" companies. Samsung offered *neither qualitative nor quantitative evidence* to support this theory.[332] For instance, Samsung did not submit an empirical study addressing any general correlation between company size and research and human resources development activity. Nor did the Government of Korea submit any evidence that would have supported such an assertion that Korean firms benefitting from the subsidy were undertaking research and human development activity proportionally to their size.

238. To the extent that Samsung was attempting to establish a "second ratio" that would explain the disproportionate subsidy distribution found by the USDOC, it failed to do so. The USDOC appropriately found that this theory was "speculative" and unsupported.[333]

239. The USDOC also found that this theory was fundamentally at odds with the purpose of the disproportionality inquiry.[334] Given the level of generality at which it was framed, this theory would render subsidies "proportionate" any time a "large" company received larger amounts of subsidy under a program. Regardless of the metric used as the basis for calculating subsidies (investments, revenue, employment, etc.), large companies will often qualify for and receive more. But this fact is not sufficient to characterize *any* distribution that emerges as "proportionate."

240. Here, again, the *US – Large Civil Aircraft* dispute is instructive. The fact that Boeing and Spirit were "large" companies with larger investments in commercial and industrial property than "smaller" companies was not found to explain the disparate distribution and could not avert

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[331] Samsung Case Brief at 26 (Exhibit USA-58).
[332] See U.S. Responses to the First Set of Panel Questions, paras. 206-208.
[333] Washers CVD I&D Memo at 37 (Exhibit KOR-77).
[334] Washers CVD I&D Memo at 37 (Exhibit KOR-77).

a disproportionality finding. The Appellate Body did not accept a "size defense" in that case, and the Panel should not do so here.

241. And even assuming some degree of connection between size and R&D activity, this general correlation would not explain the *extent* of the disparity evident here, with one company (Samsung) receiving [[***]] percent of all subsidies out of nearly 12,000 participants, and [[***]] times more subsidy than the average participant.[335]

242. Nor does the relative size of participants in the RSTA Article 10(1)(3) program explain this disparity. As an initial matter, information on relative size was not available to the USDOC. The GOK took the position that Korean confidentiality laws prevented it from providing information that would allow the USDOC to consider the relative size of individual participants, much less the amount of their qualifying investments.[336]

243. In its response to Panel Question 3.9, Korea has offered *extra-record* evidence on Samsung's size relative to the next largest company in Korea. Of course, such information cannot be used to impugn the determination of an investigating authority based on the evidence in the record.[337] Nonetheless, this extra-record evidence does not support Korea's claim.

244. Korea asserts that in 2011, Samsung was the largest company in Korea by sales revenue (KRW 165 trillion), followed by Hyundai (KRW 77.8 trillion). Korea asserts that in that year Samsung's revenues were "more than twice as large as the next largest Korean company."[338]

245. Critically, the information offered by Korea does not purport to compare two participants in the RSTA Article 10(1)(3) program. The United States does not know if Hyundai sought or received any subsidies under this program, or in what amounts. Moreover, the sales revenue data that Korea put forward is for the year 2011. In the investigation, Korea was unable to provide information on disproportionality for the year 2011. The most recent year in which such data was available was 2010 (based on the 2009 fiscal year).[339]

246. The only known RSTA 10(1)(3) participants for which there is information on the record regarding size are the two companies under investigation – Samsung and LG. These are both unquestionably "large" companies. For each company, the USDOC obtained information concerning total revenue, taxable income, eligible expenditures, RSTA Article 10 credits received, and share of total RSTA Article 10 credits distributed under the program, covering the fiscal years 2007-2009. This information is summarized in the table below:[340]

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[335] U.S. First Written Submission, paras. 334, 340.
[336] U.S. Responses to the First Set of Questions, paras. 159, 183-185.
[337] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 175 ("*A panel must [ ] limit its examination to the facts that the agency should have discerned from the evidence on record*.") (emphasis supplied).
[338] Korea's Responses to the First Set of Panel Questions, para. 222.
[339] Washers CVD I&D Memo at 35 (Exhibit KOR-77).
[340] The table is a compilation of data before the USDOC and is based on the following data sources on the record: (1) SEC FY2010: Samsung April 9, 2012 QR, Ex. 5 (Exhibit KOR-72); (2) Samsung affiliates FY2010: Samsung April 9, 2012 QR, Ex. 5B (SGE), 5C (SES), 5D (SEL) (Exhibit USA-73) (BCI); (3) SEC and Samsung affiliates FY2007-2009: Samsung June 25, 2012 QR, Ex. 3 (Exhibit USA-74) (BCI); (4) LG and ServeOne FY2010: LG

	Year	Revenue	Taxable Income	Eligible Investments	Art. 10 Credit	Share
Samsung Total	FY2007 FY2008 FY2009 FY2010	[[				]]
LG Total	FY2007 FY2008 FY2009 FY2010	[[				]]
Samsung : LG Ratio	FY2007 FY2008 FY2009 FY2010	[[			]]	

Samsung Total includes SEC, SEL, SES, and SGE.

LG Total includes LG and ServeOne.

* Data for one or more affiliates was not available for the given year.

** Although LG made eligible investments in FY2010, LG did not claim a tax credit under RSTA Article 10(1)(3) in FY2010. The amount of ServeOne's eligible investments is not on the record.

247. As this table reflects, throughout the 2007-2009 period, Samsung and LG both received very large amounts of subsidy. In particular, Samsung consistently received very large proportions of the total subsidies conferred under RSTA Article 10 – [[***]] percent for fiscal year 2007, [[***]] percent for fiscal year 2008, and approximately [[**]] percent for fiscal year 2009. These results are remarkable given the fact that between 8,000 and 12,000 companies participated each year in this period.[341]

248. But LG consistently received [[***]] – a disparity that cannot be explained by their relative size. For instance, the chart shows that in the 2009 fiscal year, Samsung earned KRW [[***]] in sales revenue, compared to KRW [[***]] for LG. Yet for that same year, Samsung received approximately [[***]] percent of all subsidies under RSTA Article 10, whereas LG received [[***]] percent. In other words, Samsung was [[***]], but received [[***]]. This kind of disparity is also evident in in fiscal years 2007 and 2008.

249. Nor can the disparity in subsidy distribution be explained by the amounts of eligible investments. For instance, in fiscal year 2009 Samsung made [[***]], but still received for that same year [[***]].

April 9, 2012 QR, Ex. 11 (LG), Ex. 15 (ServeOne) (Exhibit USA-75) (BCI); and (5) LG and ServeOne FY2007-2009: LG June 25, 2012 QR, Ex. 57 (Exhibit USA-76) (BCI). The table reports aggregate RSTA Article 10 tax credit figures for 2007-2009, because the program was not broken out into three different categories – *i.e.*, RSTA Article 10(1)(1), 10(1)(2), and 10(1)(3) – until 2010 (effective for the 2009 fiscal year).

[341] GOK April 9, 2012 QR at App. Vol. 116 (Exhibit KOR-75).

250. Other record evidence confirms that this pattern – *i.e.*, the concentration of subsidy benefits in a very small number of recipients – is long-standing. According to a news source, the Korean Ministry of Finance and Economy reported that the top 5 companies in Korea received 45% of all tax credits under RSTA Article 10 in 2000, 46% in 2001, 63% in 2002, and a staggering 65% in 2003.[342] As one observer commented, "*R&D expense tax credits are concentrated to the few top corporations*," and *"[t]his shows a rapid pace of increase*."[343]

251. The distribution with respect to RSTA Article 10 is consistent with a broader pattern of concentration of tax benefits in the top "chaebol." Again, record evidence (a 2011 study conducted by the office of a member of the Korean Congress) showed that in 2009, the top 138 companies in Korea, with more than KRW 500 billion in capital, received 30.5% of all tax reductions claimed by the 41,920 corporations in Korea, due in part to RSTA Article 10 tax credits.[344] As the study's author observed, "*tax reduction benefits are being concentrated on Chaebol companies*."[345] This reflects the fact that RSTA Article 10 and the temporary investment tax credit "*have become 'fit-to-large-enterprise' tax reductions*."[346] This disparity prompted the congresswoman to call for "downsizing the R&D tax reductions."[347]

252. All of this evidence in the record before the USDOC amply supported its analysis and conclusion of disproportionality. Simply put, even comparing the "size" of the very two companies that were under investigation and the subsidies they received does not support Korea's argument. Rather, this comparison confirms the USDOC's view that the distribution of subsidy was skewed and was not what would have been expected.

c. The USDOC Redetermination

253. In its redetermination, the USDOC further confirmed that Samsung's status as a "large" company cannot explain the distribution of RSTA Article 10(1)(3) subsidies.[348] The USDOC asked for detailed information concerning the largest 100 companies that received subsidies under the program, including the amount of subsidy received and data relating to assets and

[342] "R&D Expense Tax Credit Shows Serious Polarization," *Herald Economy*, July 12, 2005 (Ex. C-130 to Washers CVD Petition) (Exhibit USA-77) (citing data reported by the Ministry of Finance and Economy) (emphasis supplied).
[343] "R&D Expense Tax Credit Shows Serious Polarization," *Herald Economy*, July 12, 2005 (Ex. C-130 to Washers CVD Petition) (Exhibit USA-77) (emphasis supplied).
[344] "Corporate tax reduction, benefits only the 0.03%," *Kyunghyang News*, April 18, 2011 (Ex. C-137 to Washers CVD Petition) (Exhibit USA-78).
[345] "Real corporate tax rates for Chaebols are lower than those for large enterprises," *Mail News*, April 20, 2011 (Ex. C-136 to Washers CVD Petition) (Exhibit USA-79) (emphasis supplied).
[346] "Corporate tax reduction, benefits only the 0.03%," *Kyunghyang News*, April 18, 2011 (Ex. C-137 to Washers CVD Petition) (Exhibit USA-78) (emphasis supplied).
[347] "Real corporate tax rates for Chaebols are lower than those for large enterprises," *Mail News*, April 20, 2011 (Ex. C-136 to Washers CVD Petition) (Exhibit USA-79).
[348] The USDOC redetermination was not issued until after the Panel was established, and thus falls outside the Panel's terms of reference. Nonetheless, it was put forward by Korea in this dispute, and is a relevant fact that the Panel can take into account.

revenues. Korea refused to provide the bulk of this information, largely on confidentiality grounds. However, in the end, Korea did provide certain aggregated data.[349]

254. The results were striking:

- Samsung accounted for approximately [[***]] percent of all credits received by the largest 100 companies that received subsidies; and
- Samsung's credits were equal to [[***]] percent of all credits claimed by the other 99 large companies combined;
- RSTA 10(1)(3) subsidies reduced Samsung's taxes by [[***]] percent, which was over [[***]] times greater than the combined tax benefit received by the other 99 largest companies in the program.[350]

255. The USDOC concluded that, even among other "large" companies, Samsung's use of the program was "*overwhelming[ly] disproportionate*."[351]

256. In its responses to the Panel's questions, Korea dismisses the USDOC's redetermination, asserting that the USDOC "did not rely on any evidence pertaining to the issue of disproportionality."[352] The apparent basis for this facially implausible statement is Korea's assertion that the Appellate Body required a "second ratio," and that the USDOC's findings did not constitute a "second ratio."[353]

257. But as discussed above, the Appellate Body did not require a "second ratio." The Appellate Body considered the "explanations" or "reasons" offered by the parties, which did not have be framed as a ratio, and found that they did not "undermine the assessment" that the distribution of subsidies to Boeing was "at variance from what would have been expected."[354]

258. Likewise, the USDOC considered Samsung's "size" argument, and – drawing in part on quantitative evidence obtained during the redetermination – found that this explanation did not

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[349] See U.S. Responses to the First Set of Panel Questions, para. 134; U.S. First Written Submission, paras. 399-400.
[350] U.S. First Written Submission, paras. 400-402. These figures actually understate Samsung's disproportionate use of the program. Samsung's data reflects only its use of RSTA Article 10(1)(3) tax credits, whereas data with respect to the other 99 "large company" subsidy recipients includes credits received under all Articles 10(1)(1), 10(1)(2), and 10(1)(3). Washers CVD Redetermination at n.43 (Exhibit KOR-44).
[351] Washers CVD Redetermination at 10-11 & n.34, 14 & n.43 (Exhibit KOR-44) (BCI) (emphasis supplied).
[352] Korea Responses to the First Set of Panel Questions, para. 177. Korea also points to the fact that the U.S. Court for International Trade ("CIT") remanded the USDOC's original determination. *Id.* But Korea neglects to mention that the CIT largely grounded its remand on concerns over the possibility that a common formula would establish a "standard pricing mechanism," a concept which generally applies to purchases of electricity and has a unique status under U.S. law. In any event, the CIT affirmed the USDOC's redetermination in December 2014, based in part on the USDOC's explanation that RSTA Article 10(1)(3) did not impose a single "common formula" analogous to a standard pricing mechanism. The time for appeal with respect to the CIT's December 2014 order has expired, and all CIT litigation with respect to the USDOC's CVD determination and redetermination has come to an end.
[353] Korea Responses to the First Set of Panel Questions, para. 178.
[354] *US – Large Civil Aircraft (AB)*, para. 888.

"undermine the assessment" that the amount of subsidies conferred on Samsung was contrary to what would be expected.

259. Korea falls back on the argument that data in the redetermination, which is based on taxable income and tax savings, is "irrelevant," because it may reflect a company's tax planning strategy.[355] It is remarkable that Korea would criticize the USDOC for relying on taxable income, as an indicator of company size, given that *the GOK refused to provide data on company revenue or assets*.[356] The USDOC explained that its "initial attempt" to address the size argument "based upon the size of assets and amount of revenue was not possible," but that "[t]axable income is a suitable alternative" in part because the "benefit" of a tax credit can be framed as a function of the amount by which taxes are reduced – *i.e.*, the tax savings – and thus premised on taxable income.[357]

260. The fact that a company's taxable income and tax savings may reflect tax planning strategies does not render this data "irrelevant," particularly at the level of an aggregate comparison between Samsung and the other 99 companies. The USDOC used the best data available, which accounts for company size.[358]

4. Korea Has Failed To Make a *Prima Facie* Case With Respect To The Final Sentence Of Article 2.1(c)

261. In its first written submission, the United States observed that Korea had failed to make a *prima facie* case with respect to the final sentence of Article 2.1(c) of the SCM Agreement.[359] Korea did not explain how the USDOC neglected to take into account "the length of time during which the subsidy programme has been in operation," or the "extent of diversification of economic activities within the jurisdiction of the granting authority." The United States went on to address how the USDOC had, in fact, taken these factors into account in its determination.[360]

262. Through its subsequent submissions, Korea has failed to cure the deficiencies in its case. In its oral statements and answers to the Panel's questions, Korea has failed to make an adequate legal argument for its claims,[361] and has not "adduce[d] evidence sufficient to raise a presumption that what is claimed is true."[362] Korea has not provided a meaningful interpretation of these provisions or explained what type of analysis they require. Nor has Korea ever explained how proper consideration of these factors would have affected the overall specificity analysis. On this basis alone, the Panel should reject Korea's claim.

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[355] Korea Responses to the First Set of Panel Questions, para. 179.
[356] Washers CVD Redetermination at 12-13, 16-17 (Exhibit KOR-44) (BCI); *see also* U.S. First Written Submission, paras. 399-400; U.S. Responses to the First Set of Panel Questions, para. 134.
[357] Washers CVD Redetermination at 28 (Exhibit KOR-44) (BCI); *see* SCM Agreement Article 1.1(a)(1)(ii) (financial contribution in the form of "government revenue that is otherwise due is foregone or not collected").
[358] Washers CVD Redetermination at 28-29 (Exhibit KOR-44) (BCI).
[359] U.S. First Written Submission, paras. 383-384.
[360] U.S. First Written Submission, paras. 385-394.
[361] *See Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.
[362] *US – Wool Shirts and Blouses (AB)* at 14.

263. Equally, there is no basis for what little Korea has said about these factors. In its opening statement at the first Panel meeting, Korea dismissed the United States' observation that the USDOC expressly took note of the duration of the RSTA Article 10(1)(3).[363] Although Korea labels this a "*post hoc* argument,"[364] the USDOC's preliminary report expressly noted the thirty-year duration of the program (a fact that was repeatedly referenced in the record).[365] Korea suggests that this was not enough, but it fails to explain exactly what form of analysis would have been required. Korea asserts that Samsung made an "express request" that the USDOC take into account duration of the subsidy program,[366] but again fails to provide any citations, evidence, or explanation. The United States is left to speculate about the basis for Korea's arguments.

264. Likewise, Korea asserts that "there is no evidence" that the USDOC took into account the diversification of the Korean economy.[367] To the extent that Korea is asserting that this factor must be addressed explicitly, Korea is incorrect. As the United States explained in its first written submission, it is well-established that "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly."[368] Indeed, panels have upheld determinations by investigating authorities where these factors were taken into account implicitly.[369]

265. And it is a "publicly-known fact" that Korea is one of the wealthiest, most diversified economies in the world.[370] The record reflects this at several points – for instance, evidence showing that Korea is a member of the G-20 and recently chaired a G-20 summit.[371] The fact that nearly 12,000 Korean companies participated in the RSTA Article 10(1)(3) R&D program is itself evidence of this diversification.[372]

266. As the USDOC observed in its redetermination, "[a]ccording to the GOK, over 11,000 Korean corporations received this [Article 10(1)(3)] tax credit in 2010. Furthermore, the record

[363] Korea Opening Statement at the First Panel Meeting, para. 59.
[364] Korea Opening Statement at the First Panel Meeting, para. 59.
[365] U.S. First Written Submission, para. 389-391.
[366] Korea Opening Statement at the First Panel Meeting, para. 59. Korea asserts that the United States attempts to establish a "false test, by claiming that Korea was required to present a *prima facie* case before the DOC would consider the applicability of the last sentence of Article 2.1(c)." Korea Opening Statement at the First Panel Meeting, para. 58. This misrepresents the U.S. position. In its first written submission, the United States stated that "implicit findings are all the more understandable where, as here, none of the parties to the countervailing duty proceedings ever argued or suggested that these factors had any bearing on the facts at issue." U.S. First Written Submission, para. 388. And the United States observed that the GOK never raised these factors with the USDOC, making it remarkable that Korea should now criticize the USDOC for allegedly failing to take these factors into account. *Id.*
[367] Korea Opening Statement at the First Panel Meeting, para. 57.
[368] U.S. First Written Submission, para. 387 (quoting *US – Countervailing Measures (China) (Panel)*, para. 7.253).
[369] U.S. First Written Submission, para. 387.
[370] U.S. First Written Submission, para. 394; *see, e.g., US – Softwood Lumber IV (Panel)*, para. 7.124 (finding that the USDOC took into account the "publicly known fact" that Canada is a highly diversified economy when the USDOC noted that the vast majority of companies and industries in Canada did not receive benefits under the wood product subsidy programs in question).
[371] U.S. First Written Submission, para. 394.
[372] U.S. First Written Submission, para. 394.

indicates that Korea, as a member of the G-20, is one of the twenty major economies in the world."[373] The USDOC redetermination confirmed that these facts were taken into account in both the original determination and redetermination:

> With these facts in mind, i.e., that the tax credit is available to all Korean corporations in one of the world's largest economies, and that over 11,000 companies used the credit, the Department determined (and continues to find) that a single company receiving [[***]] percent of all the program's total credits, compared to the average of [[***]] percent, has received a disproportionately large amount of those credits . . . .[374]

267. And because of limitations in the evidence that the GOK provided, the extent of diversification of the economy was not at issue. The GOK was unable to provide information with respect to the distribution of RSTA Article 10(1)(3) subsidies along industry and sector lines. So the USDOC was not in a position to evaluate whether, for instance, certain sectors received more subsidies than others, or consider this sectoral distribution in light of the diversification of the Korean economy.[375]

268. Korea nonetheless argues that Samsung "raise[d] the issue" of diversification in its submissions to the USDOC.[376] Korea points to the fact that it submitted a chart setting out the amounts of investments that *Samsung* made in various areas.[377] According to Korea, this chart shows that the tax credits "were provided for a wide variety of economically diversified investment activities throughout Korea's economy."[378]

269. Samsung's submission of a chart listing its investments is in no sense an argument to the USDOC about the diversification of the Korean economy, or how this should affect the disproportionality analysis. In any event, Korea's opening statement appears to concede that Korea has a highly diversified economy,[379] rendering its diversification argument moot.

C. The USDOC's Determination That RSTA Article 26 Subsidies Were Regionally Specific Was Consistent With Article 2.2 Of The SCM Agreement

270. Korea also failed to establish that the USDOC's specificity determination with respect to RSTA Article 26 subsidies is inconsistent with Article 2.2 of the SCM Agreement. Article 2.2 provides 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."

271. As discussed in the U.S. first written submission, eligibility for the RSTA Article 26 subsidy program is expressly limited to investments located in a designated geographic region –

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[373] Washers CVD Redetermination at 3-4 (Exhibit KOR-44) (BCI).
[374] Washers CVD Redetermination at 3-4 (Exhibit KOR-44) (BCI) (emphasis supplied).
[375] U.S. First Written Submission, para. 393.
[376] Korea Opening Statement at the First Panel Meeting, para. 58.
[377] Korea Opening Statement at the First Panel Meeting, para. 58.
[378] Korea Opening Statement at the First Panel Meeting, para. 58.
[379] Korea Opening Statement at the First Panel Meeting, para. 58.

the area falling outside the Seoul overcrowding region.[380] Accordingly, the KRW[[***]] in facilities subsidies that Samsung received under this program (equivalent to USD[[***]])[381] fall squarely within the scope of Article 2.2.

272. Korea attempts to avoid this conclusion by means of a strained interpretation of the term "enterprises" in Article 2.2; by mischaracterizing the RSTA Article 26 subsidy program; and by invoking an array of failed legal theories – such as Korea's "double basis" argument. These arguments are unavailing, and should be rejected.

1. Korea's Interpretation Of The Term "Enterprise" In Article 2.2 Is Flawed

273. In its responses to the Panel's questions, Korea offers a narrow, results-driven interpretation of the term "enterprise" in Article 2.2. According to Korea, this term means the "overall business organization," which it distinguishes from a firm's facilities and investments.[382] Korea asserts that "the relevant consideration under Article 2.2 is whether there are limitations as to the physical location of the enterprise and not of its facilities or investments."[383]

274. This interpretation does not withstand scrutiny. Korea fails to acknowledge that the term "enterprise" is part of the compound, defined term, "certain enterprises." As the United States explained in its response to Panel Question 3.2, this phrase is defined in the *chapeau* of Article 2.1 as "an enterprise or industry or group of enterprises or industries."[384] This phrase thus encompasses a wide variety of economic structures and activities. "Certain enterprises" includes not only business firms and companies, but also includes the concept of an "industry," which transcends individual entities (*i.e.*, any "form or branch of productive labour" or "trade"), and extends to "groups" or classes of companies or industries.[385]

275. When the term "certain enterprises" is read in context with Article 2.2, it is clear that a firm, industry, or group thereof may be "located" in a variety of places, including the site of a head office, branch, manufacturing facility, or other asset or investment. As discussed in the U.S. response to Panel Question 3.2, the fact that the term "certain enterprises" encompasses the term "industries" renders it particularly inappropriate to draw formalistic distinctions about location (*e.g.*, an "industry" does not have a head office, but may be "located" at the site of assets or facilities).[386]

276. Instead of acknowledging the implications of the phrase "certain enterprises," Korea casts a wide net, hoping to find support for its interpretation in other provisions of the SCM Agreement and the GATT 1994. This effort fails.

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[380] U.S. First Written Submission, paras. 407-408.
[381] Final Samsung CVD Calculation Memo, Attachment 9 (Exhibit USA-26) (BCI).
[382] Korea Responses to the First Set of Panel Questions, paras. 183-188.
[383] Korea Responses to the First Set of Panel Questions, para. 188.
[384] U.S. Responses to the First Set of Panel Questions, para. 142.
[385] U.S. Responses to the First Set of Panel Questions, para. 143.
[386] U.S. Responses to the First Set of Panel Questions, para. 148.

277. Korea first points to Article 6.1(c) and paragraph (e) of the Illustrative List of Export Subsidies in the SCM Agreement, arguing that these provisions show that an "enterprise" may "maintain[ ] its own accounting and report[ ] its own operating profits and losses,"[387] and is capable of paying taxes and social welfare charges.[388] But even if firms are typically capable of carrying out these activities, that would not address the Panel's question – *i.e.*, whether the term is restricted to a particular type of legal address or place of economic activity. And these characteristics are not defining elements of an "industry" or "group" of industries.

278. Korea then cites Article 8.2(c) of the SCM Agreement, which it asserts shows that the SCM Agreement "draws a distinction between 'enterprises' and 'facilities.'"[389] This argument is frivolous. Article 8.2(c) provided that "assistance to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms" would be non-actionable if certain conditions were met. This provision does not suggest that the drafters of the SCM Agreement viewed a "facility" as being entirely distinct from the company that owns it. In fact, this provision affirms the interconnection between the terms "firm," "facility," and "investment," as the environmental regulations that require the upgrading of the facilities or "assisted investment" result in "constraints" and "financial burden" on the firm.

279. More fundamentally, the sharp distinction that Korea seeks to draw between "enterprise" and "facility" defies logic. It is unclear where an enterprise would be located, if not in facilities of some kind. How would it pay taxes or carry on the other activities that Korea focuses on, if not from a "facility" of some kind? Korea provides no answer.

280. Korea also invokes Article XVII of the GATT 1994, which addresses state-owned enterprises ("SOEs"). Korea asserts that the term "enterprise" in this provision is a reference "to the overall business organization and not to particular operations or investments of such enterprise."[390] The apparent suggestion is that, because this provision allegedly does not address particular operations or investments, this means that an enterprise is distinct from these activities and investments.

281. Korea's argument is incorrect, as Article XVII specifically addresses "particular operations" of SOEs – *i.e.*, their "purchase" and "sale" of goods.[391] And the fact that Article XVII does not explicitly address the term "investments" does not mean that SOEs are incapable of making investments (which they clearly are).

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[387] Korea Responses to the First Set of Panel Questions, para. 184.
[388] Korea Responses to the First Set of Panel Questions, para. 185.
[389] Korea Responses to the First Set of Panel Questions, para. 186. One such condition is that the assistance "does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms." SCM Agreement, Article 8.2(c)(iii).
[390] Korea Responses to the First Set of Panel Questions, para. 187.
[391] GATT, Article XVII(1)(a) ("Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.") (emphasis supplied).

282. To the extent that context is needed, the TRIMS Annex addresses "trade related investment measures," and affirms that these measures include those that restrict the "importation by an enterprise of products used in or related to its local production . . . ."[392] This provision confirms that "enterprises" may make "investments," import goods, and engage in "local production." Indeed, the fact that enterprises carry out "production" implies that they produce goods – which can only occur in some type of "facility."

283. Likewise, footnote 36 of the SCM Agreement provides that countervailing duties are intended to offset subsidies bestowed on the "manufacture, production or export" of merchandise. This manufacturing and production does not occur in a vacuum, but instead is undertaken by enterprises in manufacturing facilities.

284. Thus, Korea's textual arguments about the supposed distinction between an "enterprise" and "facilities" or "investments" are groundless.

2. Korea Mischaracterizes The RSTA Article 26 Program

285. Reflecting its flawed interpretation of Article 2.2, Korea offers a distorted portrayal of the RSTA Article 26 program. Korea asserts that the Article 26 program "does not impose any limitation on the location of the enterprise that receives the subsidy."[393] According to Korea, this program only imposes a limitation on the location of the "*investments* that give rise to the tax credits."[394] Korea then falls back on its familiar refrain that "an investment does not constitute an 'enterprise.'"[395]

286. Korea neglects to mention that the geographic limitation in the RSTA Article 26 program is imposed with respect to the location of "facilities" in which investments are made. As the United States explained in its response to Panel Question 3.26, the relevant enforcement decree limits eligibility to "the investment (which is only for business assets out of overcrowding control region of the Seoul Metropolitan Area) . . . for newly acquiring facilities falling under the asset for business . . . ."[396]

287. In other words, eligibility for RSTA Article 26 subsidies is explicitly limited by the location of newly-acquired facilities. As discussed above, an enterprise is plainly "located" at its facilities. The fact that subsidies are disbursed based on the amount of qualifying investments in such facilities does not alter this reality.

288. Korea attempts to efface this geographic limitation by focusing on the location of a company's head office. As Korea states in its responses, "Article 26 imposed no limitation on Samsung's location. In fact, Samsung is located within the Seoul overcrowding control

[392] TRIMS Agreement, Annex 2(b).
[393] Korea Responses to the First Set of Panel Questions, para. 189.
[394] Korea Responses to the First Set of Panel Questions, para. 190 (emphasis in original).
[395] Korea Responses to the First Set of Panel Questions, para. 190.
[396] Article 23(1) of the Enforcement Decree (Exhibit KOR-81) (emphasis supplied); *see* U.S. Responses to the First Set of Panel Questions, paras. 212-213.

region."[397] Of course, Samsung did not receive subsidies based on its "newly acquired facilities" in the Seoul overcrowding region. Instead, the company received subsidies based on the location of its facilities that fall *outside* this area. As discussed in the U.S. response to Panel Question 3.2, the fact that a company such as Samsung has multiple locations – that fall both within and without a designated region – is of no moment.[398]

289. And Korea's interpretation – if adopted – would create a major loophole in subsidy disciplines. Subsidy disciplines easily could be circumvented if, for example, subsidies to manufacturing facilities in a designated region were deemed to be non-specific based only on the location of associated headquarters operations that fell outside this region.[399]

3. Korea Relies On Legal Theories That Have No Grounding In The Text Of Article 2.2

290. Korea continues to rely on failed legal theories that have no basis in the text of Article 2.2. They should be rejected.

291. *First*, Korea clings to its "double basis" theory.[400] Under this theory, regional specificity can only be established where subsidies are limited both to a designated region and to "certain enterprises" located within this region. As discussed in the U.S. first written submission, this argument is untenable and would render Article 2.2 redundant.[401]

292. Not surprisingly, two panels that have addressed this theory – the panels in *EC – Large Civil Aircraft* and *US – Anti-dumping and Countervailing Measures (China)* – rejected it.[402] Korea asserts that these panels faced different facts, and that this interpretative issue has not been "definitively resolved" by the Appellate Body.[403] But these panels' rejection of the "double basis" theory does not hinge on the particular facts of those disputes. Instead, their analysis is grounded in the text of the SCM Agreement.[404] These panels' reasoning is sound, and supports the rejection of Korea's argument in this dispute.

293. *Second*, Korea asserts that a geographic region under Article 2.2 must be designated "affirmatively, not by implication or suggestion."[405] But as the United States explained in its first written submission, Article 2.2 does not contain the word "explicit," and does not require

[397] Korea Responses to the First Set of Panel Questions, para. 189.
[398] U.S. Responses to the First Set of Panel Questions, para. 150.
[399] U.S. Responses to the First Set of Panel Questions, para. 149.
[400] Korea Opening Statement at the First Panel Meeting, para. 91.
[401] U.S. First Written Submission, paras. 410-413.
[402] U.S. First Written Submission, paras. 411-413.
[403] Korea Opening Statement at the First Panel Meeting, para. 91.
[404] *EC – Large Civil Aircraft (Panel)*, paras. 7.1220-7.1231; *US – Anti-dumping and Countervailing Measures (China) (Panel)*, paras. 9.124-9.139.
[405] Korea Opening Statement at the First Panel Meeting, para. 87.

that a region be "affirmatively" designated.[406] There is no basis for Korea's theory that Article 2.2 is limited to situations of "affirmative" *de jure* specificity.[407]

294. Here, RSTA Article 26 incorporates an express geographic limitation. Eligibility is limited to a designated region – *i.e.*, the territory outside the Seoul overcrowding region. As discussed in the U.S. first written submission, it is of no moment that the language of the enforcement decree designates a geographical region through language of exclusion or inclusion – the effect is the same.[408] Korea's argument would privilege form over substance.[409]

295. *Third*, Korea's continued reliance on its "large region" defense is equally without merit. Korea argues that there may come a point in which a "subpart" becomes "co-extensive" with the territorial jurisdiction of the granting authority.[410] With respect to RSTA Article 26, Korea argues that because the designated region is large – *i.e.*, it includes 98% of Korean territory – there is "no identifiable demarcation between this geographical region and the broader jurisdiction of the granting authority."[411] According to Korea, the degree of overlap is "almost total," such that there is "effectively no distinction" between the area that is excluded and that which is included.[412]

296. These arguments do not withstand scrutiny. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large.[413] As the panel observed in *US – Anti-dumping and Countervailing Duties (China)*, the term "designated geographical region" can encompass "any identified tract of land within the jurisdiction of a granting authority," and need not have a formal administrative or economic identity.[414]

297. And it would be particularly inappropriate to overlook the geographic limitation imposed here. The excluded area is the most densely populated area of Korea, and accounts for a substantial portion of Korea's economy. Korea does not dispute that Seoul is the engine of its economy.[415] Thus, there is no basis for Korea's attempt to dismiss the geographic limitation in RSTA Article 26 as "effectively no distinction" and "miniscule."[416]

298. *Finally*, Korea's resort to "policy" arguments also cannot avert a finding of specificity. In contrast with its previous efforts to downplay the geographic limitation in RSTA Article 26, Korea touts its policy significance. Korea asserts that this geographic limitation is intended to "relieve over-congestion and income disparity," and is a "zoning regulation."[417] Korea states

[406] U.S. First Written Submission, para. 423.
[407] U.S. First Written Submission, para. 424.
[408] U.S. First Written Submission, para. 425.
[409] U.S. First Written Submission, para. 425.
[410] Korea Opening Statement at the First Panel Meeting, para. 86.
[411] Korea Opening Statement at the First Panel Meeting, para. 89.
[412] Korea Opening Statement at the First Panel Meeting, para. 89.
[413] U.S. First Written Submission, paras. 426-429; U.S. Opening Statement at the First Panel Meeting, paras. 46-47.
[414] *US – Anti-dumping and Countervailing Measures (China) (Panel)*, paras. 9.140-9.144 (emphasis supplied).
[415] U.S. First Written Submission, para. 430.
[416] Korea Opening Statement at the First Panel Meeting, para. 89; Korea Closing Statement at the First Panel Meeting, para. 18.
[417] Korea Opening Statement at the First Panel Meeting, para. 90.

that "it is precisely the concentration of population in the Seoul Overcrowding Control Area that RSTA Article 26 is intended to address by *encouraging investments in the other 98 percent of Korea's territory*."[418]

299. These policy arguments confirm that the RSTA Article 26 program is regionally specific.[419] Korea is open about the fact that RSTA Article 26 is a regional assistance program. Article 8.2(b) of the SCM Agreement was drafted to render such programs non-actionable, if certain criteria were met. This provision lapsed, however. As a consequence, the RSTA Article 26 program falls squarely within the regional specificity provisions of Article 2.2.[420]

D. The USDOC Appropriately Treated RSTA Subsidies As "Untied" When Calculating Subsidy Ratios

300. In its first written submission, Korea criticized the USDOC's calculation of the subsidy ratios for RSTA Articles 10(1)(3) and 26. Korea argued that treating them as "untied" would "improperly attribute a portion of the tax credits that Samsung received on products other than LRW to LRW."[421] Korea argued that, instead, the USDOC should have employed a novel variation of the "tied" approach to attribution, based on a "retroactive use" theory. According to Korea, the USDOC should have carved up both the numerator and denominator of the subsidy ratio, based on a forensic accounting exercise to trace which subsidies were attributable to washers. Korea purported to ground its claim in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.[422]

301. However, the United States has shown that Korea's claim is legally untenable. As the United States explained in its submissions, Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement do not specify particular attribution methodologies, much less Korea's. Instead, these provisions fix a quantitative ceiling on the amount of duties, which cannot exceed the "amount of the subsidy found to exist." And they confirm that the subsidy must have been "bestowed", directly or indirectly, on the manufacture, production, or export of the imported product. These parameters, in fact, support the U.S. approach.

302. Absent rules on specific methodologies, an investigating authority must determine an appropriate approach, and may derive guidance from certain provisions – such as those cited and footnote 36 of the SCM Agreement, which suggests that in determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a given product, the facts surrounding the Member's "bestowal" of the subsidy will be a key consideration. Other relevant sources of guidance include Annex IV of the SCM Agreement and the Informal Group of Experts Report ("IGE") to the Committee on Subsidies and Countervailing Measures.[423]

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[418] Korea Opening Statement at the First Panel Meeting, para. 90 (emphasis supplied).
[419] U.S. First Written Submission, paras. 431-432.
[420] U.S. First Written Submission, para. 432.
[421] Korea First Written Submission, para. 288.
[422] Korea First Written Submission, paras. 291-303.
[423] U.S. First Written Submission, paras. 437-462.

303. Here, there can be no doubt that the R&D and facilities subsidies at issue are not "tied" to particular products:[424]

- The RSTA legislation did not specify any product-specific tie, and eligibility criteria were not limited by product type.

- The structure, architecture, and design of the RSTA subsidy programs did not reflect a product-specific tie. As discussed in the U.S. submissions, 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 GOK) did not acknowledge any such product-specific use at the time of bestowal.

304. In its statements to the Panel at the First Meeting, and in its responses to the Panel's questions, Korea has attempted to re-invent and re-cast its claim. Korea distances itself from its previous "retroactive use" theory, and instead grounds its tying theory on the "benefit" or effect of *expenses* that were incurred and associated *activities* that were undertaken well before the subsidy was bestowed. Korea argues that Samsung's records of these expenses gives it a "tying ability."[425] However, these records were not presented to the granting authority, the GOK, and thus formed no basis for the GOK's bestowal of the subsidy on the recipients.

305. Korea further relies on separate antidumping investigations, and adduces evidence not on the record of the washers CVD investigation, in an attempt to show that R&D expenses from the Samsung digital appliance unit should be associated with or "assigned" to washers.[426] But these antidumping materials do not refer to any of the subsidy programs at issue here, and are irrelevant on their face. They are also offered to support an untenable legal theory, premised on the "benefit" or effect of expenses – and not the bestowal of subsidies. Nor do the cost accounting practices adopted in antidumping proceedings have any bearing on subsidy attribution, which requires a qualitatively different line of inquiry.

306. As discussed below, this reinvented position is no more viable than its predecessor, and should be rejected.

1. Korea's Reinvented Attribution Theory Is Groundless

307. Korea distances itself from its previous "retroactive use" theory, but fails to offer a coherent alternative.

[424] U.S. First Written Submission, paras. 464-467, 479-484; U.S. Opening Statement at the First Panel Meeting, paras. 58-59.
[425] Korea Responses to the First Set of Panel Questions, para. 212.
[426] Korea Responses to the First Set of Panel Questions, para. 207.

308. By way of background, in its first written submission, Korea argued in favor of a theory under which the "use is inherent in the nature of the credit" and "retroactively" reduces expenses.[427] As Korea stated, "[i]t is Korea's position that, even in the case of a grant or loan for which the approval documents do not state the intended use, the administering authority has the *obligation to investigate the actual use of the subsidy*."[428]

309. But at the first Panel meeting, and in its responses to the Panel's questions, Korea dismissed its previous statements, arguing that they were only intended to criticize the USDOC's position.[429] And Korea stated that the actual use of subsidies after their receipt is "irrelevant"[430] – another apparent about-face. In this respect, Korea's position has moved closer to that of the USDOC, which explains that there is no requirement to "examine the use or effect of subsidies or to trace how benefits are used by companies."[431]

310. In its opening statement at the First Panel Meeting, Korea declared that instead of the use or effect of subsidies, Korea's theory would be based on the effect of expenses incurred by the recipient. "Korea's tying claim is premised solely on *Samsung's ability to document* that it claimed tax credits on digital appliances based on qualifying *expenditures that benefited the production* of digital appliances."[432] This statement conveys a position that is several steps removed from the "bestowal" of subsidies.

311. Korea's attribution theory hinges on *expenditures* that were incurred by the subsidy recipient.[433] When these expenditures were incurred, no "subsidy" yet existed, within the meaning of Article 1.1 of the SCM Agreement. No financial contribution had been granted, and no benefit had been conferred. Indeed, at this point, no subsidy had been "bestowed" or "granted" within the meaning of Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement. It is thus impossible to reconcile Korea's expense theory with the purpose of countervailing duties – *i.e.*, to offset the "bestowal" of subsidies.[434]

312. Although Korea grounds its theory in expenditures that it says "benefit" production, it uses this term in a way that has no basis in Article 1.1(b) of the SCM Agreement. The term "benefit" in Article 1.1(b) refers to the extent which a financial contribution places a recipient in a better position than it would have been absent the contribution – for instance, relative to a

[427] Korea First Written Submission, paras. 14, 297, 301.
[428] Korea First Written Submission, para. 300 n.295 (emphasis supplied).
[429] Korea Opening Statement at the First Panel Meeting, para. 67; Korea Responses to the First Set of Panel Questions, paras. 218-219.
[430] Korea Opening Statement at the First Panel Meeting, para. 67.
[431] Washers CVD I&D Memo at 41 (Exhibit KOR-77).
[432] Korea Opening Statement at the First Panel Meeting, para. 67.
[433] Korea argues that "when the investments that would generate the tax credits were made," the "purpose" of those investments – *i.e.*, the "benefit to Digital Appliance development and production" – was "known." Korea Responses to the First Set of Panel Questions, para. 219. This hidden "purpose" of the expenses was at all times unknown to the granting authority, and has no bearing on the bestowal of subsidies, which occurred at a later point in time.
[434] SCM Agreement, Article 10 n.36.

market benchmark.[435] The notion of an expense that confers a "benefit" is alien to the SCM Agreement.

313. To the extent that Korea is using the term "benefit" as a short-hand reference to the effect of an expenditure, this too would be inconsistent with the SCM Agreement. Once again, the purpose of countervailing duties is to offset the bestowal of subsidies. Korea's approach would blur the distinction between determining the amount of the subsidy and the separate injury analysis called for under Article 15 of the SCM Agreement.[436] And Korea's theory is even further removed from the SCM Agreement by virtue of being grounded in the effect of an expenditure, and not a subsidy.

314. Treating expenses as synonymous with subsidies is also inappropriate here, given the structure, architecture, and design of the subsidies at issue. For instance, Samsung received RSTA Article 10(1)(3) subsidies in 2011 based on 40% of the difference between the aggregate expenses incurred in the 2010 tax year and the average annual amount of qualifying expenses incurred in the previous four years.[437] Samsung's subsidies also reflected a substantial carry-forward of credits earned in 2009, and deferral of credits earned in 2010 until the 2011 tax year.[438] Under the circumstances, there is no factual basis for viewing a given KRW of expense in any given time period as a proxy for a KRW of subsidy received in 2011.

2. RSTA Article 10(1)(3) Does Not Require A Product-By-Product Breakdown Of Expenses, And Samsung Did Not Provide Such A Breakdown To The Government Of Korea

315. Korea relies heavily on Samsung's internal expense records, which it argues allow Samsung to "'tie' the tax credits that it received to the washers that it produced in its Digital Appliance Division."[439] Korea's focus on record-keeping is misplaced, and does not support a "tied" approach to attribution here.

316. *First*, the defects in Korea's legal theory render its focus on Samsung's alleged "tying ability"[440] untenable. As discussed above, the attribution of subsidies is not a function of the effect of expenses, but rather the bestowal of the subsidies. So the internal records of these expenses would not provide a basis for calculating subsidy ratios. And the USDOC was not required to conduct an *ex post* forensic investigation based on these records.

317. *Second*, the record-keeping requirements for RSTA Article 10(1)(3) do not support Korea's view. In its response to Panel Question 3.5, Korea admitted that "companies are not required to file a form or report as part of their tax return that shows how its R&D expenses that are eligible for Article 10(1)(3) tax credits are tied to or associated with particular

[435] SCM Agreement, Article 1.1(b); *Canada – Aircraft (AB)*, paras. 149-161.
[436] U.S. First Written Submission, para. 474; *see also* U.S. Opening Statement at the First Panel Meeting, para. 67.
[437] U.S. Responses to the First Set of Panel Questions, para. 131.
[438] U.S. Responses to the First Set of Panel Questions, para. 131.
[439] Korea Responses to the First Set of Panel Questions, para. 192.
[440] Korea Responses to the First Set of Panel Questions, para. 212.

merchandise."[441] The fact that the granting authority, the GOK, did not require recipients to submit this kind of product-specific breakdown is evidence that it did not bestow the subsidies under RSTA Articles 10(1)(3) and 26 in a way that is "tied" to a particular product.[442]

318. Korea points to the fact that Korea's Basic Act on National Taxes requires all taxpayers to "prepare and keep faithfully books and documentary evidence related to all transactions."[443] But this is a cross-cutting requirement, applicable to all taxpayers in all contexts. It is not a part of the RSTA legislation, and thus sheds no light on the structure of that program or the basis of the bestowal of the subsidies. And even under the Basic Act, taxpayers are not required to collect and identify which expenses relate to particular *products*; the requirement is only to maintain records of *transactions*, for use in case an audit is conducted.

319. *Third*, reflecting the absence of such a requirement, Samsung did not submit any records – internal or otherwise – to the granting authority, the GOK, that would have shown which expenses were allegedly spent in connection with a particular product. As Samsung stated on the record of the investigation, its "*tax return did not specify the merchandise for which this reduction was to be provided*."[444]

320. In its responses to the Panel's questions, Korea conceded that even the "detailed breakdown" of expenses that it touted in its first written submission – really, a one-page summary of business unit totals – was never presented to the GOK.[445] As Korea stated, this document was only "prepared for the USDOC's investigation."[446]

321. Likewise, it is undisputed that the "200 page document" (which Korea says the USDOC should have reviewed) was never submitted to the GOK, and did not inform the bestowal of the subsidies.[447] Korea characterizes this document as the "information that Samsung was required to maintain for the Korean tax authorities"[448] – presumably a reference to the generic requirement in the Basic Act to maintain transaction-level records. Yet the requirement to maintain records <u>for a hypothetical audit</u> says nothing about the bestowal of subsidies under the RSTA programs. The USDOC cannot be criticized for not reviewing this document, which was irrelevant on its face and that the GOK – the granting authority – never saw.[449] Nor was this document part of the administrative record in this proceeding,[450] and Korea's attempt to bring

[441] Korea Responses to the First Set of Panel Questions, para. 204.
[442] U.S. First Written Submission, paras. 347, 404, 479-480.
[443] Korea Responses to the First Set of Panel Questions, para. 203 (quoting Korea Basic Act on National Taxes, Article 85-3).
[444] Samsung April 9, 2012 QR, Ex. 24, p. 2 (Exhibit KOR-72) (emphasis supplied).
[445] Korea Responses to the First Set of Panel Questions, para. 192.
[446] Korea Responses to the First Set of Panel Questions, para. 192.
[447] U.S. Opening Statement at the First Panel Meeting, para. 61.
[448] Korea Responses to the First Set of Panel Questions, para. 201.
[449] U.S. Opening Statement at the First Panel Meeting, para. 61.
[450] *See* Korea Responses to the First Set of Panel Questions, para. 216 (describing how Korea has now submitted "representative excerpts" from this document as Exhibit KOR-115).

this material forward now can in no way undermine the USDOC's review based on the record evidence.[451]

322. At most, the "200 page document" would allow verification of the "detailed breakdown" by business unit already on the record of the USDOC investigation.[452] It would not contribute additional detail that would permit anyone to discern which expenses could be traced specifically to washers. As Korea states in its response to Panel Question 3.8: "Samsung collected and maintained its R&D expense records at the Digital Appliance Division level, not at the product specific level."[453]

323. *Fourth*, Korea asserts that, "[d]ue to the complexity of R&D finance and accounting," such a product-specific breakdown would not be possible at all, because of the way Samsung does business.[454] But, if this is so, even Samsung is unable to provide what Korea argues is *required* to be analyzed under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. That is, Korea would concede that for purposes of this subsidy, it is impossible to produce the records that would permit "countervailing duties [to] be limited to the amount of subsidies provided on the production and sale of LRW."[455] To avoid this outcome, at least in this context, Korea appears to endorse an attribution approach that is not product-specific and that is "untied" with respect to all digital appliances manufactured by Samsung. But this fatally undermines its assertion that an administering authority breaches its obligations when it fails to conduct the necessary analysis, as Korea itself supports *not* conducting the necessary analysis here but rather using a sort of approximation.

324. *Finally*, even if Samsung had submitted a product-by-product breakdown in its tax return to the GOK, this would not necessarily be a sufficient basis for finding that the RSTA Article 10(1)(3) and 26 subsidies were "tied" to particular products. Contrary to Korea's assertion,[456] the United States never suggested otherwise.[457] Evidence of what is included in the tax return should be considered along with other relevant facts, including the applicable legislation, structure, and operation of the subsidy program.

325. Accordingly, there is no merit to Korea's assertion that the USDOC's treatment of subsidies under RSTA Articles 10(1)(1) and 10(1)(2) as "untied" was somehow "inconsistent" with its treatment of RSTA Article 10(1)(3) subsidies – which were also treated as untied.[458] The USDOC did not include the subsidies conferred on Samsung under RSTA Articles 10(1)(1)

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[451] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 175 ("*A panel must [ ] limit its examination to the facts that the agency should have discerned from the evidence on record*.") (emphasis supplied).
[452] U.S. Opening Statement at the First Panel Meeting, para. 62.
[453] Korea Responses to the First Set of Panel Questions, para. 220 (emphasis supplied).
[454] Korea Responses to the First Set of Panel Questions, para. 221.
[455] Korea First Written Submission, para. 288.
[456] Korea Responses to the First Set of Panel Questions, para. 198.
[457] *See* U.S. First Written Submission, para. 483 ("In theory, if Samsung submitted a tax return that indicated some tie between subsidies received and a particular product, the acceptance of that return by the Korean tax authorities might be construed as official acknowledgement of the product-specific 'use' of those subsidies. But even on this theory, the evidence fails to support the existence of a product-specific tie. . . .") (emphasis supplied).
[458] Korea Responses to the First Set of Panel Questions, para. 199.

and 10(1)(2) in Samsung's subsidy rate because the rates from those programs were not measurable, and Korea has not challenged these determinations in this dispute.

326. The USDOC observed that the RSTA Article 10(1)(1) and 10(1)(2) programs conferred tax deductions in connection with R&D activities relating to "new growth engines" and "core technologies," which were intended to "boost general national economic activities."[459] The USDOC considered the overall structure and design of these subsidies, noting with respect to eligibility, for instance, that there was no evidence that "tax credits could only be claimed for non-subject merchandise," and finding that they "reduce[ ] Samsung's overall tax liability which benefits all of its domestic production and sales."[460]

327. The USDOC also found that there was no evidence in the tax returns themselves to indicate that RSTA Article 10(1)(1) and 10(1)(2) subsidies were tied to specific products.[461] In its Form 3(2), Samsung merely listed two generic categories of technology: "Related to the BIO medicine" and "Related to the Display."[462] The USDOC appropriately viewed this form as not identifying particular products. Although Korea apparently disagrees with the USDOC's assessment, the Panel need not resolve this issue, for which Korea has not asserted a claim in this dispute.

328. For present purposes, the significance of RSTA Articles 10(1)(1) and 10(1)(2) is their contrast with RSTA Article 10(1)(3). Articles 10(1)(1) and 10(1)(2) require a breakdown of expenses that relate to activities in connection with certain technologies, although they do not require a product-specific breakdown. By contrast, Article 10(1)(3) does not require any breakdown whatsoever, even by technology – nor was such a breakdown provided in Samsung's return. This aspect of the structure, architecture, and design of Article 10(1)(3) further supports the USDOC's determination that subsidies conferred under this program were not "tied" to particular products.

3. Korea's Reliance On Separate Antidumping Investigations Is Improper, And Does Not Support A "Tied" Attribution Approach With Respect To RSTA Article 10(1)(3) Subsidies

329. In its response to Panel Question 3.5, Korea attempts to buttress its expense-driven tying theory by adducing materials from two separate antidumping investigations: Bottom Mount Refrigerator-Freezers from Korea ("BMRF Korea") and the washers AD investigation.[463] These materials – and the narrative they accompany – have no bearing on the question actually posed by the Panel: "Does Korea agree with the United States' assertion, at para. 347 of its first written submission, that companies claiming Article 10(1)(3) tax credits are not required to identify,

[459] Washers CVD I&D Memo at 9-10 (Exhibit KOR-77).
[460] Washers CVD I&D Memo at 42 (Exhibit KOR-77).
[461] Washers CVD I&D Memo at 42 (Exhibit KOR-77). Although there was some breakdown by activity related to certain technologies, the RSTA legislation did not require – and Samsung did not include in its return – a product-specific breakdown.
[462] Washers CVD Samsung Verification Ex. 8, p. 12 (Exhibit KOR-111) (BCI).
[463] Korea Responses to the First Set of Panel Questions, paras. 205-214 (and accompanying exhibits, KOR-98 and KOR-99).

whether or which R&D expenses are related to particular merchandise?" Korea conceded that there is no such requirement,[464] and the matter ends there.

330. In any event, Korea's reliance on these antidumping materials – most of which were not part of the washers CVD record – is entirely misplaced. These materials do not refer to or address the RSTA Article 10(1)(3) subsidy program, and have no bearing on the issue before this Panel – *i.e.*, the proper method for attributing subsidies. Korea's attempt to inject cost accounting principles into subsidy attribution has no basis in the SCM Agreement or GATT 1994. Nor is there a factual basis for Korea's position, which is premised on a distorted interpretation and application of these materials.

331. *First*, the verification reports and verification exhibits that Korea submitted from these antidumping proceedings were never a part of the washers CVD record.[465] In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body made clear that panels are to limit their consideration of investigating authority action to evidence on the administrative record:

> The Appellate Body has stated previously that, when assessing an investigating authority's determination, a panel may not fault the agency for failing to take into account facts that it could not reasonably have known. *A panel must therefore limit its examination to the facts that the agency should have discerned from the evidence on record*. Where a panel reads evidence with the "benefit of hindsight," it fails to consider how the evidence should have fairly been understood at the time of the investigation, and thereby fails to make an "objective assessment" in accordance with Article 11 of the DSU.[466]

332. Likewise, in *Japan – DRAMS*, the panel refused to consider non-record evidence submitted by Korea. The panel affirmed that it "*should refrain from considering non-record evidence when reviewing the [investigating authority's] determination*."[467]

333. And although Korea attempts to blur the distinctions between the various CVD and AD investigations, they are separate proceedings with distinct administrative records. The USDOC maintains strict evidentiary barriers in its proceedings to ensure transparency, requiring that parties are served with all documents in their respective proceedings while protecting the

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[464] Korea Responses to the First Set of Panel Questions, para. 204.

[465] Exhibit KOR-98 appears to contain the following: (1) the Issues and Decision Memorandum in the BMRF Korea AD investigation ("BMRF Korea AD I&D Memo"); (2) the redacted, public version of the verification report in the BMRF Korea AD investigation; and (3) excerpts from verification exhibits containing business proprietary information, which were attached to the verification report in the BMRF Korea AD investigation. Of these documents, only the BMRF Korea AD I&D Memo was noted on the record of the washers CVD investigation – as a cite in the Samsung case brief, which was filed two months after the record had closed. Samsung Case Brief at 50 (Exhibit KOR-90). Exhibit KOR-99 appears to contain: (1) the redacted, public version of the verification report in the washers AD investigation and (2) excerpts from verification exhibits attached to the verification report in the washers AD investigation. None of the documents in Exhibit KOR-99 is part of the record in the washers CVD investigation.

[466] *US –Countervailing Duty Investigation on DRAMS (AB)*, para. 175 (emphasis supplied).

[467] *Japan – DRAMS (Panel)*, para. 7.152 (emphasis supplied).

business confidential information submitted in each.[468] Consequently, a document filed in one proceeding (*e.g.*, a CVD investigation) is not served on parties outside of that proceeding (*e.g.*, a companion AD investigation). The parties involved may overlap to some extent, but because the USDOC only evaluates evidence properly filed on the record and served on all parties to that proceeding, the USDOC does not take into account extra-record documents when making its determinations.[469]

334. Thus, the Panel should refrain from considering this evidence, which was not seen or commented on by the parties to the washers CVD investigation, and was not reviewed or considered by the USDOC in that investigation.[470]

335. *Second*, even aside from their not forming part of the record to be examined by the Panel in reviewing Korea's claims, these materials are irrelevant on their face. Exhibits KOR-98 and KOR-99 do not refer to or address the RSTA Article 10(1)(3) subsidy program. Instead, they set out the USDOC's cost accounting verification for purposes of determining whether certain goods (refrigerators and washers) were sold at less than fair value.

336. *Third*, Korea attempts to rely on these documents to support a legal theory the United States has previously explained is erroneous. Korea asserts that Exhibits KOR-98 and KOR-99 "explain how Samsung maintains its records of the R&D expenses that it incurs."[471] But as discussed above, Samsung's records were not submitted to the GOK, and do not form the basis of the bestowal of the subsidies. The attribution of subsidies is not a function of whether *expenses* "benefit" or affect a product – much less how the recipient happens to account for those expenses.

337. *Fourth*, cost accounting principles used in antidumping proceedings are a particularly inappropriate basis for attributing subsidies. As discussed in the U.S. response to Panel Question 3.22, Article 2 of the AD Agreement sets out detailed criteria governing whether costs are "associated with" a product, and confirm that this determination is based presumptively on a company's books and records.[472] The analysis called for under the countervailing duty

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[468] *See* 19 C.F.R. §§ 351.103, 351.104 (Exhibit USA-80), 19 C.F.R. § 351.303 (Exhibit USA-81), and 19 C.F.R. § 351.306 (Exhibit USA-82).

[469] Korea points to the fact that certain information from the BMRF Korea CVD investigation appears on the record of the washers CVD investigation. Korea Responses to the First Set of Panel Questions, para. 205 n.72. The USDOC specifically requested that the parties place this information on the washers CVD record, as both CVD investigations addressed some of the same subsidy programs. *See* U.S. Responses to the First Set of Panel Questions, para. 134 (summarizing May 18, 2012 and June 7, 2012 questionnaires and responses). By contrast, the USDOC did not request that the parties place materials from the BMRF Korea AD investigation on the washers CVD record.

[470] The United States observes that pages 16-29 of Exhibit KOR-98 are marked with double brackets. The United States understands that Korea wishes to designate such information as confidential pursuant to DSU Article 18.2 and paragraph 2 of the Panel's Working Procedures, and will treat the information accordingly. These documents were not submitted on the record of either the washers CVD or AD investigations and thus are not covered by the BCI working procedures established in this dispute. According to Korea, these pages are taken from verification exhibits attached to the verification report prepared in the BMRF Korea AD investigation. Korea Responses to the First Set of Panel Questions, para. 210.

[471] Korea Responses to the First Set of Panel Questions, para. 205.

[472] U.S. Responses to the First Set of Panel Questions, paras. 196-197.

provisions of Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement entails a qualitatively different line of inquiry, addressing whether and how a Member has "bestowed" a subsidy on products.[473]

338. Thus, it would be inappropriate to conflate the various CVD and AD proceedings. Contrary to Korea's assertion,[474] the USDOC was not required to "conduct the exact same type of inquiry" in the washers CVD investigation that it did in the BMRF and washers AD investigations. The USDOC was not required to delve into Samsung's records to engage in an *ex post* cost tracing exercise, for purposes of attributing subsidies.

339. *Fifth*, there is a fundamental mismatch between the time periods and methods used to carry out R&D cost accounting in the washers and BMRF AD investigations, and the calculation of subsidies in RSTA Article 10(1)(3). In the washers AD investigation, the USDOC calculated cost of production based on R&D expenses accrued in the Digital Appliances Unit between October 1, 2010 and September 30, 2011, the period of investigation.[475] Likewise, in the BMRF Korea AD investigation, the USDOC grounded its cost of production analysis in R&D expenses from the Digital Appliances Unit incurred between January 1, 2010 and December 31, 2010.[476]

340. By contrast, as explained in the U.S. response to Panel Question 3.22, the RSTA Article 10(1)(3) subsidies were conferred on Samsung at a different time period (2011) than R&D expenses were incurred.[477] Samsung's subsidies were calculated based on a comparison between the aggregate of all research and human resource development expenses incurred by the company in fiscal year 2010 and the annual average of those expenses in the preceding four years.[478] This amount was further adjusted by carry-forwards of subsidy earned in fiscal year 2009 and deferral of subsidies to future years, to comply with Korea's Minimum Tax Law.[479] Given these differences, it would not be useful or appropriate to graft the analysis from the washers and BMRF AD investigations onto the attribution of these subsidies.

341. *Finally*, Korea offers a flawed and incomplete description of the USDOC's cost accounting in these AD investigations. For instance, Korea emphasizes that the USDOC followed Samsung's books and records, and calculated cost of production using R&D costs from the Digital Appliance Unit.[480] But Korea fails to mention that – consistent with Article 2 of the AD Agreement – the USDOC presumptively follows the investigated company's books and records in carrying out this calculation. As the USDOC stated in its Issues and Decision Memorandum from the BMRF Korea AD investigation: "The Department, over time, has established a practice of relying on R&D costs as maintained in a company's normal books and

[473] U.S. Responses to the First Set of Panel Questions, para. 196.
[474] Korea Responses to the First Set of Panel Questions, para. 214.
[475] *See, e.g.*, Washers AD I&D Memo at 2 (Exhibit KOR-18).
[476] BMRF Korea AD I&D Memo at 3 (Exhibit KOR-69).
[477] U.S. Responses to the First Set of Panel Questions, para. 199.
[478] U.S. Responses to the First Set of Panel Questions, para. 199.
[479] U.S. Responses to the First Set of Panel Questions, para. 199.
[480] Korea Responses to the First Set of Panel Questions, para. 207.

records except in those instances where the record evidence shows that the normal records unreasonably allocate costs."[481]

342. Korea likewise fails to mention that U.S. courts have imposed a substantial evidentiary hurdle and strict requirements for departing from an investigated company's books and records. The USDOC made this clear in its Issues and Decision Memorandum from the BMRF AD investigation, when it declined to accept the petitioner's request that it depart from Samsung's books and records on a "cross-fertilization" theory. As the USDOC explained, U.S. courts have "struck down" the Department's previously more expansive use of the cross-fertilization theory.[482] U.S. courts have imposed an "*evidentiary hurdle that must be cleared to disregard a company's normal books* and to reallocate costs based on the theory of cross-fertilization."[483] Substantial evidence must be adduced, and "*the burden of proof is high*."[484]

343. The USDOC was bound by these requirements when it declined to calculate a "company-wide" R&D ratio under the petitioner's cross-fertilization theory, and instead relied on Samsung's records.[485] As the USDOC pointed out, the petitioner in that case did not present "compelling" or "substantial" evidence that technology advances from other business units "directly impacted" development of refrigerators.[486]

344. Consistent with Samsung's books and records, the USDOC calculated the R&D ratio based solely on expenses from the Digital Appliance Unit, which it divided over the consolidated cost of all sales from the various production entities within the Digital Appliance Unit.[487] Korea touts language in the Issues and Decision Memorandum that grounds this "consolidated cost of sales" approach in "the fact pattern of the current case," which "supports the position that [Samsung]'s Digital Appliance business' related R&D activities benefitted all of its subsidiaries that also produced and sold its digital appliance products."[488] But whether certain activities can be viewed as "benefitting" or having an effect on the Digital Appliance Unit for purposes of cost accounting does not have any bearing on how and in what amounts subsidies were bestowed.

E. Korea's Overseas Effects Theory Is Groundless

345. Equally, there is no merit to Korea's argument that the USDOC should have incorporated overseas manufacturing into the denominator of the subsidy ratio for RSTA Article 10(1)(3). Like Korea's "tying" theory, this theory has no grounding in the bestowal of subsidies. As expressed by Korea at the first Panel meeting, this theory would require the attribution of subsidies based on the indirect overseas effect of R&D activity.[489] As discussed below, the

[481] BMRF Korea AD I&D Memo at 124 (Exhibit KOR-98).
[482] BMRF Korea AD I&D Memo at 125 (Exhibit KOR-98).
[483] BMRF Korea AD I&D Memo at 126 (Exhibit KOR-98) (emphasis supplied).
[484] BMRF Korea AD I&D Memo at 126 (Exhibit KOR-98) (emphasis supplied).
[485] BMRF Korea AD I&D Memo at 126-127 (Exhibit KOR-98).
[486] BMRF Korea AD I&D Memo at 126-127 (Exhibit KOR-98).
[487] BMRF Korea AD I&D Memo at 126-127 (Exhibit KOR-98).
[488] Korea Responses to the First Set of Panel Questions, para. 208 (quoting BMRF Korea AD I&D Memo at 127) (Exhibit KOR-98) (emphasis supplied).
[489] Korea Opening Statement at the First Panel Meeting, para. 72.

USDOC was not compelled to calculate subsidy ratios in this manner, and appropriately focused on the facts relating to the bestowal of the subsidies.

346. *First*, the obligations that Korea grounds its claim in – Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement – do not support its theory. As discussed in the U.S. first written submission and the U.S. response to Panel Question 3.17, these provisions confirm that the subsidy must have been "bestowed", directly or indirectly, on the manufacture, production, or export of the imported product and, within these parameters, do not dictate precisely how an investigating authority must calculate the rate of subsidization. Nor would they require incorporation of overseas manufacturing into subsidy ratios.[490]

347. Indeed, Korea fails to address the text of these provisions, which both focus exclusively on domestic production. Article VI:3 of the GATT 1994 states that duties may be imposed to offset subsidies granted on the "manufacture, production or export of such product *in the country of origin or exportation*."[491] Likewise, Article 19.4 of the SCM Agreement frames the subsidy calculation in terms of "subsidization per unit of the *subsidized and exported product*."[492]

348. Nor do these provisions support an effects-based attribution theory. Indeed, as discussed above, Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that the purpose of countervailing duties is to offset the bestowal of subsidies. Subsidies can only be bestowed to the extent that they exist. Yet here, Korea would premise attribution on activities that occur distinct from and prior to the existence of bestowal of a subsidy.

349. *Second*, Korea's approach is at odds with the facts here, which confirm that Korea bestowed RSTA Article 10(1)(3) subsidies on domestic production – not overseas manufacturing. The USDOC's calculation was based on the following considerations:

- the "laws creating these tax credits," which limit eligibility to Korean companies and only confer subsidies in connection with research and human resources development activities that occur *within Korea*.[493]

- Korea's statement on the record of the investigation that RSTA Article 10(1)(3) "aims to facilitate Korean corporations' investment in their respective research and development activities, and thus to *boost the general national economic activities* in all sectors."[494]

- The tax returns, which do not identify or include any qualifying R&D expenses incurred outside Korea, or otherwise indicate any intent by Korea to subsidize overseas production.[495]

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[490] U.S. First Written Submission, paras. 437-462; U.S. Responses to the First Set of Panel Questions, para. 176.
[491] Emphasis supplied.
[492] Emphasis supplied.
[493] U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77).
[494] GOK April 9, 2012 QR at App. Vol. 108 (emphasis supplied) (Exhibit KOR-75); U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77). At the first Panel meeting, Korea dismissed this finding, asserting that "boosting the national economy" is an "abstract term in the tax code." Korea Opening Statement at the First Panel Meeting, para. 74. But Korea itself used this phrase when describing the purpose of the RSTA Article 10(1)(3) program. GOK April 9, 2012 QR at App. Vol. 108 (Exhibit KOR-75).

350. *Third*, instead of addressing these facts, Korea impugns the USDOC for alleged inconsistency in its approach. In its opening statement at the first Panel meeting, Korea began discussion of its overseas effects theory by criticizing the USDOC for having "reversed its preliminary determination, stating that the tax credit benefitted only Samsung's domestic production."[496]

351. But as discussed in the U.S. response to Panel Question 3.21, this alleged "change in position" – as Korea puts it – between the USDOC's preliminary and final determination was not a change in position at all. Rather, the change reflected the correction of Samsung's misreported data.[497]

352. *Fourth*, Korea argues that "[i]t is common sense that the results of the R&D will normally benefit all operations of a company, wherever located."[498] Yet Korea – like Samsung before the USDOC – fails to support this conclusory assertion with any evidence.[499] The "results of the R&D" – particularly overseas – are notoriously difficult to trace, and may not materialize for years (if ever).[500]

353. *Fifth*, Korea argues that, for the USDOC to attribute subsidies to domestic production, it must prove that the effects of R&D "were limited to washer production in Korea."[501] Korea's approach would distort the provisions on which it grounds its claims – *i.e.*, Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement – beyond all recognition. As discussed above, these provisions do not contemplate an effects-based inquiry to begin with. But they also exclusively focus on *domestic* production. This textual focus reflects the fact that Members generally grant subsidies to generate economic activities within their borders, and not to promote outsourced or overseas manufacturing.[502] Korea's approach would turn these provisions on their head.

354. *Sixth*, Korea fails to address the troubling implications of its approach. Investigating authorities would be required to conduct a jurisdiction-by-jurisdiction inquiry into how R&D activities affect production across the globe. As the United States has observed,[503] tracing these effects is particularly challenging, given the differing legal, tax, and other regulations applicable to overseas operations; complexities in how companies structure their overseas and domestic operations; and the time lag between R&D activities and their effects. As Korea is undoubtedly aware, this task would be even more onerous with respect to large multinational companies such as Samsung, which has a presence in many countries across the globe. By requiring that an investigating authority prove that these effects are limited to one jurisdiction, Korea erects a standard that is virtually impossible to meet.

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[495] U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77).
[496] Korea Opening Statement at the First Panel Meeting, para. 71.
[497] U.S. Responses to the First Set of Panel Questions, paras. 188-192.
[498] Korea Opening Statement at the First Panel Meeting, para. 73 (emphasis supplied).
[499] U.S. First Written Submission, para. 493.
[500] U.S. First Written Submission, paras. 500.
[501] Korea Opening Statement at the First Panel Meeting, para. 74.
[502] U.S. Opening Statement at the First Panel Meeting, para. 65; U.S. First Written Submission, para. 489.
[503] U.S. Opening Statement at the First Panel Meeting, para. 68; U.S. First Written Submission, paras. 500-501.

355. More broadly, Korea's approach would inject an overseas dimension into subsidy attribution, with potentially far-reaching consequences. On Korea's logic, a Member could countervail products manufactured in country A based on subsidies conferred in country B – as long as the effects of underlying R&D activities carried out in country B are not proven to be limited to country B. This would represent a radical change in Members' understanding of the reach of the subsidies disciplines and countervailing duties under Article VI of the GATT 1994 and the SCM Agreement.

356. *Finally*, it is telling that, to support its approach, Korea again takes refuge in antidumping proceedings. At the first Panel meeting, Korea relied heavily on the USDOC antidumping investigation of Bottom Mount Refrigerator-Freezers from Mexico ("BMRF Mexico"). Korea argued that the USDOC's determination in that investigation supports the view that R&D conducted in Korea "benefitted" overseas production.[504] In particular, Korea fastened onto the royalty payment made by Samsung's Mexican affiliate, which it touted as confirmation that R&D had an overseas effect.[505]

357. As discussed above and in the U.S. response to Panel Questions 3.22-3.23, the Mexican antidumping proceeding – which involved a different product and different jurisdiction – has no bearing on the attribution of RSTA Article 10(1)(3) subsidies. Like the BMRF Korea and washers AD investigations, the USDOC's antidumping determination in BMRF Mexico does not address the RSTA Article 10(1)(3) subsidy program. Instead, it is grounded in cost accounting principles that are unique to the antidumping context and that are particularly inapplicable here, given the structure of RSTA Article 10(1)(3). 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. One does not follow from the other.

358. In fact, Korea's reliance on the royalty payment made by Samsung undercuts its overseas attribution theory. As discussed in the U.S. response to Panel Question 3.22, if the Mexican subsidiary is paying its parent for the value of the R&D work carried out, then it is difficult to see how the subsidies conferred on the Korean parent would "pass through" to that overseas affiliate.[506] Indeed, presumably Korea would agree that Korean corporations would normally make these payments on an arms-length basis at fair market value, given the requirements of Korean and Mexican law with respect to such intra-corporate transfers.[507] All of this confirms

[504] Korea Opening Statement at the First Panel Meeting, para. 78; Korea Closing Statement at the First Panel Meeting, paras. 14-15.
[505] Korea Opening Statement at the First Panel Meeting, para. 78.
[506] U.S. Responses to the First Set of Panel Questions, para. 200.
[507] *See, e.g.*, Korea Act for the Coordination of International Tax Affairs, Article 4 (permitting tax authorities to adjust transaction values between a party and a related foreign party on the basis of an "arm's length price") (Exhibit USA-83); International Financial Reporting Standards (IFRS), IAS 18 ("Revenue shall be measured at fair value . . . Fair value is the amount for which an asset could be exchanged, or a liability settled, between knowledgeable parties in an arm's length transaction") (Exhibit USA-84); PwC, *International Transfer Pricing 2013/14*, "Mexico," at 2 (under Mexican law, "[a]ll inter-company transactions between related parties, including domestic and foreign-related parties, must be reflected at arm's-length prices for income tax purposes") (Exhibit USA-85).

the distinction between the R&D activity and expenses, on the one hand, and the subsidies, on the other.[508]

IV. CONCLUSION

359. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject Korea's claims.–

[508] U.S. Responses to the First Set of Panel Questions, paras. 200-201.