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

(DS464)

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

(Public Version)

July 3, 2015

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Short Form	**Full Citation**
US – Countervailing Duty Investigation on DRAMS (Panel)	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R
US – DRAMS (Panel)	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999
US – FSC (AB)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations*", WT/DS108/AB/R, adopted 20 March 2000
US – Large Civil Aircraft (2nd Complaint)(AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Large Civil Aircraft (2nd Complaint) (Panel)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R
US – Softwood Lumber IV (Panel)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

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Exhibit No.	Description
USA-104	Response of Samsung Electronics Co., Ltd. to the Department's February 15, 2012 Questionnaire, *Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea* (April 9, 2012) (excerpts)

5 SUBSIDY CLAIMS

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

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

1. Korea asserts that Samsung Electronics Corp. ("SEC") is a "Korea corporation that engages in production and sales of washers outside Korea through its wholly owned and controlled overseas subsidiaries."[1] In other words, SEC does not itself produce large residential washers outside Korea. As Samsung reported in its questionnaire responses, "SEC performed all LRW production operations at its Gwangju, Korea facility."[2]

2. Korea states that SEC "made the sales of the washers that its overseas subsidiaries produced."[3] This response indicates that – in addition to selling washers that it manufactures in Korea – SEC purchases goods such as washers from its overseas affiliates and then resells them.[4]

3. Critically, none of SEC's overseas affiliates received RSTA Article 10(1)(3) tax credits. As discussed in the U.S. response to the Panel's question, only four Samsung entities received these tax credits; all were Korean corporations.[5] Korea does not argue – and has offered no evidence – that these subsidies "passed through" from these Korean entities to any overseas affiliate.[6] And as Korea concedes, the Korean recipients obtained these credits based solely on research and human resources development activities that they carried out within Korea.[7]

4. Korea's emphasis on SEC's overseas affiliates is belied by documents submitted in the U.S. Department of Commerce ("USDOC") investigation. SEC's 2011 tax returns and

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[1] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 1.
[2] Samsung April 9, 2012 QR, at 3, Ex. 1 (Exhibit USA-100). Korea's response to the Panel's question – which asked whether the entity that received subsidies "engages in production and/or sales outside of Korea" – only references overseas production carried out by overseas affiliates, and it is reasonable to infer that SEC carries out no overseas production of any kind, including – but not limited to – large residential washers.
[3] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 1.
[4] SEC presumably pays an arm's length price to its overseas affiliates for the goods that it purchases from them. *See, e.g.*, U.S. Second Written Submission, para. 358 & n.507 and authorities cited therein (citing requirements that related-party transactions be conducted on an arm's length basis).
[5] U.S. Responses to the Second Set of Panel Questions – CVD Issues, para. 1 & n.2, and authorities cited therein.
[6] Under Korea's attribution theory, any such "pass through" of tax credits would occur after the bestowal of these subsidies, and would thus be irrelevant. *See, e.g.*, Korea Opening Statement at the First Panel Meeting, para. 67. Indeed, Korea's attribution theory is based on the alleged overseas effect on production of R&D activity, and has nothing to do with the bestowal of subsidies. U.S. Second Written Submission, paras. 307-314, 345-358. In any event, the evidence militates against any inference of "pass through," given the royalty payments made by overseas subsidiaries such as Samsung Mexico to SEC, which were presumably made at fair market value. *Id.*, para. 358.
[7] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 1.

unconsolidated financial statements confirm that SEC paid Korean taxes on its own income – not income from its overseas subsidiaries.[8]

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

5. As Korea observes, the Government of Korea ("GOK") stated in its questionnaire responses that RSTA Article 10(1)(3) "aims to facilitate" investment in research and human resources development and thus "boost the general national economic activities."[9] Yet to the extent that RSTA Article 10(1)(3) could be construed as "subsidiz[ing] R&D activity" carried out in Korea, it confers subsidies – in Korea's words – "long after the investments that generated the credit were made."[10]

6. The relevant provisions of RSTA Article 10(1)(3) provide a tax credit equivalent to forty per cent of the difference between the amount of all qualifying research and human resources development expenditures incurred in a tax year and the average annual amount of such expenditures over the preceding four years (subject to carry-forwards and deferrals to comply with Korea's Minimum Tax Law, and tax planning considerations).[11] Companies such as Samsung that apply these provisions are in a sense "rewarded" after the fact for having increased aggregate research and human resources development spending beyond this historic average. These companies pay less tax, freeing up cash.

7. But RSTA Article 10(1)(3) is not an "R&D subsidy" to the extent that it neither rewards particular R&D activity nor requires that the tax savings that a company receives be *used* for a particular activity.[12] Once a subsidy is "bestowed" and comes into existence (*i.e.*, once the tax

[8] *Compare* Samsung April 9, 2012 QR, at Ex. 4A (Exhibit USA-104) (SEC's 2011 Unconsolidated Financial Statements listing "Profit for the year" as 13,236,461 million KRW) *and* Ex. 5A (Exhibit KOR-72) (BCI) (SEC's 2011 tax returns listing [[***]]). In contrast, "Profit for the year" as listed in SEC's 2011 Consolidated Financial Statements, which includes SEC's subsidiaries, is 16,146,525 million KRW. Samsung April 9, 2012 QR, at Ex. 4A (Exhibit USA-104).

[9] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 2 (quoting GOK April 9, 2012 QR, App. Vol. at 108 (KOR-75) (BCI)).

[10] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 3.

[11] U.S. Second Written Submission, para. 340; U.S. Responses to the First Set of Panel Questions, para. 131.

[12] *See* U.S. Responses to the Second Set of Panel Questions – CVD Issues, para. 6. Contrary to Korea's assertion, the subsidies also do not retroactively "reduc[e] the cost of the R&D activities." Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 3. Income tax subsidies do not alter costs that have already been incurred. *Cf. US – FSC (AB)*, para. 131 (costs associated with marketing products "have already been incurred and the amount of these costs is not altered by the income tax"); *see* U.S. Responses to the Second set of Panel Questions – CVD Issues, para. 7.

return is filed and credits are received), it may be used for any purpose. As Korea concedes, this subsidy need not be used in connection with R&D, much less a particular product.[13]

8. Thus, contrary to Korea's response,[14] the answer to Panel question (ii) is clearly "no." Korea attempts to reframe the Panel's question by stating that the "tax savings resulting from the tax credit *are the result of* the expenditures on eligible R&D activities."[15] But this is not responsive to the Panel's question, which addresses the use of subsidies after they are received.

9. Korea attempts to further avoid the Panel's question by focusing on the "direct effect of the availability of the tax credit."[16] Although Korea never makes clear how any of this relates to attribution, Korea argues that the "effect" of an RSTA Article 10(1)(3) credit is to "spur[] the particular investment that results in the earning of the credit."[17] According to Korea, one can "necessarily" trace the effect of the subsidy because by definition any qualifying research and human resources development investment was the "effect" of the tax credit.[18]

10. This tortured reasoning does not withstand scrutiny. As a threshold matter, this appears to reflect a belated variation on Korea's effects-based attribution theories, which have no basis in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") or the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").[19] And even if it were appropriate to ground attribution in the effects of a subsidy, that is not what Korea is attempting to do here. A "subsidy" within the meaning of Article 1.1 of the SCM Agreement (*i.e.*, a financial contribution that confers a "benefit" on a recipient) cannot have an effect unless and until it is bestowed. Once bestowed, the subsidy does not retroactively "spur" the making of any past investment (which has already occurred).

11. An investigating authority is not legally or logically required to calculate subsidy ratios based on speculation regarding whether the *possibility* of eventually receiving a subsidy had an effect *ex ante*. Such an endeavor would be fraught with uncertainty, as it is virtually impossible to determine whether and to what extent the potential "availability" of a tax credit actually "spurred" particular research and human resource development activity.[20] A company undertakes research and human resource development activities to secure a business outcome, for reasons of corporate strategy. The possibility of receiving a tax credit may or may not affect this decision.

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[13] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 6 ("The cash that is saved by paying less in taxes than otherwise would be the case can then be spent on any activities that the taxpaying company elects.").
[14] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 4.
[15] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 4 (emphasis supplied).
[16] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 6 (emphasis supplied).
[17] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 5.
[18] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 5.
[19] *See, e.g.*, U.S. Second Written Submission, paras. 345-358; U.S. Opening Statement at the First Panel Meeting, paras. 67-70; U.S. First Written Submission, paras. 437-462, 485-501.
[20] Korea Responses to the Second Set of Panel Questions – CVD Issues, paras. 5-6.

12. When undertaking a particular research or human resources development activity, a company does not know whether it will later receive any RSTA Article 10(1)(3) credit in connection with associated expenditures. For instance, a company may eventually receive no tax credits at all if it suffers a tax loss for the year. Moreover, a large company's aggregate research and human resources development expenditures in a given year may not exceed the average amount over the past four years. As a consequence, it would at most qualify for the six per cent tax credit available under the alternative formula.[21] The possibility of receiving this much smaller percentage may not be sufficient to "spur" R&D investment, particularly in comparison with other market-driven factors.

13. Critically, Korea has not alleged that the possibility of receiving RSTA Article 10(1)(3) tax credits actually "spur[red]" or caused Samsung to undertake R&D activities in Korea with respect to a particular product – much less subject large residential washers. Nor is there any evidence to this effect. This reflects the structure, design, and operation of this untied subsidy program, which in the case of Samsung conferred an aggregate pool of subsidies based on a percentage of the difference between the aggregate of all qualifying expenditures incurred within Korea – regardless of product – in a given tax year and the historic average over the preceding four years.[22]

14. Thus, contrary to Korea's assertion, there is no basis for equating the effect of a subsidy with the effect of the *potential availability* of a subsidy. And there is no basis for using the potential availability of RSTA Article 10(1)(3) subsidies as the basis for calculating subsidy ratios.

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

15. Korea's response is unsupported and internally inconsistent.

16. Korea asserts that "[t]he total amount of the benefit from a tax credit [under RSTA Article 10(1)(3)] is the amount of that credit a company earns in a given year."[23] It is telling that Korea makes no attempt to justify this assertion in the text of the SCM Agreement, which refutes Korea's position.

17. As the United States has explained, the mere hypothetical earning of a tax credit does not affect the amount of revenue that the government actually foregoes – and thus does not confer a "financial contribution" or "benefit" within the meaning of Article 1.1 of the SCM Agreement –

[21] U.S. Responses to the First Set of Panel Questions, para. 129; U.S. First Written Submission, para. 344.
[22] *See* U.S. First Written Submission, paras. 480-482.
[23] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 9 (emphasis in original).

unless and until it is claimed by the taxpayer.[24] Thus, the amount of the subsidy – *i.e.*, the benefit conferred on the recipient – is the amount of credits actually claimed by the taxpayer.[25]

18. Contrary to Korea's assertion, the earning of a tax credit is not "irrevocable."[26] Under RSTA Article 10(1)(3), a company does not "earn" a credit in any formal sense. A company like Samsung is entitled to claim a credit equivalent to forty percent of the difference between the amount of eligible research and human resource development expenditures incurred in the tax year and the annual average of those expenses over the past four years. But, as the United States has explained, a company may ultimately choose not to claim this amount of credits. Or it may be unable to do so – for instance, if it suffers a tax loss.[27] Unless and until a company claims credits in its return, the credits remain hypothetical, and no benefit or subsidy has been conferred.

19. Korea concedes the weakness of its position when it states that "the Panel should examine the 'claimed' tax credit amount when it considers the issue of whether the USDOC correctly and precisely calculated the subsidy rate."[28] Indeed, one can only quantify the "amount of the subsidy found to exist" under Article 19.4 of the SCM Agreement once that subsidy "exists" and has been bestowed. A credit that a company might have been entitled to, but did not ultimately claim, does not confer a benefit or constitute a subsidy, and cannot serve as the basis for quantifying the "amount of the subsidy."

20. Remarkably, Korea nonetheless asserts that the Panel should treat the amount of tax credit that is "earned" as the basis for determining whether Samsung received disproportionate amounts of subsidy.[29] Korea offers no justification for this inconsistent position – which has no basis in the text of the SCM Agreement. Under Article 2.1(c) of the SCM Agreement, a subsidy is *de facto* specific based on "the granting of disproportionately large amounts of subsidy to certain enterprises" (emphasis supplied). But the hypothetical earning of a tax credit does not equate to the actual "grant" or bestowal of a "subsidy." The analysis under Article 2.1(c) must be based on the amounts of "subsidy" actually granted – here, the amounts claimed in tax returns.

Disproportionality

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

[24] U.S. Responses to the Second Set of Panel Questions – CVD Issues, paras. 8-12.
[25] U.S. Responses to the Second Set of Panel Questions – CVD Issues, para. 13.
[26] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 9.
[27] U.S. Responses to the Second Set of Panel Questions – CVD Issues, paras. 12-13.
[28] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 8.
[29] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 8.

by "a limited number of certain enterprises", or the "predominant use" of the programme by certain enterprises?

21. In its response, Korea does not dispute the possibility that a Member could, in fact, design a subsidy program in accordance with the scenario outlined in the Panel's question – that is, with eligibility criteria that disproportionately benefit a group of large companies, by virtue of the fact that they are more likely to engage in the qualifying activity and thus receive a greater amount of subsidy. But apart from stating that application of *de jure* specificity principles would depend on the language of the applicable statutory provision,[30] Korea does not answer the Panel's question. Instead, Korea denies that RSTA Article 10(1)(3) is an example of the scenario set out above.[31]

22. The United States described this scenario in its submissions to illustrate why Samsung and the GOK's "size defense" – which Korea now downplays and attempts to distance itself from[32] – would "undermine the purpose" of the disproportionality inquiry.[33] According to this argument, "large" companies will "typically" invest more in research and human resources development than "smaller" companies.[34] Given the level of generality at which this argument was framed, it would render subsidies "proportionate" any time a "large" company received larger amounts of subsidy under a program.[35]

23. As the United States explained in its second written submission, 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."[36] Indeed, in *US – Large Civil Aircraft (Second Complaint)*, the fact that Boeing and Spirit were "large" companies with larger investments in commercial and industrial property than "smaller" companies was not to found to explain the disparate distribution, and could not avert a finding that they received disproportionately large amounts of subsidy.[37]

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[30] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 13.
[31] Korea Responses to the Second Set of Panel Questions – CVD Issues, paras. 12-13.
[32] In its second written submission, Korea attempts to minimize its "size defense," arguing that "the United States makes too much of this argument," while conceding that Samsung made this unsupported argument "at a high level of generality." Korea Second Written Submission, para. 262. Korea now portrays this argument as merely "context" for its "common formula" argument – *i.e.*, that subsidies were simply conferred based on a formula applicable to all enterprises, based on the amount of qualifying investments made, and could thus never be "disproportionate." *Id.*, paras. 259, 262-264. The United States has discussed at length the many legal and logical flaws in Korea's common formula argument. U.S. Second Written Submission, paras. 228-234; U.S. Oral Statement at the First Panel Meeting, para. 58; U.S. Responses to the First Set of Panel Questions, paras. 129-130; U.S. First Written Submission, paras. 376-382.
[33] U.S. Responses to the First Set of Panel Questions, para. 209 (quoting Washers Final CVD I&D Memo at 37 (Exhibit KOR-77).
[34] Samsung Case Brief at 26 (Exhibit USA-58).
[35] U.S. Second Written Submission, para. 239.
[36] U.S. Second Written Submission, para. 239.
[37] U.S. Second Written Submission, para. 240.

24. Samsung and the GOK's "size" reasoning could immunize from scrutiny under the "disproportionately large" prong of Article 2.1(c) a substantial number of programs, including those designed along the lines of the scenario outlined above. In its response to the Panel's question, the United States explained that other forms of specificity analysis under Article 2.1 – *i.e.*, *de jure* specificity under Article 2.1(a), and "use of a subsidy program by a limited number of certain enterprises" and "predominant use" under Article 2.1(c) – may not capture this scenario.[38]

25. With respect to RSTA Article 10(1)(3), the USDOC did not expressly find that the GOK intentionally designed the program to disproportionately benefit certain enterprises. Indeed, no such finding was necessary, as a specificity determination under Article 2 of the SCM Agreement does not require the existence of deliberate or intentional targeting of certain enterprises.[39]

26. Nonetheless, the evidence would support such a finding. As the United States observed in its second written submission, record evidence confirms a long-standing pattern whereby extremely large amounts of RSTA Article 10(1)(3) subsidies are concentrated in a very small number of recipients.[40] For instance, in 2003, the top 5 companies in Korea received a staggering 65% of all RSTA Article 10(1)(3) subsidies.[41] A single company, Samsung, received consistently massive amounts of RSTA Article 10(1)(3) subsidy over the years, and accounted for approximately [[***]]% of the total for fiscal year 2009.[42]

27. Yet despite the widely-observed concentration of these benefits in the hands of *chaebol* such as Samsung,[43] the GOK maintained the program year after year. Regardless of whether the GOK originally intended this result when it first put the RSTA program in place in 1982, the GOK continued a program whose design (based on qualifying research and human resources development expenditures) yielded outcomes that disproportionately benefitted "certain enterprises."

5.7. To Korea. Please comment on the United States' assertion, at footnote 348 of its second written submission, that the USDOC's disproportionality redetermination falls outside the Panel's terms of reference because it was not issued until after the Panel was established.

28. It is undisputed that the USDOC's redetermination was not the subject of consultations, and did not exist at the time the Panel was established. Thus, despite Korea's assertion that it

[38] U.S. Responses to the Second Set of Panel Questions – CVD Issues, paras. 15-21.
[39] *See, e.g.*, *US – Softwood Lumber CVDs (Panel)*, para. 7.116 (rejecting argument that a subsidy is specific "only when the authority deliberately limits access" to certain enterprises).
[40] U.S. Second Written Submission, paras. 246-252.
[41] U.S. Second Written Submission, para. 250.
[42] U.S. Second Written Submission, paras. 246-249.
[43] U.S. Second Written Submission, paras. 250-251.

would be "inefficient" not to include it,[44] the USDOC's redetermination is not a measure before the Panel, and falls outside its terms of reference.

29. Nonetheless, Korea has invoked the USDOC redetermination in this dispute,[45] and it is a relevant fact that the Panel may take into account. As discussed in the U.S. submissions, the redetermination strongly supports the USDOC's finding that RSTA Article 10(1)(3) subsidies were granted in disproportionately large amounts to certain enterprises.[46]

5.8 To Korea. Please comment on the United States' assertion, at paragraph 52 of its oral statement at the second meeting, that Korea and Samsung were in the same position before the USDOC in the Washers CVD investigation that the United States was in before the panel and Appellate Body in US – Large Civil Aircraft (Second Complaint).

30. In its response, Korea repeatedly mischaracterizes the United States' position, and offers an extended – and ultimately irrelevant – discussion of concepts such as burden of proof, standard of review, and the obligations of investigating authorities. Yet Korea fails to address the key point that the United States made in its opening statement – namely, the striking similarities between this dispute and *US – Large Civil Aircraft (Second Complaint)*.

31. Korea accuses the United States of conflating "the burden that an *investigating authority* bears under the SCM Agreement" with the burden that a Member faces when it defends a subsidy program before a WTO Panel after a *prima facie* showing has been made" in a prohibited or actionable subsidy claim under Part III of the SCM Agreement.[47] But the United States has never stated or suggested that an investigating authority such as the USDOC bears the same "burden" as a *respondent* in a dispute with an actionable subsidy claim – a proposition that would make no sense.

32. To this, Korea adds another mischaracterization. Korea states that "Korea does not bear the same burden in this proceeding as the United States bore in *US – Large Civil Aircraft (Second Complaint)*."[48] Yet the United States has never taken the position that Korea purports to refute. Korea is the *complaining party* in this dispute, and bears the burden of establishing that the USDOC's determination is inconsistent with the relevant provisions of the SCM Agreement – here, Article 2.1(c) of the SCM Agreement.[49] The United States was the *respondent* in *US – Large Civil Aircraft (Second Complaint)*.

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[44] Korea Responses to the Second Set of Panel Questions – CVD Issues, paras. 16-17.
[45] *See, e.g.*, Korea First Written Submission, para. 276.
[46] U.S. Second Written Submission, paras. 253-260, 266; U.S. First Written Submission, paras. 400-402.
[47] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 20 (emphasis supplied).
[48] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 26.
[49] *US – Wool Shirts and Blouses (AB)*, p. 14. It is of no moment that Korea has asserted its claim in the context of a review of a CVD investigation, and not as an actionable subsidy claim under Part III of the SCM Agreement *See, e.g., US – DRAMS CVD Investigation (Korea) (Panel)*, paras. 7.4-7.5 (burden of proof rests on complaining party in case involving review of CVD determination); *US – DRAMS*, paras. 6.68-6.69 (Korea failed to establish *prima facie* case in support of its claim that U.S. investigating authorities acted inconsistently with the AD Agreement).

33. What the United States actually said in its opening statement at the second Panel meeting is that "*Korea and Samsung were in the same position before Commerce in the washers countervailing duty investigatio*n that the United States was in before the panel and the Appellate Body in *US – Large Civil Aircraft (Second Complaint)*."[50] The United States went on to explain that "the facts in the washers countervailing duty investigation parallel quite closely the facts in *US – Large Civil Aircraft (Second Complaint)*."[51] As in *US – Large Aircraft (Second Complaint)*, "two companies, Samsung and LG, received [[***]] of the subsidy benefit from a subsidy that was potentially available to any company" that conducted qualifying activity (here, research and human resource development activities).[52] Nearly 12,000 companies participated in the program.[53] As the United States explained, "Commerce found, like the Appellate Body in *US – Large Civil Aircraft (Second Complaint)*, that even if the benefits of RSTA Article 10(1)(3) are limited to those enterprises actually in a position to seek them, it would expect, on the basis of the conditions for eligibility for the tax credit, a wide distribution of those benefits."[54] Korea fails to address these factual similarities.

34. The U.S. opening statement also addressed the final step of the disproportionality analysis – *i.e.*, the assessment of reasons provided by the parties. In *US – Large Civil Aircraft (Second Complaint)*, after finding, based on positive evidence, that the actual distribution of the subsidy deviated materially from what was expected, the Appellate Body considered the reasons offered by the United States to explain that outcome.[55] Korea does not dispute that, at this point in the Appellate Body's analysis, the burden of adducing and supporting such reasons had shifted to the respondent, the United States.[56] As explained in the U.S. opening statement, the Appellate Body recognized that the United States bore the burden of adducing evidence sufficient "to show why the 69% figure does not indicate that [the] subsidies were granted in disproportionately large amounts."[57] The Appellate Body rejected the reasons adduced by the United States, finding *inter alia* that they were offered at a "relatively high level of generality" and inadequately supported.[58]

35. Here, again, the GOK and Samsung were in the same position before the USDOC that the United States was in *US – Large Civil Aircraft (Second Complaint)*. As discussed above, extensive evidence was adduced showing that the skewed distribution of subsidies under RSTA Article 10(1)(3) deviated from what would be expected. The respondents before the USDOC (*i.e.*, Samsung and the GOK) were then in a position to adduce argument and evidence to explain and overcome that showing – analogous to the burden-shifting that occurred in *US – Large Civil Aircraft (Second Complaint)*. The USDOC considered and appropriately rejected the reasons

[50] U.S. Opening Statement at the Second Panel Meeting, para. 53 (emphasis supplied).
[51] U.S. Opening Statement at the Second Panel Meeting, para. 53.
[52] U.S. Opening Statement at the Second Panel Meeting, para. 53.
[53] U.S. Opening Statement at the Second Panel Meeting, para. 53.
[54] U.S. Opening Statement at the Second Panel Meeting, para. 53.
[55] *See* U.S. Second Written Submission, paras. 213-222.
[56] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 26.
[57] U.S. Opening Statement at the Second Panel Meeting, para. 52 (quoting *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 887).
[58] *US – Large Civil Aircraft (AB)*, paras. 886-888.

offered by Samsung and the GOK – *i.e.*, the common formula and "size defense."[59] We note that, like arguments asserted in *US – Large Civil Aircraft*, the "size defense" was unsupported and asserted at what Korea now concedes was a "high level of generality."[60]

36. In recognizing these similarities, the United States is not attempting to diminish the obligations borne by investigating authorities. To the contrary, the USDOC was obligated to apply Article 2.1(c) of the SCM Agreement, and – consistent with Article 2.4 of the SCM Agreement – to make specificity findings supported by positive evidence.[61] As explained in the U.S. submissions, the USDOC fully complied with these obligations. The USDOC provided a reasoned and adequate explanation for its determination that disproportionately large amounts of subsidy were conferred on Samsung and LG. The USDOC's findings were supported by positive evidence, and consistent with both the text of Article 2.1(c) and the Appellate Body's guidance in *US – Large Civil Aircraft (Second Complaint)*.[62]

Designated geographical region

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

37. Korea's response presumes that Article 2.1(a) of the SCM Agreement would be applied to the hypothetical above. But as discussed in the U.S. response to the Panel's question, a geographically limited subsidy should be addressed through Article 2.2, and found to be specific on that basis.[63] Article 2.2 addresses the "particular case" of specificity based on geographic limitations.[64]

38. Nor is the content of Korea's speculative response to this hypothetical persuasive. Korea "supposes that a large and diverse number of enterprises could potentially qualify for the subsidy," rendering it non-specific.[65] Yet the same could be said of virtually any geographic

[59] *See* U.S. First Written Submission, paras. 235-260, 376-382, 395-402; U.S. Responses to the First Set of Panel Questions, paras. 204-210; Washers Final CVD I&D Memo, at 36-37 (Exhibit KOR-77); Washers CVD Redetermination, at 8-17, 29-32 (Exhibit KOR-44) (BCI).
[60] Korea Second Written Submission, para. 262; *see also* U.S. Second Written Submission, paras. 235-238.
[61] In its response, Korea lists several provisions of the SCM Agreement that impose obligations on investigating authorities. Korea Response to the Second Set of Panel Questions – CVD Issues, para. 22. Yet Korea's specificity claim is not grounded in any of these provisions. In particular, despite having included Article 2.4 of the SCM Agreement in this list, Korea has not asserted a claim under Article 2.4. U.S. First Written Submission, n. 378; Korea Panel Request at 5-6.
[62] *See* U.S. Responses to the Second Set of Panel Questions – CVD Issues, paras. 15-31; U.S. Opening Statement at the Second Panel Meeting, paras. 47-56; U.S. Second Written Submission, paras. 209-269; U.S. Responses to the First Set of Panel Questions, paras. 128-141, 151-174, 183-187, 204-211; U.S. Opening Statement at the First Panel Meeting, paras. 40-43; U.S. First Written Submission, paras. 339-402.
[63] U.S. Responses to the Second Set of Panel Questions – CVD Issues, paras. 32-33.
[64] U.S. Responses to the Second Set of Panel Questions – CVD Issues, para. 33 (quoting *US – Anti-dumping and Countervailing Duties (China) (Panel)*, para. 9.134).
[65] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 29.

region, including the region excluded in the example above (*i.e.*, Paris).[66] The specificity inquiry in such cases does not hinge on tabulating the number or diversity of companies located within a region (or that might choose to locate to such a region for the first time, in anticipation of receiving a subsidy). Instead, Article 2.2 makes clear that, where access to subsidies is limited to a designated geographic region, this limitation is sufficient to render them specific to "certain enterprises." Article 2.2 states in mandatory language that such subsidies "shall be specific."

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

39. In its response, Korea answers this hypothetical with the same narrow, results-driven interpretation of Article 2.2 that it previously invoked in this dispute – namely, that "certain enterprises" cannot be "located" at the site of their facilities. As the United States has explained in its submissions, this interpretation is logically and legally untenable. It is unclear where an enterprise would be located, if not in facilities of some kind.[67]

40. Korea does not address the temporal aspect of the Panel's question – *i.e.*, whether the Article 2.2 specificity analysis hinges on whether the enterprise receives the subsidy *before* or *after* acquiring new facilities. As the United States discusses in its response to this question, the Article 2.2 analysis does not depend on this timing distinction which, in any event, does not apply to RSTA Article 26.[68] At the time RSTA Article 26 subsidies are granted, the recipient has already acquired the facilities in question and is "located" at those facilities.[69]

Allocation of subsidies

5.14. ***To Korea. Do Korea's two allocation claims relate only to the USDOC's treatment of RSTA Article 10(1)(3) subsidies, or also to the USDOC's treatment of RSTA Article 26 subsidies?***

41. Korea states that its "tying" claim applies to both RSTA Article 10(1)(3) and RSTA Article 26 programs, whereas its "overseas effects" claim applies exclusively to RSTA Article 10(1)(3).[70] Korea's response is revealing, for several reasons.

[66] With respect to RSTA Article 26, the region that is excluded – i.e., the Seoul overcrowding region – accounts for a significant proportion of all corporations in Korea. In 2010, out of 419,420 companies established in Korea, 146,640 – equivalent to approximately 35% – were located in Seoul. Likewise, of the total revenue reported by all Korean companies in 2010 (KRW 3,892,362,244 million), approximately 63% (KRW 2,432,944,982 million) was earned by companies located in Seoul. GOK May 30, 2014 QR, Ex. R-1 (Exhibit KOR-125). Korea does not dispute that Seoul is the engine of the Korean economy, and accounts for a significant proportion of its economy and population. U.S. Second Written Submission, para. 297; U.S. First Written Submission, para. 430.
[67] U.S. Second Written Submission, paras. 273-284; U.S. Opening Statement at the Second Panel Meeting, paras. 57-59.
[68] U.S. Response to the Second Set of Panel Questions – CVD Issues, paras. 34-38.
[69] U.S. Response to the Second Set of Panel Questions – CVD Issues, para. 38.
[70] Korea Response to the Second Set of Panel Questions – CVD Issues, para. 35.

42. *First*, Korea confirms that its tying theory has no basis in the "bestowal" of subsidies. Korea asserts that its tying claim is grounded in Samsung's alleged "ability to tie" tax credits to large residential washers, based on its internal expense records (which were never provided to the granting authority, the GOK).[71] Korea's tying claim ignores the structure, design, and operation of both RSTA Articles 10(1)(3) and 26, which were provided regardless of product type. These programs do not require that recipients disaggregate or associate particular pools of expenses with a given product when claiming credits, or that subsidies be used in connection with particular products. As the USDOC found, these are plainly "untied" subsidies.[72]

43. *Second*, the fact that Korea's "overseas effects" claim is limited to RSTA Article 10(1)(3) reflects the flawed conceptual underpinnings of its theory. As Korea's response makes clear, this claim is rooted in the alleged overseas spill-over effects of RSTA Article 10(1)(3) research and human resources development activities conducted in Korea. Korea contrasts this with facilities subsidies, whose benefits it asserts "pertained solely to local production."[73]

44. In other words, Korea's theory is premised on the alleged overseas effects of R&D activity[74] – not the bestowal of subsidies, which occurred well after these activities took place.[75] As the United States describes in its submissions, the facts relating to the bestowal of RSTA Article 10(1)(3) subsidies confirm that they were conferred on domestic production – not overseas manufacturing.[76]

5.15. ***To Korea. Paragraphs 291 and 296 of Korea's second written submission refer to the "benefit[]" of Samsung's R&D expenditures and activities. Is Korea suggesting that these R&D expenditures and activities conferred a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement? Please explain.***

45. In its response, Korea concedes that it is not using the term "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.[77] Rather, Korea uses the term as a proxy for the effect of R&D expenditures and activities – *i.e.*, to "enhance or improve" the production of digital appliances by "further developing or modifying their physical and performance characteristics."[78]

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[71] Korea Response to the Second Set of Panel Questions – CVD Issues, para. 28.
[72] U.S. Second Written Submission, paras. 300-328; U.S. Opening Statement at the Second Panel Meeting, paras. 64-69; U.S. Opening Statement at the First Panel Meeting, paras. 48-63; U.S. First Written Submission, paras. 463-484.
[73] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 35 ("[U]nlike the Article 10(1)(3) tax credit, the benefits of the Article 26 tax credit pertained solely to local production.").
[74] *See, e.g.*, Korea Opening Statement at the First Panel Meeting, para. 73 ("It is common sense that the results of R&D will normally benefit all operations of a company, wherever located.") (emphasis supplied).
[75] *See* U.S. Second Written Submission, paras. 345-358.
[76] *See* U.S. Second Written Submission, para. 349; U.S. Responses to the First Set of Panel Questions, paras. 178-180; U.S. First Written Submission, para. 490.
[77] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 36. This misleading usage is apparent in several of Korea's submissions in this dispute – and continues in its responses to the second set of Panel questions. *See, e.g.*, *id.*, paras. 35, 38; *see* U.S. Second Written Submission, paras. 310-314.
[78] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 36.

46. As explained above and in the U.S. submissions, Korea's attribution theories – which are premised on the effects of activities and expenditures – have no basis in the SCM Agreement or GATT 1994. They have no grounding in the bestowal of subsidies, much less the actual "benefit" of these subsidies, within the meaning of Article 1.1(b) of the SCM Agreement.[79]

47. When calculating subsidy ratios, the USDOC was not legally required to engage in a complex assessment of whether and to what extent these activities and expenditures ultimately "develop[ed] or modif[ied]" the "physical and performance characteristics" of individual products, or had such an effect overseas. Nor has Korea pointed to any evidence of such effects.[80]

5.16. ***To Korea. (i) What is the factual basis for Korea's assertion, at paragraph 64 of its oral statement at the second meeting, that the Government of Korea conferred subsidies "on washers"? (ii) If Samsung had directed the benefit of those alleged subsidies to other products, could the Government of Korea have sought reimbursement of those subsidies, or taken any other legal or administrative action against Samsung?***

48. Korea concedes that RSTA Article 10(1)(3) "conferred tax credits based on eligible investments in general R&D activities."[81] In other words, RSTA Article 10(1)(3) is not product-specific. Any qualifying research and human resource development expenditure is eligible for tax credits, and the subsidy conferred may be used for any purpose. As Korea states in response to Panel Question No. 5.2, once received, subsidies "can then be spent on any activities that the taxpaying company elects."[82] These admissions fatally undermine Korea's "tying" claim.

49. Yet Korea asserts that the GOK "necessarily conferred [RSTA Article 10(1)(3)] tax credit subsidies on the production of washers," based on the alleged effect of "R&D activities" conducted by Samsung on digital appliances.[83] Once again, Korea's claim – which rests on the activities and expenses undertaken by Samsung – has no grounding in the bestowal of subsidies. Even if Samsung's internal activities and accounting records could be disaggregated on a product-specific basis (which they cannot), this would not "necessarily" imply that RSTA Article 10(1)(3) subsidies are "tied" to large residential washers. One does not follow from the other.[84]

50. Reflecting the weakness of its position, Korea evades question (ii) posed by the Panel. Korea asserts that the GOK could have taken legal or administrative action against Samsung if it

[79] U.S. Second Written Submission, paras. 300-314, 345-358.
[80] U.S. Second Written Submission, paras. 353-358; U.S. First Written Submission, paras. 485-501.
[81] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 37 (emphasis supplied).
[82] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 6.
[83] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 38. Korea also invokes the alleged *ex ante* effects of the "availability of a tax credit." *Id.*, para. 37. The United States addresses this *ex ante* effects theory in its response to Panel Question No. 5.2.
[84] *See, e.g.*, U.S. Second Written Submission, paras. 300-344; U.S. Opening Statement at the Second Panel Meeting, paras. 61-69.

"had not made eligible investments" in research and human resources development, or if "Samsung spent less on R&D than it reported."[85]

51. But the Panel asked whether such action could be taken against Samsung if "Samsung had *directed the benefit of those alleged subsidies to other products*." The clear answer to the Panel's question is "no." This reflects the structure of RSTA Article 10(1)(3), which is not tied to a particular product, much less large residential washers.

[85] Korea Responses to the Second Set of Panel Questions – CVD Issues, para. 39.