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

(DS464)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(Public Version)

May 20, 2015

Madame Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you again for agreeing to serve on this Panel. The United States appreciates the significant time and effort that is involved in your work.

2. Turning to the matter at hand, as we have stated, the United States seeks to assist the Panel in completing its task by explaining the reasoning underlying the challenged determinations and by articulating the proper interpretative analysis of the provisions of the covered agreements under consideration. Unfortunately, we do not consider that Korea's arguments assist the Panel in its efforts.

3. In particular, your efforts are not assisted when Korea mischaracterizes the determinations of the U.S. Department of Commerce ("Commerce") in the challenged investigations, or distorts the arguments of the United States in this dispute, or misstates the findings of the Appellate Body in previous disputes.

4. Korea's approach to this dispute makes the Panel's work more difficult and places a tremendous, additional burden on the Panel to sort through the accuracy of Korea's assertions and arguments before even being able to evaluate their merits. This is not an efficient use of the resources of the dispute settlement system, which is under serious stress from the number and scope of disputes, as the Panel is well aware.

5. On the substance, Korea has failed to seriously engage the text of the AD Agreement,[1] the SCM Agreement,[2] and the GATT 1994,[3] and has failed to propose interpretations that would accord with the customary rules of interpretation of public international law. For example, Korea's interpretations would not give meaning to all of the terms of the covered agreements. Instead, Korea urges the Panel to adopt interpretations that are utterly divorced from the text of the covered agreements, and which would render certain terms of those agreements – even an entire sentence – *inutile*, contrary to the principle of effectiveness.

6. In the U.S. written submissions, statements to the Panel, and responses to the Panel's questions, the United States has demonstrated that Korea has failed to establish any breach of any provision of any of the covered agreements. We do not repeat in this statement the detailed arguments we have made previously, though we continue to rely on all of the arguments we have presented to the Panel during the course of the dispute. Rather, in this statement, we wish to draw to the Panel's attention and correct a number of the misstatements made by Korea during these proceedings.

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] *Agreement on Subsidies and Countervailing Measures*.
[3] *General Agreement on Tariffs and Trade 1994*.

1. Korea Misstates the Appellate Body's Previous Zeroing Findings, None of Which Have Considered Whether Zeroing Is Permissible in the Context of Article 2.4.2 of the AD Agreement

7. From the outset, Korea has misstated the nature and extent of prior Appellate Body findings relating to the use of zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. In its first written submission, Korea asserted that prior Appellate Body reports "are dispositive of the question of whether zeroing is permitted in the context of any anti-dumping proceeding, regardless of the particular price comparison methodology that is applied."[4] In its second written submission, Korea asserts that "[t]he Appellate Body has already addressed and rejected virtually all of the U.S. arguments that the second sentence somehow allows zeroing."[5]

8. None of this is correct. The United States, indeed, has demonstrated that it is not true.[6] The Panel, of course, will decide for itself whether the cited Appellate Body reports can be read as Korea has argued. But we are confident the Panel will agree that the question of whether zeroing is permissible in connection with the alternative, average-to-transaction comparison methodology, applied pursuant to the second sentence of Article 2.4.2, is a novel one; one that has not been decided by the Appellate Body previously, either explicitly or implicitly.

2. Korea Fails to Identify Anything in the Text of the Second Sentence of Article 2.4.2 of the AD Agreement that Prohibits the Use of Zeroing When Applying the Alternative Comparison Methodology to Unmask Mask Dumping

9. Korea distorts the findings of the Appellate Body because it can find no support for its argument in the text of the second sentence of Article 2.4.2. The prohibitions on zeroing that the Appellate Body has found in the past are rooted firmly in the text of the first sentence of Article 2.4.2. 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."[7] 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."[8]

10. The Appellate Body has found that its textual interpretations are supported by contextual analysis of other provisions of the AD Agreement, including, *inter alia*, the terms "dumping" and "margin of dumping." But the obligations – the prohibitions on zeroing that the Appellate Body has found – are in the text of the first sentence of Article 2.4.2.

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[4] Korea First Written Submission, para. 56.
[5] Korea Second Written Submission, para. 4.
[6] *See* U.S. First Written Submission, paras. 157-162.
[7] *See EC – Bed Linen (AB)*, para. 55.
[8] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

11. 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 has not even suggested that any of the terms of the second sentence of Article 2.4.2 establish a prohibition on the use of zeroing in connection with the alternative comparison methodology set forth in that sentence. That is because nothing in the text of the second sentence of Article 2.4.2, or any other provision of the covered agreements, or any of the Appellate Body's prior findings supports Korea's proposed interpretation.

3. Korea Has Not "Broken" Mathematical Equivalence, and the United States Has Not Abandoned that Argument

12. If Korea is to be believed, the U.S. mathematical equivalence argument is "broken" and has been abandoned by the United States.[9] Korea is not to be believed.

13. Rather than being broken, mathematical equivalence has been confirmed by Korea's own paid consultant. As Korea's consultant demonstrates – and this is in Table 7, on page 11 of Exhibit KOR-93 – 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. Korea's consultant also demonstrates mathematical equivalence using hypothetical data, which is presented in the first example in Exhibit KOR-93.[10] Korea has not broken mathematical equivalence; it has proven it.

14. Korea suggests that the United States has abandoned the mathematical equivalence argument, and goes as far as characterizing certain passages of the U.S. responses to the Panel's questions as an "abrupt change in the U.S. position."[11] In Korea's words, this purported change is "rather striking."[12] Viewed charitably, Korea has misunderstood the U.S. responses to the Panel's questions. But when the U.S. arguments are examined, it is evident that Korea is asserting that the U.S. arguments convey the opposite of their actual meaning by selectively quoting U.S. statements, divorced from their context.

15. When the United States explained that the examples in Exhibit KOR-93 that involve the transaction-to-transaction comparison methodology do not yield results that are mathematically equivalent to the results of the average-to-transaction comparison methodology,[13] this was no concession. Rather, it was a demonstration that Korea's paid consultant had proven something that was never in dispute. The United States has never taken the position that mathematical equivalence exists between the *transaction-to-transaction* and average-to-transaction comparison

[9] Korea Responses to the Panel's First Set of Questions, para. 150; Korea Second Written Submission, para. 45.
[10] Exhibit KOR-93, paras. 13 and 23, and Tables 2 and 4 (demonstrating that applying the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing), based on the same annual weighted-average normal value and same export transactions, results in a "5%" overall dumping margin under both methodologies.).
[11] Korea Second Written Submission, para. 45.
[12] Korea Second Written Submission, para. 45.
[13] *See* U.S. Responses to the Panel's First Set of Questions, paras. 115.

methodologies (indeed, given more than a handful of transactions, neither would the transaction-to-transaction and average-to-average comparison methodologies yield equivalent results, although, as the Appellate Body has reasoned, they should be systematically similar). Acknowledging this is not an admission that Korea's paid consultant has invalidated the mathematical equivalence argument,[14] and the statements in the U.S. responses to the Panel's questions cannot credibly be read as such.

16. Likewise, when the United States pointed out in response to the Panel's questions that "[t]he dispute between the parties … is not about arithmetic or algebra,"[15] this was not, as Korea characterizes it, a concession that the U.S. "argument based on mathematical logic really does not work."[16] In fact, the opposite is true. The argument based on mathematical logic does work. Everything else being equal – and that is an important qualification and the actual subject of the dispute between the parties – mathematical equivalence holds. Korea's paid consultant has proven that it holds. Korea does not dispute the *math*. Instead, Korea wants to change variables in one of the equations but not the other as part of its effort to *break* mathematical equivalence. Korea never acknowledges that its attempts to break mathematical equivalence are unrelated to unmasking masked dumping or to giving any meaning at all to the second sentence of Article 2.4.2 of the AD Agreement, consistent with the customary rules of interpretation.

17. As we have explained,[17] the dispute at this point is not about math. The parties agree on the math. The dispute is about so-called "assumptions" about the calculation of normal value, the export transactions used in the different comparison methodologies, and whether different adjustments may or should be made to export prices. The United States does not see why an investigating authority would calculate normal value differently, examine a different universe of export transactions, or make the kinds of adjustments that Korea proposes. In any event, these are questions of legal interpretation, and such questions are for the Panel to resolve itself.

18. The purported expertise of Korea's paid consultant – in economics and statistics, and even his academic research and writing related to antidumping measures – is of no assistance to the Panel. As Korea's consultant himself recognizes, he "cannot comment on the legal[] validity of the U.S.'s argument," so he purports to limit his comments to the "economic/mathematical validity of the U.S. position."[18] However, Korea's consultant tries to break mathematical equivalence by changing certain variables, such as the calculation of normal value, but he offers no mathematical or economic justification for such changes. Korea's consultant has inadvertently waded into legal interpretation waters that are beyond the depth of his expertise.

19. Ultimately, despite Korea's contentions, the mathematical equivalence argument is not broken. On the contrary, it remains unrebutted.

[14] Korea Second Written Submission, para. 44.
[15] U.S. Responses to the Panel's First Set of Questions, para. 112.
[16] Korea Second Written Submission, para. 45.
[17] *See* U.S. Responses to the Panel's First Set of Questions, para. 112.
[18] Exhibit KOR-93, para. 28.

4. Korea Misrepresents the U.S. Arguments Relating to the Negotiating History of the AD Agreement

20. The U.S. first written submission explains how documents from the negotiating history of the AD Agreement confirm that the use of zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.[19]

21. Korea misrepresents the U.S. arguments related to the negotiating history of the AD Agreement. Korea suggests that the United States "maintain[s] that Japan and Hong Kong approved the use of the zeroing practice when implementing the second sentence."[20] This distortion of the U.S. position is plainly contradicted by what the United States actually argued in the U.S. first written submission.

22. In the U.S. first written submission, the United States quoted directly from documents circulated by Japan and Hong Kong during the negotiation of the AD Agreement. In those documents, Japan and Hong Kong raised their concerns about the use of an asymmetrical comparison methodology and their opposition to the use of zeroing in connection with such a comparison methodology. What is established by these documents, and the other document we have provided to the Panel, is that the concern about and opposition to asymmetrical comparisons and zeroing were connected.

23. Indeed, Japan's proposed solution to what it viewed as a problem was to "disallow the practice of calculating 'normal value' on an <u>average</u> basis and then to compare it to 'export price' on an <u>individual</u> basis."[21] Similarly, Hong Kong described its concerns with asymmetrical comparisons and the treating of "the 'negative' dumping margin … as zero."[22] Like Japan, Hong Kong "propose[d] that such practices should be discontinued and that the Code be amended to require comparison to be made between the weighted average normal value and the weighted average export price."[23]

24. Neither Japan nor Hong Kong mentioned "zeroing" in their proposed changes to the Antidumping Code. One view of the negotiating history is that neither viewed doing so as necessary. That is, they could have considered it sufficient that the revised Code require the use of symmetrical comparisons, which would, by necessity, in their view, preclude the use of the zeroing methodology about which they had expressed concerns.

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[19] U.S. First Written Submission, paras. 242-250.
[20] Korea Second Written Submission, para. 68.
[21] *Communication from Japan*, GATT Doc. No. MTN.GNG/NG8/W/81, p. 2 (July 9, 1990) (Exhibit USA-17) (italics added; underlining in original); *see also* U.S. First Written Submission, para. 248.
[22] *Communication from the Delegation of Hong Kong*, GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, paras. 14-15 (December 22, 1989) (Exhibit USA-15) (italics added; underlining in original); *see also* U.S. First Written Submission, para. 247.
[23] *Communication from the Delegation of Hong Kong*, GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, paras. 14-15 (December 22, 1989) (Exhibit USA-15) (italics added; underlining in original).

25. Japan and Hong Kong, however, did not get everything they wanted in the final text of the AD Agreement. Article 2.4.2 of the AD Agreement, as agreed by the WTO Members, does not impose an absolute prohibition on the use of asymmetrical comparisons. Members are required to use one of the symmetrical comparison methodologies "normally," but may use an asymmetrical comparison methodology when certain conditions are met.

26. Given that the Appellate Body has grounded its view on zeroing in the text of Article 2.4.2 (*i.e.*, "all comparable export transactions", "basis", and "comparison"), and given the absence of any express reference to zeroing, either prohibiting its use or allowing it, the cited negotiating history documents are consistent with the view that the use of zeroing is impermissible in connection with the application of the symmetrical comparison methodologies, but its use is allowed in connection with the application of the alternative, asymmetrical comparison methodology.

27. It is for this reason that the United States suggests that Article 2.4.2, as construed by the Appellate Body, reflects a compromise. The United States agreed to discontinue its practice at the time of using an asymmetrical comparison methodology in favor of "normally" using one of the symmetrical comparison methodologies going forward. Japan and Hong Kong, and other *demandeurs*, agreed, as a compromise, that, while an asymmetrical comparison methodology was "normally" not to be used, its use would be permissible under certain conditions. The compromise is evidenced on the face of Article 2.4.2 of the AD Agreement, and is confirmed by reference to documents from the negotiating history. Korea's suggestion that Article 2.4.2 does not reflect a compromise among WTO Members simply is not credible.

28. As a final comment on the negotiating history, we note Korea's contention that, "[i]f the drafters of the Anti-Dumping Agreement had intended to allow the use of zeroing in the second sentence, they would have included the term in the text or more clearly expressed this wish."[24] This is a rather stunning argument, considering the absence of any express prohibition on zeroing, or even any direct reference to the concept of zeroing, anywhere in the AD Agreement. In any event, Korea's proposed concept of textual interpretation – in which that which is not permitted is forbidden – has been rejected previously by panels and the Appellate Body. The "silence of the text" of the second sentence of Article 2.4.2 with respect to zeroing cannot be understood to imply that zeroing is prohibited.[25]

5. Korea's Statistical Arguments Rest on Flawed Premises and Mischaracterizations of what Commerce Actually Did

29. Korea has recognized that "there is no single 'right way' to determine a 'pattern'" and that "[t]he text does not specify any specific method."[26] This recognition, however, has not prevented Korea from elaborating rigid, specific requirements that it contends Article 2.4.2 of the AD Agreement imposes on an investigating authority's assessment of the existence of a pattern

[24] Korea Second Written Submission, para. 65.
[25] *See US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 294; *see also Mexico – Olive Oil (Panel)*, para. 7.26.
[26] Korea Responses to the Panel's First Set of Questions, para. 71.

of export prices which differ significantly. The obligations Korea asks the Panel to find simply are not supported by the text of the second sentence of Article 2.4.2, and Korea's arguments are based on flawed premises and mischaracterizations of Commerce's analysis.

30. Although Commerce did, in a generic sense, analyze certain statistics, *i.e.*, weighted-average export prices, in the washers antidumping investigation, the "pattern clause" of Article 2.4.2 of the AD Agreement does not require the use of any particular formal statistical techniques. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause." Nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake a statistical analysis, much less to undertake a particular statistical analysis even if it chooses to utilize certain statistical tools.

31. Korea contends that the *Nails* test applied by Commerce in the washers antidumping investigation is not suitable to perform a particular type of statistical analysis,[27] and Korea complains about Commerce's purported "misuse of the standard deviation in the *Nails* test."[28] However, Korea mischaracterizes the *Nails* test, which does not involve the type of statistical analysis discussed by Korea.

32. 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.[29] Commerce did not use the standard deviation to measure statistical probability or make statistical inferences, as one would expect when using a sample of data. Rather, Commerce used the standard deviation as a tool in its *Nails* test for determining, objectively and transparently, 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."[30]

33. Korea also incorrectly alleges that Commerce "ignores actual market prices."[31] Commerce most certainly does not ignore actual market prices. Commerce's analysis is based on an examination of all of the actual export prices reported by the respondents. Commerce used weight averaging as part of its analysis, and nothing in the second sentence of Article 2.4.2 prohibits the use of weighted-average export prices. 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 Commerce to identify export prices that differ significantly among different purchasers, regions, and time periods.

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[27] *See* Exhibit KOR-92.
[28] Korea Responses to the Panel's First Set of Questions, para. 73; *see also* Exhibit KOR-92.
[29] *See* Exhibit KOR-92.
[30] *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).
[31] Exhibit KOR-92, para. 24 *et seq*.

34. 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."[32] But that mischaracterizes the *Nails* test. 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, Commerce 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."[33]

35. Ultimately, Korea's statistical arguments rest on flawed premises and mischaracterizations of what Commerce actually did, and they are without merit.

6. Korea's Arguments Related to the "Explanation Clause" Are Aimed at Depriving the Second Sentence of Article 2.4.2 of any Meaning

36. Korea's arguments related to the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement offer the Panel no compelling reason to find that Commerce's explanation in the washers antidumping investigation is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement. Instead, Korea's arguments reveal Korea's view that "whatever their trends or variations"[34] and "regardless of the size of the price differences,"[35] the normal comparison methodologies can take into account "appropriately" any "pattern of export prices which differ significantly among different purchasers, regions, or time periods."[36]

37. Korea's arguments related to the "explanation clause" would again read the second sentence of Article 2.4.2 out of the AD Agreement, contrary to the principle of effectiveness, and it is at odds with the Appellate Body's recognition that the second sentence provides Members a means to "unmask targeted dumping"[37] in "exceptional"[38] situations. Korea openly invites the Panel to find that such exceptional situations simply never would arise. The Panel should decline Korea's invitation.

7. Korea Has Failed to Establish the Existence of any So-Called "Differential Pricing Methodology" Measure

38. The United States has argued throughout this dispute that Korea has failed to establish the existence of any "differential pricing methodology" measure, and thus Korea's "as such" claims relating to such a purported measure must fail. Korea seeks to minimize the U.S. arguments, suggesting that the lone basis for the U.S. position is that "Korea cannot challenge the differential pricing methodology in general because there is always some chance the USDOC

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[32] Exhibit KOR-92, para. 24.
[33] *See* Washers Final AD I&D Memo, at 22 (Exhibit KOR-18).
[34] Korea Responses to the Panel's First Set of Questions, para. 109.
[35] Korea Responses to the Panel's First Set of Questions, para. 108.
[36] AD Agreement, Art. 2.4.2, second sentence; *see also* Korea Responses to the Panel's First Set of Questions, paras. 108-109.
[37] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[38] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.

might change the policy in the future."[39] Korea again misunderstands and misstates the U.S. arguments, which speak for themselves.[40]

39. Korea's problem is that it has presented the Panel with little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be challenged "as such,"[41] but the Appellate Body has warned that panels may not simply divine the existence of a measure in the abstract on the basis of such a string of cases, or repeated action.[42] Korea insists that it has put forward sufficient evidence, but the U.S. written submissions closely review the scant evidence presented by Korea, and demonstrate that it is insufficient.[43]

40. Korea asserts in its second written submission that the United States has failed to address Exhibit KOR-94, which is a statement from another of Korea's paid consultants.[44] Of course, Korea provided Exhibit KOR-94 to the Panel at the first panel meeting, and the Panel did not ask the United States a question about the exhibit, so when would the United States have addressed that exhibit prior to the U.S. second written submission? In the U.S. second written submission, the United States discusses Exhibit KOR-94 and demonstrates that it presents nothing that constitutes new evidence, or evidence at all.[45]

41. Korea's second written submission also purports to discuss the "legal standard" for establishing an "as such" claim.[46] Korea suggests that "[t]he Appellate Body has not said that any particular type of evidence is necessary or sufficient."[47] That, however, is misleading. In *Argentina – Import Measures*, on which Korea relies, the Appellate Body explained that "the specific measure challenged and how it is described or characterized by a complainant will determine the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged."[48]

42. In this dispute, Korea alleges that the purported "differential pricing methodology" is a rule or norm of general and prospective application[49] and Korea asserts that "[t]he best analogy is to the WTO dispute over zeroing."[50] In light of Korea's characterization of the measure it seeks to challenge, the Appellate Body's analysis in the zeroing disputes of the evidence necessary to establish the existence of a measure of this nature would appear to be most apt. Unfortunately for Korea, Korea has failed to adduce evidence here that is comparable to the

[39] Korea Second Written Submission, para. 199.
[40] *See* U.S. First Written Submission, paras. 270-281; U.S. Responses to the Panel's First Set of Questions, paras. 120-127; U.S. Second Written Submission, paras. 144-150.
[41] *See US – Zeroing (EC) (AB)*, para. 204.
[42] *See US – Zeroing (EC) (AB)*, para. 204.
[43] *See* U.S. First Written Submission, paras. 270-281; U.S. Second Written Submission, paras. 144-150.
[44] *See* Korea Second Written Submission, para. 216.
[45] *See* U.S. Second Written Submission, paras. 147-149.
[46] Korea Second Written Submission, para. 203-204, 208-209.
[47] Korea Second Written Submission, para. 209.
[48] *Argentina – Import Measures (AB)*, para. 5.110.
[49] *See* Korea First Written Submission, paras. 182-189.
[50] Korea Second Written Submission, para. 218.

evidence presented in the zeroing disputes.[51] Accordingly, Korea's "as such" claims related to the purported "differential pricing methodology" must fail.

43. The United States has also shown that the preliminary determination of the first administrative review of the washers antidumping order is not a measure that is within the Panel's terms of reference,[52] and that Korea utterly misconstrues the concept of an "ongoing conduct" claim.[53] We will not repeat here the arguments we have made in that regard.

8. Korea's Criticisms of the Cohen's *d* Test Are Exaggerated

44. In its second written submission, Korea contends that Commerce's use of the Cohen's *d* test as part of its differential pricing analysis reflects the use of "arbitrary benchmarks" with "little inherent value."[54] As with its other arguments, Korea overstates what the evidence on the record of this dispute actually supports.

45. Despite Korea's suggestion that "the Cohen's *d* test is <u>not</u> an accepted measure of 'significance'," [55] academic literature in fact recognizes the usefulness of effect size, which can be measured by the Cohen's *d* coefficient, in measuring significance. For example, one scholar has observed that "effect size quantifies the size of the difference between two groups, and *may therefore be said to be a true measure of the significance of the difference*."[56] Another commenter has lauded the value of effect size in identifying the "practical significance" of differences in comparison results.[57] Korea's suggestion that the Cohen's *d* test cannot be a measure of significance is not supported by the academic literature.

46. Moreover, Korea's critiques of the "small," "medium," and "large" thresholds used in conjunction with the Cohen's *d* test are misplaced. Korea dismisses these designations as "arbitrary," but such designations nonetheless have value as conventions in analyzing effect size as measured by the Cohen's *d* test. As observed by Dr. Cohen himself, "all conventions are arbitrary" and "may be misused," but Dr. Cohen has provided various rationales for why his proposed conventions "will be found to be reasonable by reasonable people."[58] The thresholds associated with the Cohen's *d* test have been "widely adopted"[59] and "provide a good basis for interpreting effect size and for resolving disputes about the importance of one's results."[60]

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[51] *See* U.S. First Written Submission, paras. 270-281; U.S. Responses to the Panel's First Set of Questions, paras. 120-127; U.S. Second Written Submission, paras. 144-150.
[52] *See* U.S. Responses to the Panel's First Set of Questions, paras. 32-42, 84, 95; U.S. Second Written Submission, paras. 159-161.
[53] *See* U.S. First Written Submission, paras. 320-329; U.S. Second Written Submission, paras. 155-158.
[54] *See* Korea Second Written Submission, paras. 133, 136.
[55] Korea Second Written Submission, para 129 (original emphasis).
[56] Robert Coe, "It's the Effect Size, Stupid: What effect is and why it is important," paper presented at the Annual Conference of British Education Research Association (Sept. 2012), p. 6 (emphasis supplied) (Exhibit USA-87).
[57] *See* Paul Ellis, *The Essential Guide to Effect Sizes* (2010), pp. 3-6 (Exhibit USA-88)
[58] Jacob Cohen, Statistical Power Analysis for the Behavioral Sciences (2d ed. 1988), pp. 12-13 (Exhibit KOR-120).
[59] David M. Lane, "Difference Between Two Means," p. 2 (Exhibit USA-89).
[60] Paul Ellis, *The Essential Guide to Effect Sizes* (2010), pgs. 40-42 (Exhibit KOR-34).

9. Korea Also Misstates Prior Appellate Body Findings Related to the Disproportionality Analysis and Introduces a New, Largely Incomprehensible Argument

47. As with its claims under the AD Agreement, Korea similarly misunderstands and misstates the Appellate Body report in *US – Large Civil Aircraft (Second Complaint)* to support its claims under the SCM Agreement.[61] Because of the degree to which Korea has misstated the findings in that report, we seek to assist the Panel by discussing the issue in some detail.

48. Korea does not rely on the Appellate Body's findings in *US – Large Civil Aircraft (Second Complaint)* so much as it relies on arguments the United States made in that dispute, arguments that the Appellate Body rejected. To be clear, the United States argued that the subsidy at issue was not *de facto* specific, and the Appellate Body upheld the panel's finding that the subsidy was *de facto* specific. The U.S. arguments on which Korea relies were not successful.

49. Korea asserts that "[t]he Appellate Body agreed with the United States that disproportionality could only be evaluated using a second ratio."[62] This morning, in its opening statement, at paragraph 56, Korea adds that the Appellate Body, in Korea's words, "concluded that the appropriate second ratio 'could demonstrate whether the amounts of IRB subsidies provided to Boeing and Spirit were disproportionately large.'" Korea's assertions about the Appellate Body's findings are demonstrably untrue. That quote that Korea relied on in its opening statement comes from paragraph 885 of the Appellate Body report. The entire sentence reads: "In this dispute, the European Communities and the United States engaged in considerable debate over the proper scope of a second ratio measuring the economic participation of Boeing and Spirit that, when compared against the 69% figure, could demonstrate whether the amounts of IRB subsidies provided to Boeing and Spirit were disproportionately large." This was a summary of the arguments of the parties. This was not a conclusion by the Appellate Body. That is plain on the face of the Appellate Body's report, as the Panel will see for itself.

50. Indeed, the Appellate Body described the focus of the parties and the panel on the only second ratio for which the parties presented evidence and argument as "not particularly relevant."[63] There was no second ratio accepted by the Appellate Body that underpinned the finding that Boeing had received a disproportionately large amount of the subsidy, within the meaning of Article 2.1(c) of the SCM Agreement. Yet, the Appellate Body agreed with the Panel's finding that Boeing had received a disproportionately large amount of the subsidy. If the Appellate Body found in *US – Large Civil Aircraft (Second Complaint)* that disproportionality can only be established on the basis of a comparison between two ratios, as Korea suggests, then the Appellate Body proceeded, in the very same section of the very same report, to immediately make findings inconsistent with its own interpretation. That is not what happened in that dispute.

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[61] Korea Second Written Submission, paras. 243-256.
[62] Korea Second Written Submission, para. 251.
[63] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 886.

51. Rather, the Appellate Body signaled its understanding that the challenged subsidy was "potentially available to enterprises that seek to purchase, construct, or improve various types of commercial or industrial property."[64] The Appellate Body further recognized that "although the legal basis for the allocation of [the subsidy] may seemingly be broadly available to enterprises in Wichita, the enterprises that are actually in a position to avail themselves of [subsidy] benefits at any given moment represent only a subset of all enterprises in Wichita."[65] The Appellate Body continued:

> 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. Where 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.[66]

52. Korea suggests that the Appellate Body's observation about the expected distribution "led to the required next step in the analysis, which was to determine whether there was a reason to believe that the City of Wichita provided IRB subsidies in disproportionately large amounts to certain enterprises. This was the purpose of the second ratio."[67] Korea does not cite to any paragraph of the Appellate Body report in support of this assertion. The Appellate Body did not, itself, proceed to examine a second ratio as the next step in its own analysis. What the Appellate Body did do, however, was to find that the burden was at that point on the United States, the respondent, to adduce evidence of a relevant second ratio sufficient "to show why the 69% figure does not indicate that [the] subsidies were granted in disproportionately large amounts."[68]

53. Korea and Samsung were in the same position before Commerce in the washers countervailing duty investigation that the United States was in before the panel and the Appellate Body in *US – Large Civil Aircraft (Second Complaint)*. Indeed, the facts in the washers countervailing duty investigation parallel quite closely the facts in *US – Large Civil Aircraft (Second Complaint)*. Two companies, Samsung and LG, received [[***]] of the subsidy benefit from a subsidy that was potentially available to any company in Korea that conducted research and development activities. This seemingly broadly available subsidy, of course, was only available to the subset of companies that undertook such activities, and nearly 12,000 companies did so. 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 established for eligibility for the tax credit, a wide distribution of those benefits across various sectors of the economy of Korea.

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[64] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 883.
[65] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 883.
[66] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 883.
[67] Korea Second Written Submission, para. 255.
[68] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 887.

54. Again, on very similar facts, the Appellate Body found that the subsidy challenged in *US – Large Civil Aircraft (Second Complaint)* was *de facto* specific because Boeing received a disproportionately large amount of the subsidy. On the basis of the Appellate Body's interpretation and application of Article 2.1(c) of the SCM Agreement, the Panel should find that Commerce's determination that RSTA Article 10(1)(3) was *de facto* specific because Samsung and LG received a disproportionately large amount of the subsidy is not inconsistent with Article 2.1(c).

55. In addition to incorrectly portraying the Appellate Body's findings in *US – Large Civil Aircraft (Second Complaint)*, Korea also advances a puzzling new argument that is premised on mischaracterizations of the facts and U.S. arguments, and on a misreading of Article 2.1(c). Korea now argues that the Panel should "focus upon" the amount of tax credits *earned* during the period of investigation rather than the amount of tax credits *granted*.[69] However, this does not align with Article 2.1(c) of the SCM Agreement, which refers to the *granting* of disproportionately large amounts of the *subsidy*.

56. Furthermore, the tax credit earned under RSTA Article 10(1)(3) in a given year is not the amount of subsidy granted. The amount of subsidy granted is the amount of revenue foregone by the Korean government. The revenue foregone by the Korean government, as the United States explained in response to question 3.1 from the Panel, "is not simply a function of the amount of qualifying investments."[70] Rather:

> The amount of tax credits received may reflect a range of factors – such as the size of a company (SME vs. non-SME), the extent to which expenses in the tax year compare to the annual average over preceding years, a company's tax loss, compliance with Minimum Tax requirements, and other tax planning considerations.[71]

Korea mischaracterizes the facts of its own subsidy program and the argument of the United States when it suggests that a company's tax planning is unrelated to the calculation of the amount of subsidy granted to the company, and when it asserts that the United States has recognized this.[72]

10. Korea Misconstrues the Text of Article 2.2 of the SCM Agreement and the U.S. Arguments Regarding RSTA Article 26

57. Korea's second written submission asserts that "it is without dispute" that RSTA Article 26 does not impose limitations on the location of enterprises.[73] Of course, that is precisely the question that *is* in dispute. Commerce determined that the tax subsidy is limited to an enterprise's presence in a specific location. Commerce's determination accords with the plain

[69] Korea's Second Written Submission, para. 242.
[70] U.S. Responses to the Panel's First Set of Questions, para. 130.
[71] U.S. Responses to the Panel's First Set of Questions, para. 130.
[72] *See* Korea Second Written Submission, para. 242.
[73] Korea's Second Written Submission, para. 340, subheading D.1.

meaning and context of Article 2.2 of the SCM Agreement. Korea, however, seeks to avoid the disciplines of the SCM Agreement by relying on irrelevant policy justifications and by advancing an overly restrictive – and ultimately untenable – interpretation of the term "enterprises."

58. Korea suggests that the term "enterprises" in Article 2.2, which is collocated with the term "certain," somehow should not be read as "certain enterprises," which is defined for purposes of the SCM Agreement in Article 2.1 as "an enterprise or industry or group of enterprises or industries."[74] Korea's suggestion simply is not credible.

59. Korea attempts to support its tortured textual construction by pointing to U.S. arguments, incorrectly suggesting that the United States has acknowledged that the subsidy program's limitations "do not concern the location of the enterprises receiving the subsidy."[75] However, the United States has been clear from the outset that "the RSTA Article 26 program is expressly limited to investments in facilities located in a designated region," meaning that "access to the program was limited by law to enterprises or industries within this region."[76] Korea's effort to divorce the term "facilities" from "enterprises" finds no support in the unambiguous position of the United States.

60. The Panel should reject Korea's approach and find that Commerce's regional specificity determination reflects a straightforward application of Article 2.2 of the SCM Agreement that is not inconsistent with that provision.

11. Korea's Arguments against Commerce's Tying Analysis Rely Increasingly on Irrelevant Non-Record Evidence and Mischaracterizations

61. Regrettably, Korea's arguments regarding Commerce's attribution of subsidies similarly rely on misstatements and extraneous evidence and arguments.

62. First, Korea persists in its misguided effort to color this dispute with the introduction of non-record evidence from separate antidumping proceedings that were subject to rules that are distinct from those that govern Commerce's countervailing duty investigation of washers from Korea.[77] Evidence from those antidumping proceedings was not relevant to Commerce's determination in the washers countervailing duty investigation and is not relevant to the Panel's review of Commerce's determination in this dispute. The information Korea has put before the Panel pertains to Samsung's cost accounting, not the measurement of a subsidy benefit granted by the Korean government or the subsidy rate calculation.

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[74] *See* Korea Second Written Submission, para. 350.
[75] Korea's Second Written Submission, para. 344 (citing U.S. First Written Submission, para. 408).
[76] United States First Written Submission, para. 408.
[77] *See* Exhibit KOR-98, containing a redacted, public version of the verification report from the BMRF Korea AD investigation and excerpts from verification exhibits; Exhibit KOR-99, containing the redacted, public version of the verification report in the Washers Korea AD investigation and excerpts from verification exhibits containing business confidential information that were attached to that verification report; Exhibit KOR-115, containing a proprietary excerpt from Samsung's Digital Appliance Division accounting records.

63. Moreover, because this information was not part of the record of the washers countervailing duty investigation, it did not factor into Commerce's determination of Samsung's subsidy rates. As explained in paragraphs 331-334 of the U.S. second written submission, the Appellate Body has explained that panels should limit their review "to the facts that the agency should have discerned from the evidence on record."[78] Accordingly, the Panel should decline to consider or rely on extra-record evidence when reviewing Korea's claims under the SCM Agreement.

64. Second, Korea purports to argue in favor of an exacting standard under the SCM Agreement and the GATT 1994, insisting that Commerce is required to calculate the "precise" amounts of subsidy granted to the merchandise under consideration.[79] However, Korea's own proposed alternative to Commerce's approach is itself not specific to the subject merchandise.[80] Rather, Korea would have the Panel find that the subsidy should be tied to any products at the corporate division level. That is, Korea is not taking a principled stand in support of a requirement that investigating authorities tie subsidies to a particular product. Korea is simply advocating a subsidy calculation at a level of generality (the corporate division level) that is somewhat lower than the level of generality of Commerce's subsidy calculation (the company level).

65. The reason for Korea's position in this particular instance is transparent: calculating the subsidy rate at the division level would make the subsidy rate lower. However, that would not necessarily always be the case. In any event, in light of the totality of the facts and evidence available to the granting authority at the time of bestowal of the subsidy, Commerce's approach of calculating the subsidy rate on the basis of the subsidy granted to Samsung as a company is more logical and is consistent with the general nature of the subsidy program and the basis on which Samsung received a subsidy benefit. Nothing in Article 19.4 of the SCM Agreement or Article VI:3 of the GATT 1994 compels Commerce to adopt Korea's favored approach to such an untied subsidy.

66. Third, Korea asserts that Commerce was "passive" when presented with evidence allegedly germane to the tying analysis.[81] In reality, however, Commerce examined the legal text of RSTA Articles 10(1)(3) and 26 and the particular manner in which the Korean government bestowed those tax credits on Samsung. Commerce's review of that evidence indicated that the tax programs were not tied to the manufacture, production, or export of any particular merchandise, regardless of how Samsung maintained its own accounting records. Commerce did not act passively, but appropriately focused on evidence relevant to the issue at hand.

67. Finally, Korea again misunderstands and misstates that Commerce's tying analysis in the washers countervailing duty investigation was an "irrebuttable presumption." In reality, Commerce did not apply any presumption at all. Rather, Commerce focused its analysis on

[78] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 175.
[79] Korea Second Written Submission, paras. 283 and 314.
[80] Korea Second Written Submission, paras. 280 and 285.
[81] Korea Second Written Submission, para. 285.

evidence related to the "bestowal" of the subsidy,[82] which is consistent with Article VI:3 of GATT 1994 and footnote 36 of the SCM Agreement. The reference to "bestowed" in Article VI:3 and footnote 36 indicates that a subsidy is tied to a product if its intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy. Commerce's approach did not presume that the subsidies were tied or untied; it simply provided a means of classifying the programs based on the nature of the programs themselves.

68. Additionally, Korea's contention that Commerce applied an "irrebuttable presumption" is belied by Commerce's determination in the washers countervailing duty investigation that certain grants bestowed upon LG were tied, while grants bestowed upon Samsung under the same programs were not.[83] The distinguishing factor in those subsidies was the terms of the bestowal. LG's grant approval documents evinced an explicit purpose, while Samsung's did not. This demonstrates that, aside from not applying a presumption at all in the washers countervailing duty investigation, any alleged presumption that Commerce applied would have been both rebuttable and, in fact, rebutted.

69. Commerce applied the same tying analysis to the tax programs that it applied to the grant programs. Specifically, Commerce considered both the general requirements of the tax programs and the manner in which the tax credits were bestowed. As with the grant programs, the outcome of Commerce's analysis rested entirely on the design of RSTA Articles 10(1)(3) and 26 and the bestowal of subsidies under those programs. Korea mischaracterizes Commerce's analysis as a presumption to distract the Panel from the fact that record evidence establishes that the Korean government itself did not intend to subsidize – that is, it did not intend to "bestow" subsidies on – any particular products with those tax credits. Commerce merely recognized that fact and calculated the subsidy rates accordingly. Korea has failed to explain why or how the SCM Agreement or the GATT 1994 prohibit the evidence-based approach that Commerce took in the washers countervailing duty investigation.

12. Korea Misstates the Facts Concerning Commerce's Determination of the Denominator Used to Calculate Samsung's Subsidy Rate

70. Lastly, we address two of Korea's arguments regarding the denominator Commerce used to calculate Samsung's subsidy rate. Like Korea's other arguments, these arguments rely on assertions of fact that simply are not true.

71. First, Korea continues to misconstrue Commerce's determination in the refrigerators countervailing duty investigation. To be absolutely clear, Commerce did not make an affirmative finding that RSTA Article 10(1)(3) benefits should be attributed to Samsung's global sales in the refrigerators investigation. Commerce simply made a mistake based on Samsung's erroneous reporting of data.

72. To demonstrate this, we are providing Exhibit USA-86, which is an excerpt of Samsung's response to the USDOC's initial questionnaire in the refrigerators countervailing duty

[82] Washers Final CVD I&D Memo, at 41 (Exhibit KOR-77).
[83] Washers Final CVD I&D Memo, at 17-20 (Exhibit KOR-77).

investigation. This questionnaire was not part of the record before Commerce in the washers countervailing duty investigation. As we have explained previously, panels generally should refrain from considering non-record evidence. However, should the Panel accept and consider the extra-record documents submitted by Korea, which we argue the Panel should not do, we request that you also consider this document to avoid any confusion about the facts of the refrigerators investigation.

73. As Exhibit USA-86 shows, and contrary to Korea's assertions in its second written submission,[84] Commerce explicitly instructed Samsung to "not include the volume and value of merchandise produced outside of Korea" in its reported sales data.[85] Samsung claimed to respond with the "requested quantities and values."[86] It is no surprise, then, that Commerce used the reported figure in the denominator of the *ad valorem* subsidy rate calculation for untied subsidy programs, whether they were tax credits under RSTA Article 10(1)(3) or grants for R&D. However, this cannot be construed as a determination by Commerce that these subsidies benefited Samsung's global production. In fact, the global production issue was never raised in the refrigerators investigation. Commerce used Samsung's misreported information inadvertently. Furthermore, no matter what Commerce did in a different, prior investigation, it is clear that in the *washers* investigation Commerce requested the quantity and value of Samsung's sales of domestically produced merchandise.[87]

74. Second, Korea asserts that Samsung raised the "royalty payment" issue with Commerce during the washers countervailing duty investigation.[88] This is yet another mischaracterization of the record by Korea. Samsung discussed royalty payments from its overseas subsidiaries solely in the context of requesting that Commerce include non-production revenue in the subsidy rate denominator.[89] Commerce declined to do so because its regulations require it "to attribute subsidy benefits to products sold by a company, *not to its non-production related income*."[90] In short, during the washers investigation, neither Samsung nor Korea argued that these royalty payments also supported a finding that RSTA Article 10(1)(3) benefits should be attributed to global production, and Commerce had no reason to consider them in that context.

13. Conclusion

75. The United States has set out in some detail in this statement numerous errors made by Korea in this proceeding, including interpretations that are divorced from the text of the agreements and misunderstandings, misstatements, or mischaracterizations of the facts and determinations made by Commerce, the arguments of the United States, and prior findings of the Appellate Body.

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[84] Korea Second Written Submission, para. 323, n. 311.
[85] Samsung's Supplemental Questionnaire Response in *Bottom Mount Combination Refrigerator Freezers from the Republic of Korea* (June 30, 2011), p. III-5 (Exhibit USA-86).
[86] Samsung's Supplemental Questionnaire Response in *Bottom Mount Combination Refrigerator Freezers from the Republic of Korea* (June 30, 2011), pp. III-5-III-6 (Exhibit USA-86).
[87] Samsung's Questionnaire Response in the Washers CVD Investigation (April 9, 2012), p. 6 (Exhibit USA-49).
[88] Korea Second Written Submission, paras. 336-338.
[89] Washers CVD Samsung Case Brief, pp. 50-51 (Exhibit KOR-90).
[90] Washers Final CVD I&D Memo, p. 53 (Exhibit KOR-77).

76. As we have demonstrated in the U.S. written submissions, statements, and responses to the Panel's questions, all of Korea's claims are without merit, and the United States respectfully renews its request that the Panel reject them.

77. Madame Chairperson, members of the Panel, this concludes our opening statement. We would be pleased to respond to your questions.