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

(DS464)

RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS TO THE PARTIES

(Public Version)

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2 ANTI-DUMPING CLAIMS

2.1 Pattern clause

2.1.1 Korea and the United States

2.1. Korea suggests at paras. 143 and 150 of its first written submission that lower prices during key holiday seasons should not trigger the application of the W-T comparison methodology. Are such prices not evidence of prices that differ by period, as envisaged by the second sentence of Article 2.4.2?

1. Lower prices during "key holiday seasons" may, indeed, be evidence of prices that differ significantly by time period, as envisaged by the second sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). The U.S. first written submission responds to Korea's arguments about holiday pricing at paragraphs 82-89.

2. Critically, Korea's argument is contrary to the text of the second sentence of Article 2.4.2 of the AD Agreement. Korea argues that, despite the text of second sentence of Article 2.4.2, the article *does not apply* when there is a pattern of export prices that differ among different time periods. This reading is untenable.

3. In its opening statement at the first panel meeting, Korea explains that it is "not suggesting that the [investigating] authority must consider the exporter's subjective intent in setting prices," but rather urges that "[i]f the prices differ for normal commercial reasons . . . then those prices do not constitute a 'pattern' of prices that 'differ significantly.'"[1] Regardless of whether Korea's proposed analysis is framed in terms of discerning an exporter's subjective intent or whether so-called "normal commercial reasons" underlie the pattern found, the investigating authority is charged with "find[ing]" whether a pattern of export prices that differ significantly exists.

4. Nothing in Article 2.4.2 or any other provision of the AD Agreement supports Korea's proposed notion that significant price differences – or dumping for that matter – must be found to be the result of some "guilty" intent or motivation. These concepts simply are foreign to the AD Agreement, and reading into the "pattern clause" an obligation that an investigating authority may not apply an alternative methodology when there exists a pattern of export prices that differ significantly would be inconsistent with the customary rules of interpretation of public international law.

5. An analogy to the broader question of whether dumping exists is instructive here. Lower-priced exports, if they are priced below normal value, constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. Likewise, in certain instances, setting export prices below normal value may well be, as Korea puts it, "normal commercial behavior." But this pricing behavior constitutes dumping nonetheless.

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[1] Oral Statement of the Republic of Korea at the First Meeting of the Panel, para. 26 (March 10, 2015) ("Korea Opening Statement at the First Panel Meeting").

Furthermore, dumping may be determined to be injurious to the domestic industry, regardless of the intention of the exporter to cause such injury.

6. Turning back to the application of Article 2.4.2 of the AD Agreement, the existence of a pattern of export prices which differ significantly among different purchasers, regions, or time periods provides evidence that a condition may exist in which dumping potentially could be "masked."[2] Such a finding is based on the facts before the investigating authority regardless of the intentions of the exporter.

7. Korea's arguments about holiday season pricing just confirm that the lower-priced export sales indeed "target" particular time periods. Regardless of whether Samsung and LG intended to "dump" large residential washers, when export prices were compared with average normal value in Korea, it was revealed that Samsung's and LG's admitted "low price[]"[3] targeting actually resulted in "targeted dumping" that would be "masked" by higher price sales if the average-to-average comparison methodology were used. This is precisely the kind of situation in which an investigating authority may need to resort to the alternative, average-to-transaction comparison methodology to "unmask targeted dumping," which is being concealed by other higher-priced export sales during other times of the year.

2.2. Please explain, in as detailed manner as possible, how the USDOC established in the Washers investigation that there was a pattern of export prices which differed significantly among purchasers, regions, or time periods. Was the pattern identified on the basis of purchasers; periods; or regions?

8. In the washers antidumping investigation, the USDOC examined whether there existed a pattern of export prices that differed significantly among different purchasers, regions, or time periods for both Samsung and LG. At the time of the washers antidumping investigation, the United States Department of Commerce ("USDOC") required an allegation of "targeted dumping"[4] by a member of the domestic industry before the USDOC would examine whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods. In the washers antidumping investigation, Whirlpool Corporation, a member of the domestic industry, alleged that both LG and Samsung had "targeted" certain purchasers, regions, or time periods in the export market, and put forth evidence to support its claims.[5]

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[2] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[3] First Written Submission of Korea (Confidential), para. 153 (September 29, 2014) ("Korea First Written Submission").
[4] The concept of "targeted dumping" is a short-hand way of referring to the textual requirements of the second sentence of Article 2.4.2 of the AD Agreement. When the Panel inquired of the third parties what "targeted dumping" means at the third party session of first panel meeting, several third parties appeared to agree with the U.S. view that this term simply refers to the textual components of that provision.
[5] *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 46,391, 46,394-46,395 (August 3, 2012) ("Washers Preliminary AD Determination") (Exhibit KOR-32).

9. The USDOC employed what has been referred to as the "*Nails* test" in the washers antidumping investigation to examine whether there existed a pattern of export prices which differ significantly among different purchasers, regions, or time periods.[6] Applying the *Nails* test, the USDOC examined whether export prices to the allegedly "targeted" purchasers, regions, or time periods were at significantly different (*i.e.*, lower) levels than the export prices to other purchasers, regions, or time periods, based on the domestic industry's allegation of which purchasers, regions, or time periods had been "targeted." In other words, the USDOC applied the *Nails* test only to the allegedly "targeted" purchasers, regions, or time periods, and did not test whether the export sales to other purchasers, regions, or time periods also may have been "targeted."[7]

10. The *Nails* test that the USDOC applied in the washers antidumping investigation consisted of two distinct steps: the "standard deviation test" and the "gap test," both of which are described below. Additionally, the USDOC examined the total volume of sales which passed the *Nails* test relative to the total volume of export sales for the exporter as a whole during the period of investigation to determine whether the requirements of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement had been satisfied.

11. In its first written submission, Korea recognizes the role of "intermediate" comparisons when calculating the margin of dumping for an exporter.[8] Similar to comparing export prices to normal value, when comparing export prices to determine whether they differ significantly among different purchasers, regions or time periods, it may be necessary for an investigating authority to make "intermediate" comparisons of export prices on a "sub-product" level (*i.e.*, "CONNUM-specific" or "model-specific") to ensure that apparent price variations are not attributable to differences in physical characteristics among product types. As discussed further below in the U.S. response to question 2.11, the USDOC relied on CONNUMs in its application of the *Nails* test in the washers antidumping investigation to account for the "nature of the product."[9]

The "Standard Deviation Test"

12. At the outset of its application of the *Nails* test, for purposes of the "standard deviation test," the USDOC determined the variance between each of the weighted-average export prices[10] to each purchaser, region, or time period during the period of investigation and calculated the standard deviation of the weighted-average export prices.[11] The standard deviation measures the

[6] 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 19-20 ("Washers Final AD I&D Memo") (Exhibit KOR-18).
[7] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18) (referring to Whirlpool's "targeted dumping" allegation).
[8] *See* Korea First Written Submission, at para. 59.
[9] *See* Washers Final AD I&D Memo, at 19 (Exhibit KOR-18) (discussing, for example, calculation of "standard deviation on a product-specific basis (i.e., by CONNUM) using the POI-wide weighted-average sales prices for the allegedly targeted groups and the groups not alleged to have been targeted.").
[10] The sales are weighted by quantity.
[11] *See* Washers Final AD I&D Memo, at 19 (Exhibit KOR-18).

extent of the differences within a set of numbers. Calculating the standard deviation enables the USDOC to determine what a "normal" range of weighted-average sale prices is for the period of investigation, and whether certain weighted-average export prices are lower than that norm. The set of numbers (*i.e.*, the weighted-average export sale prices) the USDOC considered included all of the export sales during the period of investigation. The USDOC calculated the weighted-average export prices and the standard deviation on a model-specific basis, *i.e.*, by "CONNUM." A CONNUM is based upon the product's physical characteristics.

13. It is important to note that the USDOC used weighted-average export sales prices to each purchaser, region or time period in its application of both stages of the *Nails* test. The USDOC did not look to price variance at the transaction-specific level because the second sentence of Article 2.4.2 is concerned with export prices that "differ significantly *among* different purchasers, regions or time periods."[12] In other words, for this approach, the relevant price variance to be considered is the variance among purchasers, regions, or time periods, not among specific transactions.[13] Furthermore, using weighted-average export sale prices allows the USDOC to "disregard meaningless variations and focus instead on uncovering a pattern of prices *among* groups."[14]

14. We offer the following simple example to illustrate how the "standard deviation test" operates. A respondent makes export sales during the period of investigation to five purchasers in the export market. Assume for the sake of this example that all of the respondent's sales were of the same model and the respondent sold the same quantity of this model to each purchaser. The domestic industry alleges that a respondent's sales to Purchaser A are "targeted."

	Purchaser A	Purchaser B	Purchaser C	Purchaser D	Purchaser E
Weighted-Average Export Price	$6.00[15]	$9.50	$9.25	$8.00	$5.75

15. To calculate the variance between all of the weighted-average export prices and the standard deviation, the USDOC first calculates the weighted average of the weighted-average export prices to all purchasers.

$$\frac{(6.00 + 9.50 + 9.25 + 8.00 + 5.75)}{5} = 7.70$$

16. Next, the USDOC calculates the difference between the weighted-average export prices to each purchaser and the weighted-average export price to all purchasers.

[12] Emphasis added.
[13] Washers Final AD I&D Memo, at 21 (Exhibit KOR-18).
[14] Washers Final AD I&D Memo, at 21 (Exhibit KOR-18).
[15] Again, this is a weighted-average export sales price, not an individual export transaction price.

$$6.00 - 7.70 = -1.70$$
$$9.50 - 7.70 = 1.80$$
$$9.25 - 7.70 = 1.55$$
$$8.00 - 7.70 = 0.30$$
$$5.75 - 7.70 = -1.95$$

17. Then, the USDOC calculates the square of each of the differences.

$$(-1.70)^2 = 2.89$$
$$(1.80)^2 = 3.24$$
$$(1.55)^2 = 2.4025$$
$$(0.30)^2 = 0.90$$
$$(-1.95)^2 = 3.8025$$

18. Then, the USDOC calculates the weighted average of these results to determine the variance.

$$\frac{(2.89 + 3.24 + 2.4025 + 0.90 + 3.8025)}{5} = 2.485$$

19. Finally, the USDOC calculates the standard deviation as the square root of the variance.

$$\sqrt{2.485} = 1.58$$

20. Thus, in this example, the standard deviation is 1.58. The USDOC would then consider whether Purchaser A's weighted-average export price is more than one standard deviation less than the weighted-average export price to all purchasers (7.70).

$$7.70 - 1.58 = 6.12$$

21. Then, the USDOC would determine the volume of the allegedly targeted group's sales of subject merchandise that are at weighted-average export prices that are more than one standard deviation below the weighted-average export price to all purchasers during the period of investigation. The USDOC would consider whether the volume of sales to the allegedly targeted group which are priced at more than one standard deviation below the weighted-average export price to all purchasers exceeded 33 percent of the total volume of the respondent's sales of subject merchandise to the allegedly targeted group.

22. In the example above, which only included the sale of a single model, 100 percent of sales to Purchaser A are priced at more than one standard deviation below the weighted-average export price to all customers. Recall that the weighted-average export price to Purchaser A is $6.00, which is more than one standard deviation (1.58) below the weighted-average export price to all purchasers ($7.70).

23. In the washers antidumping investigation, on a CONNUM-specific basis, the USDOC determined that, for both of the Korean respondents, Samsung and LG, there were export sales to the allegedly "targeted" groups (*i.e.*, purchasers, regions, or time periods) where the weighted-average export prices to those groups were more than one standard deviation below the weighted-average export price to all of the groups, and the volume of such sales to each allegedly targeted group exceeded 33 percent of the volume of export sales to each allegedly targeted group.[16]

The "Gap Test"

24. Whereas the "standard deviation" test establishes only the possible existence of a pattern of export prices which differ (but not necessarily significantly), the "gap test," which is the second stage of the *Nails* test, permitted the USDOC to ascertain if such prices differ significantly among purchasers, regions or time periods. In applying the gap test, the USDOC determined the total volume of sales for which the difference between the weighted-average sale price to the allegedly targeted group and the next higher weighted-average sale price for a non-targeted group exceeds the average price gap, weighted by sales volume, between sale prices in the non-targeted group. The next higher price is the weighted-average sale price to a non-targeted group that is greater than the weighted-average sale price to the allegedly targeted group. The gap test is only performed for sales which passed the standard deviation test. For purposes of the gap test, the USDOC omits weighted-average sale prices to non-targeted groups that are lower than the weighted-average sale price to the allegedly "targeted" group.

25. Returning to the example above, the weighted-average sale price to Purchaser A is $6.00 and the weighted-average export prices to the non-targeted purchasers are $9.50, $9.25, $8.00 and $5.75. Because the USDOC omits weighted-average sale prices to non-targeted groups that are lower than the weighted-average sale price to the allegedly targeted group, the price of $5.75 would be omitted from the gap test. Commerce calculates the gap between $6.00 and $8.00 because $8.00 is the next higher weighted-average export price to a non-targeted purchaser above $6.00. Thus, the gap between Purchaser A and the purchaser with the next higher weighted average export price, Purchaser D, is $2.00. The gaps between the non-targeted purchasers that form the basis of the USDOC's gap test are $0.25 (Purchaser B and Purchaser C), and $1.25 (Purchaser C and Purchaser D). The weighted-average gap is $0.75.

26. If the volume of the export sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly "targeted" group, then the USDOC determined that the sales which satisfy this five percent threshold pass the gap test.[17] In the example above, the volume of the sales that met this threshold is 100 percent, and thus exceeds five percent of the total volume of sales of subject merchandise to Purchaser A.

The Sufficiency Test

[16] *See* Washers Final AD I&D Memo, at 12, 19 (Exhibit KOR-18).
[17] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18).

27. Finally, the USDOC considers, on a case by case basis, whether the volume of export sales which pass the *Nails* test constitutes a sufficient volume of sales as compared to all sales made by the exporter during the period of investigation.[18] If so, the USDOC found that the requirements of the "pattern clause" had been satisfied, and moved on to separately consider the requirements of the "explanation clause."

Application in the Washers Antidumping Investigation

28. In the washers antidumping investigation, the USDOC applied the analysis described above to the sales data for LG and Samsung, based on Whirlpool's allegation of "targeted dumping," and determined that there existed a sufficient volume of sales to the alleged "target" which passed the *Nails* test.[19]

29. Specifically, with respect to Samsung, the USDOC determined that a pattern of export prices that differed significantly existed during [[***]]. The USDOC separately observed a pattern of significant price differences by region, specifically in the [[***]]. The USDOC made a similar observation for [[***]].[20] Again, these findings were based on employing the *Nails* test, based on Whirlpool's "targeted dumping" allegations.[21] The USDOC determined that the volume of export sales comprising the pattern constituted a sufficient percentage of Samsung's total export sales to continue to its analysis of whether the average-to-average methodology could take into account appropriately the pattern found.[22]

30. For LG, the USDOC determined that there existed prices that differed significantly during the time period [[***]]. The USDOC separately made a similar determination for the [[***]]. Finally, the USDOC made a similar determination for [[***]].[23] Again, these findings were based on employing the *Nails* test, based on Whirlpool's "targeted dumping" allegations.[24] Similar to Samsung, the USDOC determined that the volume of export sales passing the *Nails* test constituted a sufficient percentage of LG's total export sales to continue to its analysis of whether the average-to-average methodology could take into account appropriately the pattern found.[25]

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[18] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18) ("If we determined that a sufficient volume of U.S. sales were found to have passed the Nails test, then the Department considered whether the average-to-average method could take into account the observed price differences.").
[19] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18).
[20] Samsung Final Determination Calculation Memorandum (dated December 18, 2012) ("Final Samsung AD Calculation Memo"), at 1-2 (Exhibit KOR-41) (BCI).
[21] Washers Final AD I&D Memo, at 20 (Exhibit KOR-18).
[22] Washers Final AD I&D Memo, at 20 (Exhibit KOR-18). *See also* Exhibit USA-37, p. 2, for a summary of the USDOC's findings for Samsung.
[23] Final Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (dated December 18, 2012) ("Final LG AD Calculation Memo"), at 1-2 (Exhibit KOR-42) (BCI).
[24] Washers Final AD I&D Memo, at 20 (Exhibit KOR-18).
[25] Washers Final AD I&D Memo, at 20 (Exhibit KOR-18). *See also* Exhibit USA-37, p. 1, for a summary of the USDOC's findings for LG.

31. The USDOC then considered, after finding that there existed patterns of export prices that differed significantly among different purchasers, regions, or time periods, whether the average-to-average comparison methodology, which the USDOC normally would use, could appropriately take into account the observed differences, or whether it was necessary to utilize the asymmetrical average-to-transaction comparison methodology to "unmask" any "targeted dumping."[26] Upon identifying a meaningful difference in the weighted-average margins of dumping calculated for each respondent when using the average-to-average comparison methodology and the average-to-transaction comparison methodology, the USDOC concluded that the average-to-average comparison methodology could not take into account such price differences appropriately.[27]

2.3. Korea's Exhibit KOR-96 contains the USDOC's preliminary determination for the first administrative review of the Washers order. Please explain, in as detailed manner as possible, how the USDOC established in this administrative review that there was a pattern of export prices which differed significantly among purchasers, regions, or time periods. Was the pattern identified on the basis of purchasers; periods; or regions? Was the pattern identified by model or by product?

32. In its opening statement at the first panel meeting, Korea asserted that the differential pricing analysis "is subject to challenge, as applied, in the Washers administrative review."[28] Korea is incorrect.

33. As an initial matter, we observe that the first administrative review of the washers antidumping order has not yet been finalized. The preliminary determination was published only recently, on March 9, 2015, and the final determination is not expected to be published until later this year, 120 days after the publication of the preliminary determination, unless the deadline is extended.[29] Because the "results" are, at this point, only "preliminary," the duties to be assessed, if any, would be known only following the final determination. No antidumping duties have been or will be levied as a result of the "preliminary results" of the first administrative review. Thus, at this point, there is simply no antidumping measure assessing duties on the import transactions subject to the first administrative review, and therefore no relevant "action" under the AD Agreement.[30]

34. In *US – Continued Zeroing*, the Appellate Body observed that a challenge to preliminary results issued by the USDOC in an administrative review was "premature."[31] The Appellate Body reasoned that, "given that these preliminary results could be modified by the final results,

[26] Washers Final AD I&D Memo, at 12, 20 (Exhibit KOR-18).
[27] Washers Final AD I&D Memo, at 12, 20 (Exhibit KOR-18); *see also* First Written Submission of the United States of America (Confidential), para. 127 (November 24, 2014 ("U.S. First Written Submission").
[28] Korea Opening Statement at the First Panel Meeting, para. 46.
[29] *See Large Residential Washers from the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014*, 80 Fed. Reg. 12,456 (March 9, 2015) ("Washers AD Administrative Review Preliminary Determination") (pp. 2-4 of the PDF version of Exhibit KOR-96).
[30] *Cf.* AD Agreement, Art. 17.4 (A Member may refer a matter to the DSB where "final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties.").
[31] *US – Continued Zeroing (AB)*, para. 210.

we fail to see how the [complaining party] could establish that final anti-dumping duty were assessed in excess of the margin of dumping . . . ."[32] Accordingly, the Appellate Body declined to complete the legal analysis and find that the preliminary results were within the panel's terms of reference and inconsistent with the covered agreements.[33]

35. Additionally, at the time of consultations, the first administrative review of the washers antidumping order had not yet even been initiated. Korea requested consultations on August 29, 2013 and the parties held consultations on October 3, 2013.[34] The first administrative review was initiated on April 1, 2014.[35] As explained above, the first administrative review certainly has not been completed even at this point. Since the parties could not possibly have consulted on a measure that still will be finalized only in the future, that is not a measure that can be within the Panel's terms of reference in this dispute.

36. The Appellate Body explained in *EC – Chicken Cuts* that "[t]he term 'specific measures at issue' in Article 6.2 [of the DSU] suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[36] The final determination of the first administrative review of the washers antidumping order is, of course, not a measure that was in existence at the time of the establishment of the panel; it does not yet exist even now.

37. The Appellate Body further explained that "measures enacted subsequent to the establishment of the panel may, in certain circumstances, fall within the panel's terms of reference."[37] Recalling its findings in *Chile – Price Band System*, the Appellate Body observed that this may be the case where the measure "remains essentially the same" or where "[t]he measure is not, in its essence, any different."[38]

38. The Appellate Body elaborated this line of reasoning in the context of antidumping measures in some of the disputes that have concerned zeroing. For example, in *US – Zeroing (Japan) (Article 21.5)*, the Appellate Body found that the ninth administrative review was properly within the compliance panel's terms of reference. In that situation, the Appellate Body noted that the Article 21.5 proceedings "present[ed] circumstances in which the inclusion of Review 9 was necessary for the Panel to assess whether compliance had been achieved."[39] The Appellate Body pointed out that:

> Review 9 related to the same anti-dumping duty order as Reviews 1, 2, and 3, which were found to be inconsistent in the original proceedings, and to the three

[32] *US – Continued Zeroing (AB)*, para. 210.
[33] *See US – Continued Zeroing (AB)*, para. 212.
[34] *See* Request for the Establishment of a Panel by the Republic of Korea, WT/DS464/4, circulated December 6, 2013 ("Panel Request"), p. 1.
[35] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 Fed. Reg. 18,262, 18,264 (April 1, 2014) (Exhibit KOR-43).
[36] *EC – Chicken Cuts (AB)*, para. 156.
[37] *EC – Chicken Cuts (AB)*, para. 156.
[38] *EC – Chicken Cuts (AB)*, para. 156 (*quoting Chile – Price Band System (AB)*, para. 139.
[39] *US – Zeroing (Japan) (Article 21.5 – Japan) (AB)*, para. 125.

> subsequent reviews (Reviews 4, 5, and 6) being challenged by Japan as "measures taken to comply". Japan's panel request expressly referred to "subsequent closely connected measures". Review 9 had been initiated at the time the matter was referred to the Panel and was due to be completed during the Article 21.5 proceedings. Under these circumstances, we consider that the Panel was correct in finding that Review 9 was within its terms of reference, as doing so enabled it to fulfil its mandate to resolve the "disagreement" between the parties and determine, in a prompt manner, whether the United States had achieved compliance with the DSB's recommendations and rulings.[40]

39. The circumstances here are much different. Rather than the final results of a ninth administrative review, Korea seeks to bring into the dispute the preliminary results of the first review. Where in *US – Zeroing (Japan) (Article 21.5)* the ninth review had been initiated at the time the matter was referred to the panel and was due to be completed during the proceeding, the first review here had not been initiated at the time of panel establishment and is not due to be completed until well after the Panel has received the arguments of the parties, both in writing and at the panel meetings.

40. More importantly, though, the situation in *US – Zeroing (Japan) (Article 21.5)* can be distinguished from the situation here because, in *US – Zeroing (Japan) (Article 21.5)*, the substantive claim against the ninth administrative review was that, in the words of the panel, "Review 9 also continues to apply the zeroing methodology found to be WTO-inconsistent in the original proceeding."[41] Thus, the panel in *US – Zeroing (Japan) (Article 21.5)* found that the USDOC applied the same zeroing methodology in the ninth administrative review that it had applied in previous segments of the antidumping proceeding, and the United States did not challenge that finding.[42] By contrast, in this dispute, Korea alleges that, in the preliminary determination of the first administrative review of the washers antidumping order, the USDOC applied an analysis that Korea's own first written submission demonstrates is substantially different from the analysis that the USDOC applied in the washers antidumping investigation.

41. In *US – Continued Zeroing*, the Appellate Body explained that:

> [T]he periodic reviews listed in the consultations request also involve essentially the same practice as the successive periodic reviews identified in the panel request, that is, the assessment of duty liabilities and cash deposit rates. Moreover, the [EC's] claims against the periodic and sunset reviews listed, respectively, in the consultations request and the panel request relate to essentially the same dispute, that is, the application of the zeroing methodology in the imposition or continuation of specific antidumping duties. Thus . . . the Panel properly relied on the relevant findings in *Brazil – Aircraft* to confirm its finding that a precise identity is not required between the specific measures identified in

[40] *US – Zeroing (Japan) (Article 21.5 – Japan) (AB)*, para. 124 (emphasis added).
[41] *US – Zeroing (Japan) (Article 21.5 – Japan) (AB)*, para. 123 (*quoting US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.114).
[42] *See US – Zeroing (Japan) (Article 21.5 – Japan) (AB)*, para. 124.

> the consultations request and those identified in the panel request, provided that the complainant does not expand the scope of the dispute.[43]

42. As already noted, the situation here is quite different. Korea alleges that the washers antidumping investigation involved the application of the "targeted dumping" analysis, while the preliminary determination of the first administrative review purportedly involves the substantially different "differential pricing" analysis. Unlike with the application of zeroing in previous disputes, these two measures, the investigation and the first administrative review, cannot be said to share the same "essence" or to "relate to essentially the same dispute" such that this would be an exceptional circumstance wherein a measure that did not exist at the time of panel establishment can be considered within the Panel's terms of reference.

43. That being said, the United States wishes to be of assistance to the Panel. Accordingly, in the paragraphs that follow, we explain in detail how the USDOC established in the preliminary determination of the first administrative review that there was a pattern of export prices which differed significantly among purchasers, regions, or time periods. In addition, we are providing the Panel as Exhibit USA-36 a PowerPoint presentation that the USDOC has used to describe an analysis of differential pricing to domestic stakeholders as well as U.S. trading partners.

The Differential Pricing Analysis Applied in the First Washers Administrative Review

44. In the first administrative review of the antidumping order on washers from Korea, the USDOC applied a "differential pricing" analysis to examine whether there existed for LG, the only cooperating respondent in the first administrative review, a pattern of prices which differed significantly among different purchasers, regions, or time periods, and whether the average-to-average comparison methodology could take such a pattern into account appropriately when calculating the margin of dumping for LG.[44] The USDOC did not apply a differential pricing analysis for respondents Samsung or Daewoo because both respondents failed to respond to the USDOC's questionnaire, and, consequently, there were no sales databases to analyze for these respondents.[45]

45. As evidenced in the following discussion, the Cohen's *d* and ratio tests, as part of the differential pricing analysis applied in the preliminary results of the first washers administrative review, operated substantially differently from the *Nails* test applied in the washers antidumping investigation.

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[43] *US – Continued Zeroing (AB)*, para. 235 (emphasis added).
[44] *See* Washers AD Administrative Review Preliminary Determination (pp. 2-4 of the PDF version of Exhibit KOR-96), and Washers AD Administrative Review Preliminary Decision Memo (pp. 5-8 of the PDF version of Exhibit KOR-96); *see also* 2012 – 2014 Administrative Review of Large Residential Washers From Korea: Preliminary Results Margin Calculation for LGE (dated March 2, 2015) ("Preliminary LG AD Review Calculation Memo"), at 1-2 (pp. 9-10 of the PDF version of Exhibit KOR-96).
[45] *See* Washers AD Administrative Review Preliminary Determination, 80 Fed. Reg. at 12,457 (p. 3 of the PDF version of Exhibit KOR-96).

46. Under the differential pricing analysis applied in the preliminary results of the first washers administrative review, the USDOC did not require an allegation from the domestic industry to consider whether there existed a pattern of export prices which differ significantly among purchasers, regions, or time periods, as had been required when the USDOC utilized a "targeted dumping" analysis (*i.e.*, the *Nails* test), for example, in the washers antidumping investigation.[46]

47. The differential pricing analysis used by the USDOC in the washers first administrative review preliminary determination consists of two distinct steps: the "Cohen's *d* test" and the "ratio test." The Cohen's *d* test considers whether price differences exhibited among different purchasers, regions, or time periods are significant. The ratio test evaluates the extent that these price differences are exhibited in the exporter's pricing behavior to determine whether the "pattern clause" of the second sentence of Article 2.4.2 has been satisfied.

48. As discussed above in response to question 2.2, it may be necessary for an investigating authority to make "intermediate" comparisons of export prices among different purchasers, regions, or time periods. For the Cohen's *d* test, these intermediate comparisons are made between export prices for "comparable merchandise," as described below.

The "Cohen's *d* Test"

49. The central feature of the Cohen's *d* test is the calculation of the Cohen's *d* coefficient. The Cohen's *d* coefficient is a measure of "effect size," which quantifies the importance, usefulness, or significance of the differences between two sets of observations. The measurement of effect size is completely different from and independent of the measurement of the statistical significance of the differences between two sets of observations.

50. In the preliminary results of the first washers administrative review, in order to make "intermediate" comparisons of export prices among different purchasers, regions, or time periods, the USDOC defined default definitions for these three groups as well as for comparable merchandise. For purchasers, the USDOC defined groups using customer code information reported by LG. Regions were defined by the destination codes reported by LG and sales were grouped into regions based on standard definitions published by the United States Census Bureau, a sub-agency of the USDOC. Time periods were defined by quarter (*i.e.*, by three month periods), starting from the beginning of the administrative review period. Comparable merchandise was defined using the CONNUM, as well as all other characteristics of the sales, other than purchaser, region, and time period. The USDOC used the CONNUM and the same characteristics when it made intermediate comparisons between export prices and normal values for the purpose of calculating LG's margin of dumping.[47]

[46] *See generally* Washers AD Administrative Review Preliminary Decision Memo, at 7-9 (pp. 6-8 of the PDF version of Exhibit KOR-96).
[47] Washers AD Administrative Review Preliminary Decision Memo, at 7-8 (pp. 6-7 of the PDF version of Exhibit KOR-96).

51. A fundamental difference between the *Nails* test, as applied in the washers antidumping investigation, and the differential pricing analysis applied in the preliminary results of the first washers administrative review is that, under the differential pricing analysis, the USDOC tested *all* purchasers, regions, or time periods against other purchasers, regions, or time periods.[48] For export sales to each purchaser, region, and time period of comparable merchandise (*i.e.*, the test group), the USDOC calculated a Cohen's *d* coefficient, which quantifies the difference in the weighted-average export price to the test group with the weighted-average export price of export sales of comparable merchandise to all other purchasers, regions, or time periods (*i.e.*, the comparison group). The USDOC placed additional conditions on this intermediate comparison in that there must have been at least two export sales to both the test group and to the comparison group, and the export sales volume to the comparison group must have been at least five percent of the export sales volume to the test group.

52. To calculate the Cohen's *d* coefficient in the preliminary results of the first washers administrative review, the USDOC first calculated a weighted-average export price of the export sales to a test group, as well as a weighted-average export price of the export sales to the corresponding comparison group. Next, the USDOC also calculated the variance of the export prices within the test group and within the comparison group. From these two variances, the USDOC calculated the "pooled standard deviation" as the square root of the simple averages of these two variances. The Cohen's *d* coefficient was then calculated as the quotient of the difference between the weighted-average export prices of the test group and the comparison group, and the pooled standard deviation. This calculation is stated in the equation below.

$$d = \frac{(weighted\ average\ export\ price)_{\substack{test \\ group}} - (weighted\ average\ export\ price)_{\substack{comparison \\ group}}}{\sqrt{\frac{(variance)_{\substack{test \\ group}} - (variance)_{\substack{comparison \\ group}}}{2}}}$$

53. The calculated Cohen's *d* coefficient was then examined to determine whether the difference was significant. The extent of these differences could be quantified by one of three fixed thresholds: small, medium, or large. Of these thresholds, the USDOC determined that the large threshold provided the strongest indication that there was a significant difference between the weighted-average export prices of the test group and the comparison group, while the small threshold provided the weakest indication that such a difference was meaningful.[49] For the USDOC's analysis in the preliminary results of the first washers administrative review, the difference in the weighted-average export prices was considered significant when the Cohen's *d* coefficient was equal to or exceeded the large threshold, and the export sales within the test group were then considered to have passed the Cohen's *d* test.

[48] Washers AD Administrative Review Preliminary Decision Memo, at 7 (p. 6 of the PDF version of Exhibit KOR-96).
[49] Washers AD Administrative Review Preliminary Decision Memo, at 8 (p. 7 of the PDF version of Exhibit KOR-96).

54. The analysis discussed above was performed for the export sales to each purchaser, region, and time period based on the intermediate comparisons of the export prices for comparable merchandise.

The "Ratio Test"

55. The second step in the differential pricing analysis applied in the preliminary results of the first washers administrative review was the "ratio test." The USDOC used the ratio test to evaluate the extent that the price differences are exhibited in the exporter's pricing behavior to determine whether the "pattern" clause of the second sentence of Article 2.4.2 was satisfied.

56. For the ratio test, the results of the Cohen's *d* test were aggregated to determine the extent of the export prices which differ significantly among different purchasers, regions, or time periods.[50] In other words, the USDOC aggregated the results of the Cohen's *d* test among different purchasers, regions, or time periods found to pass that test. The USDOC did not double count export sales that passed the Cohen's *d* test for more than one category, *i.e.*, by purchaser, region, or time period. To clarify, if an export sale passed the Cohen's *d* test by purchaser and region, then the USDOC would only count it once in the aggregation of the results for the purpose of the ratio test. As discussed in more detail below in response to question 2.8, the USDOC aggregated the results of the Cohen's *d* test so that it could consider the exporter's pricing behavior in the United States market for the product as a whole. This is because the Cohen's *d* test results are simply different aspects of LG's pricing behavior. Aggregating the results allowed the USDOC to more holistically review LG's pricing behavior in the export market. The differential pricing analysis looked for a "pattern," but did not require a "target."

57. The ratio test was applied in the preliminary results of the first washers administrative review as follows. If 33 percent or less of the total value of all export sales by LG for the product as a whole passed the Cohen's *d* test, then the USDOC would not have considered whether the application of the alternative, average-to-transaction comparison methodology was necessary. If between 33 percent and 66 percent of the total value of all export sales by LG for the product as a whole passed the Cohen's *d* test, then the USDOC would consider whether the application of the alternative, average-to-transaction comparison methodology was warranted, based on the application the average-to-transaction comparison methodology to the export sales that passed the Cohen's *d* test and the application of the average-to-average comparison methodology to the remaining export sales that did not pass the Cohen's *d* test. If 66 percent or more of the total value of all export sales by LG for the product as a whole passed the Cohen's *d* test, then the USDOC would consider whether the application of the alternative, average-to-transaction comparison methodology was warranted based on the application of that methodology to all export sales.

58. In the preliminary results of the first washers administrative review, after applying the Cohen's *d* and ratio tests described above, the USDOC found that 47.12 percent of LG's export sales confirmed that there existed a pattern of export prices that differed significantly among

[50] Washers AD Administrative Review Preliminary Decision Memo, at 8 (p. 7 of the PDF version of Exhibit KOR-96).

different purchasers, regions, or time periods.[51] The USDOC thus considered whether to apply the average-to-transaction comparison methodology to those export sales passing the Cohen's *d* test and the average-to-average comparison methodology to the remainder of LG's sales.[52] The USDOC preliminarily found that applying the average-to-average comparison methodology to all of LG's sales could not account for the pattern found.[53] Accordingly, in the preliminary results of the first washers administrative review, the USDOC calculated a weighted-average margin of dumping for LG by employing the average-to-transaction comparison methodology for those export sales passing the Cohen's *d* test and the average-to-average comparison methodology for those export sales not passing the Cohen's *d* test.[54]

2.4. At para. 23 of its oral statement, Korea refers to the possibility of a pattern of significantly differing export prices being established on the basis of fluctuations in the price of raw materials. Were such price fluctuations an issue in the Washers investigation?

59. No, there was no information on the administrative record of the washers antidumping investigation to suggest that the prices of raw materials fluctuated during the period of investigation, or that any such fluctuations, had they existed, might have contributed to observed differences in export prices.

60. Additionally, the United States questions Korea's suggestion that fluctuations in the cost of raw materials could result in an investigating authority finding a pattern of export prices which differ significantly and using the alternative, average-to-transaction comparison methodology. It must be remembered that raw material input costs are not necessarily determinative of price. Instead, price may be more a reflection of other factors, including market conditions. To the extent prices might change for some reason, the USDOC may find this significant because those changes could be indicative of a pattern of export prices which differ significantly among purchasers, regions, or time periods.

2.1.3 United States

2.8. Please comment on Korea's suggestion, at para. 34 of its oral statement, that the USDOC "accumulates price differences from each category even when individually they would not meet the second sentence".

61. As an initial matter, as discussed above in response to question 2.3, the preliminary results of the first washers administrative review, in which the USDOC applied an analysis of differential pricing, are not within the Panel's terms of reference. Additionally, as demonstrated in the U.S. first written submission, Korea has failed to adduce evidence sufficient to support its

[51] Preliminary LG AD Review Calculation Memo, at 1 (p. 9 of the PDF version of Exhibit KOR-96).
[52] Preliminary LG AD Review Calculation Memo, at 2 (p. 10 of the PDF version of Exhibit KOR-96).
[53] Washers AD Administrative Review Preliminary Decision Memo, at 9 (p. 8 of the PDF version of Exhibit KOR-96).
[54] Washers AD Administrative Review Preliminary Decision Memo, at 9 (p. 8 of the PDF version of Exhibit KOR-96).

claims regarding the alleged "differential pricing methodology."[55] Korea has failed to demonstrate that any such "differential pricing methodology" exists as a measure. Korea has failed to demonstrate that any such measure, if it were found to exist, would necessarily result in a breach of Article 2.4.2 of the AD Agreement, such that it could be found inconsistent with that provision, "as such." And Korea has failed to substantiate with any evidence whatsoever its speculative complaints about the operation of the so-called "differential pricing methodology."

62. That being said, the United States wishes to be of assistance to the Panel, and offers the following comments in response to Korea's suggestion that the USDOC "accumulates price differences from each category even when individually they would not meet the second sentence."[56]

63. Korea's suggestion in its opening statement at the first panel meeting appears to be a reference to what Korea calls "cross-category" variation, which Korea discusses in its first written submission.[57] There is no textual support for Korea's contention that the USDOC cannot, or should not, aggregate the results of the Cohen's *d* test among purchasers, regions, or time periods in determining whether a pattern of prices that differ significantly exists. In applying the Cohen's *d* and ratio tests in the preliminary results of the first washers administrative review, the USDOC considered LG's pricing behavior in the United States market for the product as a whole. The USDOC's aggregation of the results of the Cohen's *d* test by purchaser, region, or time period is not analogous to an aggregation of unrelated categories. Rather, the results of the Cohen's *d* test are different aspects of the exporter's overall pricing behavior.

64. Korea does not explain how an investigating authority should examine and determine whether there exists a pattern of export prices which differ significantly among purchasers, and then among regions, and then among different time periods. As noted above, an investigating authority should consider the pricing behavior for an exporter and product as a whole.

65. The second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to find "*a* pattern … among different purchasers, regions or time periods." The language of Article 2.4.2 does not require an investigating authority to find multiple patterns, among different purchasers, or among different regions, or among different time periods. Likewise, the language in the second sentence of Article 2.4.2 does not require finding a pattern to an individual purchaser, to an individual region, or during an individual time period. As with calculating a margin of dumping, wherein "intermediate" comparisons are not in and of themselves "dumping" but rather potentially evidence of dumping, the comparisons of export prices to identify where significant differences exist are not in and of themselves "a pattern." Rather, identifying "a pattern" for the exporter and product as a whole among different purchasers, regions or time periods requires examining the exporter's sales holistically, and in the aggregate.

[55] U.S. First Written Submission, paras. 269-319.
[56] Korea Opening Statement at the First Panel Meeting, para. 34.
[57] Korea First Written Submission, paras. 227-233.

66. This is why the USDOC accumulated the results of the Cohen's *d* test among purchasers, regions, or time periods, while taking appropriate steps to avoid double counting, in discerning whether a pattern exists of prices that differ significantly in the export market as a whole for LG when employing a differential pricing analysis in the preliminary results of the first washers administrative review.[58]

67. Korea fails to put forth any evidence, either from the record of the preliminary results of the first washers administrative review or as a general matter,[59] demonstrating that the USDOC "accumulates price differences from each category *even when individually they would not meet the second sentence*."[60] That simply is an unfounded assertion. It remains Korea's burden to make a *prima facie* case of WTO-inconsistency by "putting forward adequate legal arguments and evidence" to support its claim, which Korea has failed to do.[61] It is not the role of the Panel – or that of the United States – to make Korea's arguments for it, let alone to provide evidence regarding Korea's otherwise unsupported assertions.[62]

2.9. Please comment on Korea's assertion, at para. 32 of its oral statement, that only approximately 10% of export transactions met the criteria for application of the W-T comparison methodology.

68. Korea appears to assert that approximately 10 percent of Samsung's and LG's total *number* of export transactions passed the USDOC's *Nails* test in the washers antidumping investigation. We would note that the *volume* of export sales passing the *Nails* test is [[***]] percent for Samsung and [[***]] percent for LG.[63] These volume levels are more than sufficient to demonstrate for both respondents that a pattern of export prices that differ significantly among different purchasers, regions, or time periods exists, and that conditions may exist in which "targeted dumping" could be "masked." But this is a different question entirely from the inquiry into whether the average-to-average comparison methodology can take into account appropriately the pattern identified, and whether the USDOC was justified in applying the average-to-transaction comparison methodology to "unmask targeted dumping.

[58] Washers AD Administrative Review Preliminary Decision Memo, at 8-9 (pp. 7-8 of the PDF version of Exhibit KOR-96).
[59] Korea First Written Submission, paras. 227-233 (Korea merely provides hypotheticals it created itself, which are divorced from any particular USDOC proceeding, to illustrate the so-called "cross-category" variation problem.).
[60] Korea Opening Statement at the First Panel Meeting, para. 34 (emphasis added).
[61] *See Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.
[62] *See US – Gambling (AB)*, para. 281 ("when a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU.").
[63] *See* Samsung Final Determination Calculation Memorandum (dated December 18, 2012) ("Final Samsung AD Calculation Memo"), at Attachment 2, p. 100 (p. 256 of the PDF version of Exhibit KOR-41 (BCI)); LG Final Determination Margin Calculation Memorandum (dated December 18, 2012) ("Final LG AD Calculation Memo"), at Attachment 2, p. 102 (p. 300 of the PDF version of Exhibit KOR-42 (BCI)).

69. It is important to recall that the pattern is not simply illustrated by the "approximately" 10 percent of total export sales transactions passing the *Nails* test. As the United States previously explained, the "pattern" includes both the lower-priced export sales passing the *Nails* test, as well as the higher-priced export prices that "differ significantly" from the lower-priced sales. A lower-priced export price cannot differ significantly from itself. It must differ significantly in relation to something else, namely, higher-priced export sales.[64] Therefore, *all* of the export prices examined constitute the "pattern of export prices which differ significantly among different purchasers, regions or time periods." The "pattern" is not merely the 10 percent of export sales transactions passing the *Nails* test.[65]

70. Therefore, it is not correct to say that only approximately 10 percent of export sales transactions met the criteria for application of the average-to-transaction comparison methodology. For this reason, the United States also disagrees with Korea's claim at paragraph 32 of its opening statement at the first panel meeting that the USDOC can apply the average-to-transaction comparison methodology only to the 10 percent subset of export sales because the remaining "90%" of sales are not "part of that pattern."[66] Given that the "pattern" identified by the USDOC includes both lower- and higher-priced export sales that "differ significantly" from each other, Korea's arguments continue to be misplaced. Furthermore, Korea's reliance on *US – Zeroing (Japan)* is inapt.[67] The Appellate Body in that dispute did not interpret Article 2.4.2 as limiting the application of the average-to-transaction comparison methodology only to those transactions that are priced significantly lower than other transactions.[68]

2.10. Would the following methodology be sufficient to establish the existence of a pattern by purchaser:

i. establish the weighted average export price per purchaser;

ii. compare the weighted average price for each purchaser to a weighted average price for all purchasers;

iii. establish the proportion of total volume accounted for by a purchaser with a weighted average export price that is significantly lower than the weighted average price for all purchasers; and

iv. consider whether the difference in price and the proportion is sufficient to establish a pattern.

71. As an initial matter, the question presents a hypothetical that does not match how the USDOC actually discerned whether a pattern of export prices that differ significantly among different purchasers, regions, or time periods existed in the washers antidumping investigation,

[64] U.S. First Written Submission, para. 149.
[65] U.S. First Written Submission, para. 150.
[66] Korea Opening Statement at the First Panel Meeting, para. 32.
[67] Korea Opening Statement at the First Panel Meeting, para. 33 (citing *US – Zeroing (Japan)*, at para. 135).
[68] U.S. First Written Submission, paras. 148-49 (citing *US – Zeroing (Japan)*, para. 135).

or in the preliminary results of the first washers administrative review. As we have explained, the measure before the Panel in this dispute is the USDOC's final determination in the washers antidumping investigation, in which the USDOC applied the *Nails* test to establish that a pattern existed.

72. That being said, the hypothetical methodology appears to incorporate some components of the *Nails* test as applied in the washers investigation, such as the fact that weighted average export prices are used in the test, that such weighted average export prices are compared to a certain numerical standard, and that there is a certain sufficiency standard for determining whether a pattern exists. The United States cannot categorically deny the possibility that the hypothetical methodology could be sufficient to establish a framework through which an investigating authority could implement the "pattern" clause of the second sentence of Article 2.4.2 in a manner that is WTO-consistent. A panel's assessment of an application of the hypothetical methodology described in the question would depend on the particular facts and circumstances in which the methodology was applied.

73. As a final observation, we note that the example illustrates the U.S. argument. The hypothetical analysis described in the question may be one way to implement the second sentence of Article 2.4.2, just as the *Nails* test applied in the washers investigation, or the differential pricing analysis that was applied in the preliminary results of the first washers review, are other means for doing so.

2.11. Concerning the second sentence of Article 2.4.2, how does the USDOC take into account the nature of the product when establishing whether the differences in price are significant?

74. The USDOC takes into account the "nature of the product" when establishing whether the differences in export price are significant in a manner that is similar to how the USDOC calculates the margin of dumping. Specifically, the USDOC uses multiple averaging groups to make "intermediate" comparisons. That is, the USDOC utilizes average prices of the same CONNUM sold among different purchasers, regions, or time periods in order to determine whether export prices differ significantly among different purchasers, regions, or time periods.

2.2 Explanation clause

2.2.1 Korea and the United States

2.12. Does the word "appropriate" imply a qualitative assessment of the intent of the exporter? Please explain.

75. No. Nothing in Article 2.4.2 of the AD Agreement or any other provision of the AD Agreement supports Korea's proposed notion that significant price differences – or dumping for that matter – must be found to be the result of some "guilty" intent or motivation of the exporter. These concepts simply are foreign to the AD Agreement.

76. The U.S. first written submission discusses the proper interpretation of the term "appropriately."[69] The ordinary meaning of the term "appropriately" is "proper," "fitting," or "suitable."[70] The term appears in the "explanation clause" of the second sentence of Article 2.4.2 and is connected contextually to the terms "cannot be taken into account" and "by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." Hence, an investigating authority must explain why the pattern of significantly differing export prices that has been observed cannot be taken into account "appropriately," or in a manner that is proper or fitting or suitable, using one of the normal, symmetrical comparison methodologies.

77. The intent of the exporter has no bearing on whether a pattern of significantly differing export prices can be taken into account "appropriately" using one of the normal comparison methodologies.[71] An exporter's claim that it did not intend to dump or to target its dumping is irrelevant. If there is a pattern of significantly differing export prices among different purchasers, regions, or time periods, and if higher-priced export sales above normal value would "mask" the dumping that would otherwise be evidenced by lower-priced export sales below normal value, then the normal comparison methodologies may not be able to take the pattern into account "appropriately."

78. For example, it may be the case that unadjusted export prices, when examined together, reflect a pattern of significant export price differences among different purchasers, regions, or time periods. So, a "pattern" within the meaning of the second sentence of Article 2.4.2 will be observed. However, when, in order to make a "fair comparison" with normal value, as required by Article 2.4, the export prices are adjusted,[72] the result may be that the outcome of the calculation using the average-to-average comparison methodology is not meaningfully different from the outcome of the calculation using the average-to-transaction comparison methodology. Making such "due allowances" under Article 2.4 would appear to be a way in which a pattern of export prices that differ significantly could be "taken into account appropriately" using one of the normal comparison methodologies.

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[69] *See, e.g.*, U.S. First Written Submission, paras. 108-109.
[70] *See, e.g.*, U.S. First Written Submission, paras. 108-109.
[71] It appears that Korea argues that an exporter's intent, or "evidence" of "normal commercial considerations unrelated to potential 'targeting,'" to the extent that the Panel finds that analysis of such matters is required at all, would be relevant to an investigating authority's consideration of whether export prices "differ significantly" and form a "pattern" within the meaning of the second sentence of Article 2.4.2 of the AD Agreement. *Compare* Korea First Written Submission, paras. 148-153 (arguing that the USDOC evaluated whether the prerequisites for "pattern" and "significantly" were met "exclusively through the use of a computational analysis of the difference in exporters' prices" with no consideration of the "reasons for the alleged 'pattern' of 'significant' price differences that [the USDOC] found to exist"), *with* Korea First Written Submission, paras. 154-167 (merely pointing out that the USDOC inadequately satisfied the "explanation" requirement by comparing the margins calculated under the average-to-transaction comparison methodology with zeroing and the average-to-average comparison methodology, and that the USDOC failed to consider the transaction-to-transaction comparison methodology).
[72] For example, to make "due allowance" for certain "differences" and "costs," as elaborated in Article 2.4 of the AD Agreement.

79. Finally, as the United States demonstrated in section IV.B.5 of the U.S. first written submission, if "targeted dumping" is to be "unmasked" through the use of the average-to-transaction methodology pursuant to the second sentence of Article 2.4.2, then zeroing (*i.e.*, not offsetting positive comparison results with negative comparison results) can, and indeed must be used in the application of that methodology.

80. Adjustments made pursuant to Article 2.4 and the proper use of zeroing pursuant to the second sentence of Article 2.4.2 are relevant to the question of whether a pattern can be "taken into account appropriately" using one of the normal comparison methodologies. The stated intent of the exporter is not.

2.3 Scope of application of the W-T methodology

2.3.1 Korea and the United States

2.18. Please explain what sales transactions were taken into account to calculate the anti-dumping margin in:

i. the final determination in the LRW investigation; and

ii. the preliminary determination in the administrative review of the LRW order (in each case please indicate what was taken into account, and how, in the numerator and the denominator).

Final Determination in the Washers Antidumping Investigation

81. In the final determination in the washers antidumping investigation, the USDOC analyzed all export sales transactions that each respondent reported except those found to be outside the period of investigation. In calculating the respondents' margins of dumping, the USDOC applied the average-to-transaction comparison methodology to both Samsung's and LG's sales after establishing that a pattern of export prices that differ significantly among different purchasers, regions, or time periods existed, and that the normal average-to-average comparison methodology could not take into account appropriately those patterns of price differences. As the United States demonstrated in section IV.B.5 of the U.S. first written submission, if "targeted dumping" is to be "unmasked" through the use of the average-to-transaction comparison methodology, then zeroing (*i.e.*, not offsetting positive comparison results with negative comparison results) can, and indeed must be used in the application of that methodology.

82. In calculating LG's margin of dumping, [[***]] percent by value, or [[***]] percent by volume (*i.e.*, quantity) of LG's export sales yielded positive comparison results. However, because zeroing is a necessary feature of the average-to-transaction comparison methodology to "unmask" masked dumping, the USDOC denied offsets for the intermediate comparisons that yielded negative comparison results (*i.e.*, they were set to zero).[73] Consequently, LG's margin of

[73] Final LG AD Calculation Memo, at Attachment 2, p. 125 (p. 323 of the PDF version of Exhibit KOR-42 (BCI)).

dumping calculation used these zeroed intermediate comparison results in the numerator to avoid masking the full extent of LG's dumping. Further, all of LG's export sales were included in the denominator of the dumping margin calculation.

83. Similarly, for Samsung, in calculating its margin of dumping, [[***]] percent by value, or [[***]] percent by volume (*i.e.*, quantity) of Samsung's export sales yielded positive comparison results. Again, because zeroing is a necessary feature of the average-to-transaction comparison methodology, the USDOC denied offsets for the remaining intermediate comparisons that yielded negative comparison results (*i.e.*, they were set to zero).[74] The weighted-average dumping margin calculation used these zeroed intermediate comparison results in the numerator to avoid masking the full extent of Samsung's dumping. Further, all sales were included in the denominator of the dumping margin calculation.

Preliminary Results of the First Washers Administrative Review

84. As we explained in response to question 2.3 above, the preliminary results of the first washers administrative review are not within the Panel's terms of reference. Nonetheless, and to aid the Panel, we offer the following explanation of how the preliminary, non-final dumping margins were calculated in that review.

85. As an initial matter, the USDOC only examined the full home market and export sales data of LG, because the other respondents, Samsung and Daewoo, failed to respond to the USDOC's questionnaire and had no sales databases for the investigating authority to analyze.[75]

86. The USDOC, after determining that a pattern of export prices that differ significantly among different purchasers, regions or time periods existed, and that the average-to-average comparison methodology could not take into account appropriately the observed pattern, preliminarily determined to apply the "mixed" comparison methodology to LG.[76] In other words, the USDOC applied the average-to-transaction comparison methodology to the export sales that passed the Cohen's *d* test, and applied the average-to-average comparison methodology to the remaining export sales that did not pass the Cohen's *d* test.[77] The USDOC then aggregated those intermediate comparison results to establish LG's preliminary margin of dumping.

87. Regarding the numerator, the USDOC considered all LG's export sales, but denied offsets for negative intermediate comparison results in its application of the average-to-transaction comparison methodology, which was applied to the sales passing the Cohen's *d* test (*i.e.*, it zeroed). The USDOC did offset positive intermediate comparison results with negative

[74] Final Samsung AD Calculation Memo, at Attachment 2, p. 123 (p. 279 of the PDF version of Exhibit KOR-41 (BCI)).
[75] Washers AD Administrative Review Preliminary Determination, 80 Fed. Reg. at 12,457 (p. 3 of the PDF version of Exhibit KOR-96).
[76] Washers AD Administrative Review Preliminary Decision Memo, at 9 (p. 8 of the PDF version of Exhibit KOR-96).
[77] Washers AD Administrative Review Preliminary Decision Memo, at 9 (p. 8 of the PDF version of Exhibit KOR-96).

intermediate comparison results for the export sales not passing the Cohen's *d* test (*i.e.*, the USDOC did not use zeroing in the application of the average-to-average comparison methodology).

88. With respect both to export sales that passed the Cohen's *d* test and to export sales that did not pass the Cohen's *d* test, all sales were included in the denominator.

2.19. Would an investigating authority be allowed, pursuant to the second sentence of Article 2.4.2, to apply the W-W and/or T-T and W-T comparison methodologies in the same proceeding to different transactions to find intermediate values to then be aggregated into one margin of dumping? Please explain.

89. With respect to a combination of the average-to-average comparison methodology and the transaction-to-transaction comparison methodology, the first sentence of Article 2.4.2 of the AD Agreement provides that "normally" the "existence of margins of dumping" shall be established using the average-to-average comparison methodology "or" the transaction-to-transaction comparison methodology. Nothing in the first sentence of Article 2.4.2 suggests that a combination of the two normal methodologies must or must not be used, and it is unclear, practically speaking, what factual circumstances might lend themselves to the use of a combined or mixed application of the two normal methodologies.

90. With respect to a combination of the average-to-average *or* transaction-to-transaction comparison methodology with the average-to-transaction comparison methodology, the second sentence of Article 2.4.2 permits that, when certain conditions are met, "[a] normal value may be compared to prices of individual export transactions." On its face, the second sentence neither requires nor precludes the application of the alternative, average-to-transaction comparison methodology to all export sales. In some situations, it may be appropriate for an investigating authority to utilize a mixed application of the average-to-transaction comparison methodology and one of the normal comparison methodologies provided in the first sentence of Article 2.4.2. In that case, as the question suggests, the comparison methodologies may yield "intermediate values" that would then need to be aggregated to determine one margin of dumping for the exporter for the product as a whole.

2.3.2 United States

2.20. The United States asserts at para. 149 of its first written submission that the "pattern" referred to in the second sentence of Article 2.4.2 "necessarily includes both lower and higher export prices that 'differ significantly' from each other" (emphasis original). If this is the case, why is the term "pattern" used in the text? Why doesn't the text simply allow recourse to the W-T comparison methodology "if the authorities find that export prices differ significantly among different purchasers, regions or time periods"?

91. Korea and the United States appear to agree that a "pattern" is "a regular and intelligible form or sequence [that is] discernible"[78] and that identifying a "pattern" of export prices that differ significantly among different purchasers, regions, or time periods is a precondition for applying the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. If the term "pattern" were excised from the second sentence of Article 2.4.2, it would seem that the mere presence of any two significantly different export prices to different purchasers, regions, or time periods would be sufficient to satisfy the first condition of Article 2.4.2, second sentence. The United States does not take the position that the identification of any two significantly differing export prices is enough to meet the first condition of the second sentence of Article 2.4.2.

92. Excising the term "pattern" would risk turning the exception provided in the second sentence of Article 2.4.2 into the rule. It is reasonable to expect that most, if not all, sets of export prices will have varying prices within a period of investigation, and that some of these differences likely will be significant. The term "pattern" requires the investigating authority to identify more than just one single instance of significantly different prices. It requires the identification or discernment of a form or sequence of significantly different prices.

93. However, the second sentence of Article 2.4.2 does not provide specific or detailed guidance about how precisely an investigating authority is to find a "pattern" of export prices which differ significantly among different purchasers, regions, or time periods. Likely, there are many different approaches that an investigating authority could use to "discern" a "regular or intelligible form or sequence," that is, to determine whether there exists a "pattern" of different export prices among different purchasers, regions or time periods.

94. The term "pattern" must be read in connection with the requirement that export prices "*differ* significantly" and that they do so "*among* different purchasers, regions, or time periods." Lower-priced export sales that "differ significantly" do so only in relation to some other group of sales, namely, other higher-priced export sales. In other words, the export sales that passed the *Nails* test in the washers antidumping investigation, as the USDOC explained, "represent only part of the pricing behavior of the respondent, which, in and of themselves, do not constitute the identified pattern which is based on significant price differences between all groups, whether allegedly targeted or not."[79] "The identified pattern is defined by all of the respondent's [export] sales."[80]

2.21. In cases in which the differential pricing analysis was applied, it appears that the "ratio test" was used to determine whether or not the W-T comparison methodology should be applied to all export transactions (Exhibit KOR-25, page 3 of the exhibit). Is the fact that, under this approach, the W-T comparison methodology is apparently not automatically applied to all transactions consistent with the United States' view,

[78] *See* U.S. First Written Submission, para. 59; Korea First Written Submission, para. 131; *see also* definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com), definition 11 (Exhibit USA-4).
[79] Washers Final AD I&D Memo, at 34 (Exhibit KOR-18).
[80] Washers Final AD I&D Memo, at 34 (Exhibit KOR-18).

expressed at para. 150 of its first written submission, that the "pattern" referred to in the second sentence of Article 2.4.2 includes all of the export prices examined?

95. As an initial matter, as discussed above in response to questions 2.3 and 2.8, the preliminary results of the first washers administrative review, in which the USDOC applied a differential pricing analysis, are not within the Panel's terms of reference. Additionally, as demonstrated in the U.S. first written submission, Korea has failed to adduce evidence sufficient to support its claims regarding the alleged "differential pricing methodology."[81]

96. That being said, under the *Nails* test, as it was applied in the washers antidumping investigation, the USDOC applied the average-to-transaction comparison methodology to all of LG's and Samsung's export sales after finding a pattern of prices that differed significantly among different purchasers, regions, or time periods, and after explaining why application of the normal average-to-average comparison methodology could not take into account appropriately the patterns found.[82]

97. Under the analysis of differential pricing made in the preliminary results of the first washers administrative review, the USDOC applied the "mixed" comparison methodology to LG's export sales after identifying a "pattern" and providing an "explanation" within the meaning of the second sentence of Article 2.4.2 of the AD Agreement. As explained above in response to questions 2.3 and 2.18, the USDOC applied the average-to-transaction comparison methodology to those sales passing the Cohen's *d* test, and applied the average-to-average comparison methodology to those sales not passing the Cohen's *d* test.[83]

98. There is nothing inconsistent about the different approaches the USDOC took in these different proceedings. As explained above in response to question 2.20, there likely are many different methodologies or analyses that an investigating authority could use to identify a "pattern," and there likely is a variety of approaches an investigating authority might take to "unmask" dumping concealed by such a "pattern." The terms of the second sentence of Article 2.4.2 of the AD Agreement neither require nor prohibit the application of the alternative, average-to-transaction comparison methodology to all of an exporter's export sales. Whether doing so is appropriate in a given situation will depend on the facts and the particular "pattern" identified by the investigating authority.

99. The "ratio test" that the USDOC used in connection with its analysis of differential pricing in the first washers administrative review reflects USDOC's analysis and decision to more narrowly tailor the application of the exceptional, average-to-transaction comparison methodology in certain factual situations. For example, the investigating authority might apply that methodology only to the portion of an exporter's export sales that have been found to differ significantly in price, while applying a normal comparison methodology to the remaining export sales. The USDOC's recognition that application of such a "mixed" comparison methodology may be desirable in certain situations in no way undermines the U.S. position that the USDOC –

[81] U.S. First Written Submission, paras. 269-319.
[82] Washers Final AD I&D Memo, at 19-21 (Exhibit KOR-18).
[83] Washers AD Administrative Review Preliminary Decision Memo, at 7-9 (Exhibit KOR-96).

and all Members' investigating authorities – likewise has the authority under the second sentence of Article 2.4.2 to apply the average-to-transaction comparison methodology to all export sales that constitute the "pattern" identified.

100. Even the analysis of differential pricing in the preliminary results of the first washers administrative review recognizes that it may be appropriate to apply the average-to-transaction comparison methodology to all of a respondent's export sales if more than 66 percent of those sales pass the Cohen's *d* test. Either approach, depending on the facts of the particular case, may be an appropriate means of revealing masked dumping.

2.4 Application of the W-T methodology

2.4.1 Korea and the United States

2.22. If the use of zeroing results in a margin of dumping of 10%, and yet only 30% of the total volume of subject imports actually accounted for that dumping (in the sense of only this 30% showing positive dumping values), should the injury analysis proceed on the basis of the total volume of subject imports, or only the 30% imports that accounted for the dumping?

101. In *US – Stainless Steel (Mexico)*, the Appellate Body provided the following summary of its findings relating to the legal interpretation of certain terms in the AD Agreement:

> [I]t is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) "dumping" and "margin of dumping" are exporter-specific concepts; "dumping" is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* an exporter shall not exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract "injurious dumping" and not "dumping" *per se*.[84]

The Appellate Body also has found that, when examining situations involving multiple transaction-specific comparisons, "the results of the transaction-specific comparisons are not, in themselves, 'margins of dumping'."[85]

102. In light of the Appellate Body findings referenced above, the United States is of the view that the premise of the question may be flawed. As an initial matter, the United States understands that when the question refers to "a margin of dumping of 10%," that means the margin of dumping for the exporter in respect of the investigated product as a whole. The "30% showing positive dumping values" are not "dumped" and the remaining transactions are not

[84] *US – Stainless Steel (Mexico) (AB)*, para. 94 (italics in original).
[85] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87 (citations omitted).

"non-dumped." Per the Appellate Body's findings, the 30 percent of transactions that yield positive comparison results and the remaining 70 percent of transactions that yield negative (or zero) comparison results are intermediate comparisons, and not findings of "dumping" and "non-dumping." The intermediate comparisons must be aggregated to determine a margin of dumping for the exporter for the product as a whole.

103. When applying the exceptional, average-to-transaction comparison methodology in a situation where the conditions for doing so have been met, it is permissible – indeed, it is necessary – to remove the negative comparison results in order to remove the "mask" that would conceal dumping as a result of the pattern of significantly differing export prices. As the Appellate Body has found, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[86] in "exceptional"[87] situations. That is, the Appellate Body has suggested that the "normal" comparison methodologies would "mask" the dumping that can be discerned in certain export transactions.

104. The Appellate Body has also observed, in connection with a discussion of the injury analysis, that there is a "need for consistent treatment of a product in an anti-dumping investigation," and this precludes treating the same transactions "as 'non-dumped' for one purpose, and as 'dumped' for another purpose."[88] It follows that the injury analysis should take as the volume of dumped imports the total volume of the imports of the product as a whole. It would be inconsistent with the AD Agreement, per the Appellate Body's previous findings, to view some transactions as "dumped" and others as "non-dumped" for the purpose of the injury analysis.

105. As a final observation, as one third party correctly pointed out, even where zeroing is applied, the dumping margin is calculated on the basis of all of an exporter's export transactions. This is so because the value of all of the export sales is included in the denominator when the dumping margin is calculated as a percentage of the export price, per Article 5.8 of the AD Agreement. Under any comparison methodology, including under the average-to-average comparison methodology, there may be export prices that exceed normal value, which may form part of the weighted-average export price, but that does not mean that the margin of dumping calculated is not the margin of dumping for the product as a whole. While the injury analysis considers the total volume of export sales, including those that are above normal value, it does so in connection with a consideration of the total, aggregate dumping margin, which is calculated as a percentage that reflects all export sales, including those above normal value. In this regard, the product is treated consistently throughout the antidumping investigation, even where zeroing is used, as it must be, in the application of the exceptional average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement.[89]

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[86] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[87] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.
[88] *US – Zeroing (Japan) (AB)*, para. 128.
[89] The United States notes that Korea does not challenge in this dispute any aspect of the U.S. International Trade Commission's injury determination in the washers AD investigation. *See* Request for Consultations by the Republic

2.4.2 United States

2.23. Exhibit KOR-93 sets forth three examples showing how mathematical equivalence between the results of the W-W and W-T methodologies may be avoided without zeroing. Please comment on each of these examples, and their relevance to the Panel's assessment of the United States' mathematical equivalence argument.

106. The United States refers the Panel to paragraphs 13-19 of the U.S. opening statement at the first panel meeting, which addresses the arguments Korea attempts to advance with Exhibit KOR-93. We also note, at the outset, that Korea portrays Exhibit KOR-93 as an "expert affidavit."[90] Whatever credentials the author of that document may have, he is not an impartial observer in this dispute. Indeed, he worked on behalf of the Korean respondents in the washers antidumping investigation.[91] The arguments in KOR-93 were prepared for the Government of Korea, just as every other Korean submission in this dispute is prepared for the Government of Korea. Accordingly, Exhibit KOR-93 cannot be viewed as "evidence" from an impartial or independent source. Rather, it is part of Korea's legal argumentation, just the same as any other argumentation presented by Korea in its written submissions, oral statements, and responses to the Panel's questions. In other words, Exhibit KOR-93 simply is Korea's argument presented in a different form.

107. For the reasons we have given,[92] and on which we expand below, Korea's argument is without merit. Each of the examples in Exhibit KOR-93 depends on and is exclusively premised on changing (or in some of the examples, manipulating in curious ways) the calculation of normal value for the application of the average-to-transaction comparison methodology while not making any similar change to the calculation of normal value for the application of the average-to-average comparison methodology. As explained in the U.S. opening statement at the first panel meeting,[93] we do not see how manipulating normal value would be directed to or achieve the aim of the second sentence of Article 2.4.2 to address a pattern of significantly differing export prices.

108. Korea fails to explain why changing the calculation of the *normal value* used in the application of the normal average-to-average comparison methodology and the exceptional average-to-transaction comparison methodology would in any way addresses a pattern of significantly differing *export prices* among different purchasers, regions, or time periods. There is no logical reason why an investigating authority would do so. How would manipulating the normal value calculation, which is based on *home* market sales prices, address the focus of the second sentence of Article 2.4.2, which is on a pattern of *export* prices which differ significantly among different purchasers, regions, or time periods? Korea has not explained how calculating

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of Korea, WT/DS464/1, circulated September 3, 2013; Request for the Establishment of a Panel by the Republic of Korea, WT/DS464/4, circulated December 6, 2013.

[90] Korea Opening Statement at the First Panel Meeting, para. 17.

[91] *See* Exhibit KOR-92, para. 5.

[92] *See, e.g.*, U.S. Opening Statement at the First Panel Meeting, paras. 13-19.

[93] *See* U.S. Opening Statement at the First Panel Meeting, paras. 16-17.

normal value differently would assist an investigating authority to, in the words of the Appellate Body, "unmask targeted dumping."

109. There also is no textual basis in Article 2.4.2 of the AD Agreement to support calculating normal value differently for the purposes of applying the average-to-average and average-to-transaction comparison methodologies set forth in the first and second sentences of Article 2.4.2, respectively. The phrase "weighted average normal value" in the first sentence of Article 2.4.2 is nearly identical to and conveys the same meaning as the phrase "normal value established on a weighted average basis" in Article 2.4.2, second sentence.

110. Turning to the examples presented in Exhibit KOR-93, the first example is discussed in the U.S. opening statement at the first panel meeting.[94] The example posits that normal value might be calculated on a period-wide basis for the average-to-average comparison methodology and on a monthly basis for average-to-transaction comparison methodology.[95] Unsurprisingly, the two methodologies described in this example yield different mathematical results.[96] However, Korea – neither in Exhibit KOR-93 itself nor in any other portion of its opening statement at the first panel meeting – never provides any explanation for why changing the calculation of normal value would address a pattern of export prices that differ significantly.

111. The initial discussion in Exhibit KOR-93 is useful, though. Table 7, on page 11 of Exhibit KOR-93, demonstrates that, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the washers antidumping investigation. This is also the case with respect to hypothetical data presented in the first example.[97]

112. The dispute between the parties, then, is not about arithmetic or algebra. It is about "assumptions" related to the calculation of normal value. It is Korea's assumptions that are untenable and without explanation.

113. Additionally, the initial discussion in Exhibit KOR-93 is useful because it *supports* the argument in the U.S. opening statement at the first panel meeting about the unpredictability of changing the basis for the calculation of normal value.[98] The result of the hypothetical in the first example, set forth at paragraph 38 of Exhibit KOR-93, would be that the average-to-transaction comparison methodology would, rather curiously, be *lower* than the result of the average-to-average comparison methodology. Thus, having identified a pattern of significantly different export prices, the application of the exceptional methodology yields a lower dumping margin. However, when the methodology proposed in the first example is applied to the data

[94] *See* U.S. Opening Statement at the First Panel Meeting, paras. 13-19.
[95] *See* Exhibit KOR-93, paras. 34-35.
[96] Exhibit KOR-93, para. 38.
[97] 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.).
[98] *See* U.S. Opening Statement at the First Panel Meeting, para. 18.

from the washers antidumping investigation, the average-to-transaction comparison methodology yields a result that is *higher* than the average-to-average comparison methodology. These results are unpredictable and not systematic, and they bear no relationship to the pattern of significantly differing export prices or the aim of the second sentence of Article 2.4.2 to "unmask targeted dumping."

114. The second example in Exhibit KOR-93 simply is inapposite. In this example, the investigating authority would apply the average-to-transaction comparison methodology to those sales constituting the pattern of export prices that differ significantly while applying the transaction-to-transaction comparison methodology to the remaining export sales.

115. Exhibit KOR-93 demonstrates, at the outset, that application of the transaction-to-transaction comparison methodology does not yield results that are mathematically identical to the average-to-average comparison methodology or the average-to-transaction comparison methodology (without zeroing).[99] However, this proves nothing. The United States has never argued that the transaction-to-transaction comparison methodology should lead to the same result as either the average-to-average comparison methodology or the average-to-transaction comparison methodology (without zeroing).[100]

116. The Appellate Body has found that there is no hierarchy between the average-to-average and transaction-to-transaction comparison methodologies and they should not be interpreted in a way that would "lead to results that are systematically different."[101] This does not mean that the outcomes of these two methodologies should be mathematically the *same*. It is once again unsurprising that the second example in Exhibit KOR-93 is able to achieve a different mathematical result. However, there is no attempt to explain how applying the methodology described in the example would address a pattern of significantly differing export prices or "unmask targeted dumping."

117. The third example in Exhibit KOR-93 is similar to the first, in that it is premised on manipulating the calculation of the normal value used in the application of the average-to-transaction comparison methodology.[102] Once again, it is unsurprising that mathematical equivalence does not result from this example,[103] but the example also sheds no light on the proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement, for the same reasons given above.

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[99] Exhibit KOR-93, paras. 15-18 and 46-49, and Table 8.
[100] *See* U.S. First Written Submission, paras. 181-215.
[101] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[102] Instead of using the same, period-wide weighted-average normal value for both the average-to-transaction and average-to-average comparisons in a mixed methodology, this example proposes using two different weighted-average normal values, one calculated using home market prices only from the "target" time period, and another calculated using home market prices from the "non-target" period. Exhibit KOR-93 does not explain how such a mixed methodology might be applied in a situation involving significantly differing export prices to different purchasers or regions.
[103] Exhibit KOR-93, para. 66.

118. In, sum, contrary to Korea's argument, nothing in Exhibit KOR-93 causes mathematical equivalence to "disappear[ ]."[104] Korea's attempt to undermine the mathematical equivalence argument fails because manipulating normal value under the alternative comparison methodology and leaving it unchanged under the average-to-average comparison methodology, or applying the transaction-to-transaction comparison methodology as part of the alternative methodology, would do nothing to address the pattern of significantly different *export prices* or to "unmask targeted dumping."

2.24. Please comment on Korea's assertion that the United States' mathematical equivalence argument should be rejected because mathematically different results can be arrived at by changing the normal value assumptions underlying the United States' argument.

119. The United States refers the Panel to our response to question 2.23 above, which addresses this question. To be clear, Korea is, without stating so explicitly, attacking the premise that the term "weighted average normal value" in the first sentence of Article 2.4.2 of the AD Agreement and the term "normal value established on a weighted average basis" in the second sentence of Article 2.4.2 have the same meaning. There is no logical reason or textual basis for an investigating authority, in the context of a single antidumping determination, to calculate weighted-average normal value differently under the average-to-average comparison methodology applied pursuant to the first sentence of Article 2.4.2 and the average-to-transaction comparison methodology applied pursuant to the second sentence of Article 2.4.2.

2.5 DPA/DPM

2.5.1 United States

2.30. Please comment on Korea's argument, at para. 40 of its oral statement, that the DPA test was applied in all 138 proceedings where the USDOC had any need to test U.S. prices since March 2013.

120. As noted above in response to question 2.3, the Appellate Body has found that "[t]he term 'specific measures at issue' in Article 6.2 [of the DSU] suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel."[105] It follows from the Appellate Body's reasoning that any evidence offered to demonstrate the existence of an alleged measure also must have been in existence at the time of the establishment of the Panel. Accordingly, Korea is mistaken in criticizing Exhibit USA-21 for "cover[ing] only a narrow period of time."[106] Exhibit USA-21 provides references to final determinations in which the USDOC applied a differential pricing analysis from March 2013 through the date of Korea's request for the establishment of a panel. To the extent that any USDOC determinations could serve as evidence, in part, of the existence of a "differential pricing methodology" measure, it would be the determinations identified in Exhibit USA-21.

[104] Exhibit KOR-93, para. 7.
[105] *EC – Chicken Cuts (AB)*, para. 156.
[106] Korea Opening Statement at the First Panel Meeting, para. 40.

121. It is Korea that asks the Panel to look at a "narrow period of time," beginning in March 2013, and to ignore what occurred prior to March 2013. Before it ever applied a differential pricing analysis in an antidumping proceeding, the USDOC applied another analysis, what has been referred to in this dispute as the *Nails* or "targeted dumping" test. Indeed, the USDOC applied this other test in the washers antidumping investigation that Korea challenges in this dispute. The *Nails* test itself evolved and was further refined through application in other antidumping proceedings, including proceedings involving wood flooring and refrigerators.[107] Prior to December 2008, the USDOC had a regulation in place that contemplated a different analysis, though that regulation had rarely been applied. On the occasions when it did apply the regulation, the USDOC employed several different analyses in doing so.[108] Finally, the future of the differential pricing analysis is unclear. The USDOC has solicited comments from the public and is considering "the possible further development of its approach."[109]

122. Thus, an appropriately broad view of the evidence before the Panel demonstrates that the USDOC has utilized a variety of different analyses in different proceedings over the years, those analyses have evolved with further applications, and the USDOC continues to seek to refine the analysis it uses to identify a pattern of export prices that differ significantly among different purchasers, regions, or time periods. The evidence does not support Korea's contention that there exists a "differential pricing methodology" measure that can be challenged "as such" in this dispute.

123. With respect to the 138 proceedings to which Korea refers, we observe that Korea's mere reference to the proceedings does not establish, as an evidentiary matter, the content of the determinations, or that the USDOC applied one and the same "DPA test" in each of the 138 proceedings. Even if Korea were to provide the Panel public documentation of the 138 determinations, which Korea indicated at the first panel meeting it could do, that still would be insufficient evidence for the Panel to conclude that in each instance the USDOC applied the same "DPA test," such that the instances should be viewed together as demonstrating the existence of a "differential pricing methodology" measure. It would only be through a close examination of the records of the determinations, which Korea has not supplied, that a panel might hope to satisfy itself of the veracity of Korea's assertion. And a panel that undertook such a close examination would find that the USDOC makes its determinations on a case-by-case basis, in light of the evidence and argumentation presented by the interested parties, and that the USDOC's analyses can and do change from case to case, and they evolve over time.

124. Additionally, we note that Exhibit KOR-95 is misleading for several reasons. First, it includes 32 *preliminary* determinations in investigations and *preliminary* results of

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[107] *See* Washers Preliminary AD Determination, at 46,395 (Exhibit KOR-32).
[108] *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (June 16, 2008), and accompanying Issues and Decision Memorandum, at 5-27 (Exhibit KOR-27); *see also* Korea First Written Submission, para. 104 (referencing *Nails I* test); *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60,630 (October 25, 2007) (Exhibit USA-38), and accompanying Issues and Decision Memorandum, at 3-6 (Exhibit USA-39) (applying "P/2 test").
[109] *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720 (May 9, 2014) (Exhibit KOR-25).

administrative reviews in which the USDOC applied a "differential pricing analysis," where the USDOC has not rendered final determinations.[110] As is common to all preliminary determinations or preliminary results, the USDOC solicits comments from interested parties on its calculations and methodologies, including the differential pricing analysis to the extent it was employed at all in the case.[111] Therefore, the figure of 138 proceedings is necessarily over-inclusive.

125. Second, as evidenced by Exhibit KOR-95 itself, there are some cases in which the USDOC has applied a differential pricing analysis to a particular respondent in a preliminary determination but not in the final determination.[112] Korea's number also ignores that in many cases the USDOC did not apply a differential pricing analysis at all because, for example, the USDOC applied facts available to a respondent or the USDOC lacked sufficient data to apply a differential pricing analysis.[113]

126. Finally, Exhibit KOR-95 demonstrates that the analysis by USDOC of differential pricing has not turned the exceptional comparison methodology envisaged by Article 2.4.2, second sentence, into a "rule."[114] In fact, presuming for the sake of argument that Exhibit KOR-95 is entirely accurate (including Korea's inclusion of preliminary findings), Korea demonstrates that the USDOC has applied the asymmetrical comparison methodology (*i.e.*, the average-to-transaction or mixed average-to-transaction/average-to-average comparison methodologies) in approximately 30-37 percent of cases.[115] This is comparable to the United States' own estimate

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[110] *See* Exhibit KOR-95, at 10-13 (lines 140, 143, 147-50, 152-57, 161-63, 165-69, 171-72, 174-80, 183-85).

[111] *See, e.g., Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value; Preliminary Affirmative Determination of Critical Circumstances; In Part and Postponement of Final Determination*, 80 Fed. Reg. 4,250, 4,252 (January 27, 2015) (Exhibit USA-40) (inviting interested parties to file case and rebuttal briefs commenting on preliminary determination), and accompanying Preliminary Decision Memorandum, at 22 (Exhibit USA-41) ("Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in this preliminary determination, including arguments for modifying the group definitions used in this proceeding.").

[112] *Compare Grain-Oriented Electrical Steel From the Czech Republic: Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determinatio*n, 79 Fed. Reg. 26,717 (May 9, 2014) (Exhibit USA-42), and accompanying Preliminary Decision Memorandum, at 12-13 (Exhibit USA-43) (applying differential pricing analysis to Sujani, finding pattern of prices that differ significantly, but applying average-to-average comparison methodology because there was no meaningful difference in margins of dumping calculated using average-to-average and average-to-transaction comparison methodologies), *with Grain-Oriented Electrical Steel From the Czech Republic: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 Fed. Reg. 58,324, 58,325 (September 29, 2014) (Exhibit USA-44) (calculating Sujani's weighted-average dumping margin using adverse facts available because Sujani "failed to cooperate"). Korea explicitly recognizes that the USDOC changed its approach for this respondent in this proceeding. *See* Exhibit KOR-95, at 8 (line 107).

[113] *See, e.g.*, Exhibit KOR-95, at 9 (line 121); *see also id.*, at 2 (line 17) (referencing *Pure Magnesium from the People's Republic of China: Preliminary Results of 2011-2012 Antidumping Duty Administrative Review*, 78 Fed. Reg. 34,646, 34, 647 (June 10, 2013) (insufficient sales to apply differential pricing analysis) (Exhibit USA-45), *unchanged in Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 Fed. Reg. 94 (January 2, 2014) (Exhibit USA-46)).

[114] U.S. First Written Submission, paras. 288-89.

[115] We provide a range of percentages because the actual figures necessarily depend on what cases are included in the denominator of the calculation. Exhibit KOR-95 lists 52 proceedings in which the USDOC employed the

that the USDOC has applied the asymmetrical comparison methodology approximately 20-30 percent of the time between March 2013 and the time of the filing of the U.S. first written submission.[116]

127. For these reasons, the Panel should give no evidentiary weight to Korea's assertion that the USDOC has applied the "DPA test" in all 138 proceedings where the USDOC had any need to test U.S. prices since March 2013.[117]

3 SUBSIDY CLAIMS

3.1 Korea and United States

3.1. Did the USDOC establish that the proportion of tax credits was larger than it should be in light of the qualifying investment? If so, how? In addition:

i. What information pertaining to disproportionality was requested by the USDOC?

ii. Did the USDOC request any information pertaining to qualifying investments?

iii. What of the requested information was provided?

iv. What of the information provided was used by the USDOC?

128. In this investigation, the disproportionality determination was not based on the view that the proportion of subsidy conferred "was larger than it should be in light of qualifying investments." Rather, as explained in the U.S. first written submission and in further detail below, the USDOC based its disproportionality conclusion on the fact that Samsung and LG received a combined total of [[***]] percent of all subsidies conferred under the RSTA Article 10(1)(3) program, with Samsung alone accounting for [[***]] percent of the total. Indeed, Samsung received more than [[***]] times the amount conferred on the average recipient. The USDOC considered this distribution in light of a range of factors – including the large number of participants in the program and absence of restrictions on eligibility criteria – and found that this disparity was contrary to what would be expected.[118]

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asymmetrical comparison methodology to any one respondent. Out of the 191 total proceedings listed in Exhibit KOR-95, there are 16 cases where *all* respondents had no shipments or reviewable entries, which, if deducted out of the denominator of 191 total cases, means that the USDOC employed the asymmetrical comparison methodology in 29.7 percent of cases to *any* one respondent. If one further deducts from the denominator the 35 cases where the USDOC applied either facts available to *all* respondents in a specific case, or applied facts available to one respondent and found no shipments for the only other individually investigated or reviewed respondent, the resulting percentage is 37.1 percent.

[116] *See* U.S. First Written Submission, para. 289. We note, however, that the U.S. estimate was based on an examination of each individually investigated or reviewed respondent in each case. We also note that the U.S. estimate has continued to hold through the end of February 2015.

[117] *See* Korea Opening Statement at the First Panel Meeting, para. 40.

[118] U.S. First Written Submission, paras. 372-402.

129. Given the structure of the RSTA Article 10(1)(3) program, the amount of qualifying investments would not be a meaningful basis for assessing disproportionality. Under this program, companies may elect to calculate tax credits based on four different formulas:

- Small-to-medium enterprises ("SMEs") may elect to receive credits equal to a maximum of 25% of eligible expenses incurred in the tax year;

- Alternatively, SMEs may receive credits equal to 50% of the amount by which eligible expenses in the tax year exceed the annual average of eligible expenses over the preceding four-year period;

- Non-SMEs may elect to receive credits equal to 6% of eligible expenses in the tax year; and

- Alternatively, non-SMEs may receive credits equal to 40% of the amount by which eligible expenses in the tax year exceed the annual average of eligible expenses over the preceding four-year period.[119]

And to comply with Korea's Minimum Tax requirement, companies may defer credits earned in the tax year to a future year.[120]

130. For these reasons tied to the structure of the RSTA, the amount of subsidies received is not simply a function of the amount of qualifying investments. 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.[121]

[119] U.S. First Written Submission, para. 344.
[120] *See* U.S. First Written Submission, para. 348.
[121] *See*, *e.g.*, U.S. First Written Submission, para. 399; Washers CVD Redetermination at 22-23 (Exhibit KOR-44) (BCI).

131. Samsung's receipt of subsidies in 2011 illustrates the significant effect these factors can have. For its 2011 tax return, Samsung reported that during the 2010 tax year it had incurred a total of KRW[[***]] in qualifying research and human resources development expenses for purposes of RSTA Article 10(1)(3).[122] However, Samsung then elected to compare this amount with the average annual amount of qualifying expenses incurred in the previous four years, and calculated 40% of the resulting difference, yielding approximately KRW[[***]] in eligible credits.[123] Samsung then carried forward KRW[[***]] in credits that it had earned during the 2009 tax year (which, in turn, may have included deferrals from previous years), while deferring until the 2011 tax year more than KRW[[***]] billion of the credits that it earned during the 2010 tax year.[124] The net effect of these calculations was that Samsung received KRW[[***]] in credits when it filed its tax return in 2011.[125]

132. The United States further notes that USDOC lacked access to data concerning the qualified investments made by the total universe of companies in Korea that may have been eligible to receive, or in fact received, RSTA Article 10(1)(3) subsidies. As discussed below in response to Panel Question No. 3.12, the Government of Korea ("GOK") stated that Korean tax confidentiality laws prevented it from providing individual tax returns that contained each company's eligible expenditures and amount of subsidy received.

133. Relatedly, the USDOC addressed at length Samsung's "size defense" – i.e., that large companies normally incur large amounts of R&D expenses, and thus are expected to receive large amounts of subsidy. As discussed in the U.S. first written submission and oral statement,[126] this argument was unsupported and contrary to the purpose of the disproportionality inquiry. The USDOC further considered this size argument in its redetermination, which showed that even when size of recipient was taken into account, the amount of subsidy received by Samsung was overwhelmingly disproportionate.[127]

i. What information pertaining to disproportionality was requested by the USDOC?

134. The USDOC requested extensive amounts of information pertaining to disproportionality. Below, we summarize the relevant requests posed to the GOK and Samsung over the course of the investigation and redetermination, and information received.

[122] Samsung April 9, 2012 QR, Ex. 5A, Form 3 (Exhibit KOR-72) (BCI).
[123] Samsung April 9, 2012 QR, Ex. 5A, Form 3 (Exhibit KOR-72) (BCI); Samsung CVD Verification Report at 15 (Exhibit KOR-79) (BCI).
[124] Samsung CVD Verification Report at 15 (Exhibit KOR-79) (BCI).
[125] Samsung CVD Verification Report at 15 (Exhibit KOR-79) (BCI) ("[T]he total tax credit utilized for tax year 2010 for RSTA Article 10(1)(3) includes both the carried forward amount plus the tax credit generated in tax year 2010, minus the amount deferred until tax year 2011.").
[126] U.S. First Written Submission, paras. 380-382; U.S. Oral Statement at the First Panel Meeting, paras. 41-42.
[127] U.S. First Written Submission, paras. 399-402; U.S. Oral Statement at the First Panel Meeting, para. 43.

Washers CVD Investigation

February 15, 2012 USDOC Initial Questionnaire[128]	
USDOC Request from the GOK	**GOK Response**
The USDOC requested a copy of bulletins of economic and financial statistics regarding lending, economic development, and economic planning that were published during the period of investigation.	The GOK included an exhibit containing its Fiscal Policy as published by the Ministry of Strategy and Finance to explain the basic framework and key objectives of Korea's fiscal policy.[129]
The USDOC asked for a description of the program including the purpose of the program and the date it was established.	The GOK explained that the program "aims to facilitate Korean corporations' investment in their respective research and development activities, and thus to boost the general national economic activities in all sectors." The GOK also stated that the program originally began on January 1, 1982, and explained how companies could claim and calculate their tax credit using one of four formulas.
The USDOC requested translated copies of the relevant laws and regulations and any reports pertaining to the tax credit, as well as a description of the application process, blank application forms, and a copy of a completed and approved application for each company under investigation.	The GOK submitted translations of the operative provisions of the law, including the statutory formulas. The GOK further explained the filing process and requirements for companies seeking the tax credit and provided blank copies of the forms used to calculate and claim the tax credit.
The USDOC asked for information regarding the criteria for eligibility and receipt of the tax credit.	The GOK explained that receipt of the tax credit was unrelated to industry or sector, and that the granting of the tax credit was automatic as long as the recipient satisfied the legal requirements.

[128] Unless otherwise noted, *see* GOK April 9, 2012 QR at 108-117 (Exhibit KOR-75) (BCI) for full questions and responses.
[129] GOK April 9, 2012 QR at II-1 (Exhibit USA-50); GOK April 9, 2012 QR, Ex. Gen-2 at "Minister's Forward" (Exhibit USA-27).

The USDOC asked for the amount of assistance approved for each company under investigation (including all cross-owned companies and trading companies that sell the subject merchandise to the US) during the period of investigation (2011) and three preceding years.	The GOK provided tax credits received by Samsung in 2011 for the tax year 2010.
The USDOC asked for the total amount of assistance approved for all companies under the program.	The GOK provided the total amount approved under Article 10(1)(3) from 2007 to 2010.
The USDOC asked for the total number of companies that were approved for the tax credit.	The GOK provided the total number of companies approved for tax credits under Article 10(1)(3) from 2007 to 2010.
The USDOC asked for the total amount of assistance approved for the industry in which the respondent companies operate, as well as the totals for every other industry in which companies were approved for assistance under the program.	The GOK responded that it does not compile the data of recipients in terms of business sectors or industries.
The USDOC asked for the total number of companies that applied for, but were denied, assistance under the program.	The GOK responded that it does not compile the data of recipients whose applications are denied.
April 26, 2012 USDOC First Supplemental Questionnaire[130]	
The USDOC asked for the number of companies that utilized RSTA Article 10(1)(3) and the total amount of assistance provided under the program in 2011 (*i.e.*, for tax year 2010).	The GOK responded that 2011 data were not yet available.
May 18, 2012 USDOC Second Supplemental Questionnaire[131]	
The USDOC asked the GOK to place its verification report from the CVD investigation of Bottom Mount Refrigerator-Freezers ("BMRF") from Korea on the record.	The GOK placed the report on the record. The report contains information relating to the design and operation of RSTA Article 10(1)(3).

[130] GOK May 7, 2012 QR at 4-5 (Exhibit USA-51).
[131] GOK May 24, 2012 QR at Ex. S-3 (Exhibit USA-53) (BCI).

June 7, 2012 USDOC Third Supplemental Questionnaire[132]	
The USDOC asked the GOK to place its verification exhibits from the Korean BMRF CVD investigation on the record.	The GOK placed the exhibits on the record. The exhibits contain tax statistics for the tax years 2007 to 2009.

Washers CVD Redetermination[133]

May 16, 2014 USDOC Additional Information Questionnaire[134]	
The USDOC asked for the RSTA Article 10(1)(3) tax credits data to be broken down by industry by size of total assets and size of total revenue, noting that the latter breakdown was available elsewhere in Korea's tax statistics.	The GOK responded that the industry and the size of total assets/revenue, and tax credits under RSTA Article 10(1)(3) are derived from two different sources, and as such, the breakdown cannot be provided.
	The GOK also responded that providing the requested breakdown could violate Korean confidentiality law.
The USDOC asked for the taxable income and calculated tax amounts for the largest 100 corporate tax returns in which the RSTA Article 10(1)(3) tax credit was claimed/used.	The GOK responded that the requested information would violate the confidentiality law, even if provided on a no-name basis.
	In lieu of the information requested, the GOK provided the aggregate amount of the tax reductions under RSTA Article 10 claimed by the 100 largest corporate tax returns from 2008 to 2011.
The USDOC asked for the RSTA Article 10(1)(3) tax credits data to be broken down by industry.	The GOK recognized that tax payers self-report the industry to which they belong. But the GOK noted that industry reporting is made on a tax return form different than the form used to claim RSTA Article 10(1)(3) tax credits, and the self-reporting is unreliable/not meaningful. On this basis, the GOK did not provide the requested breakdown.

[132] GOK June 25, 2012 QR at 3 and S-4 at Ex. 17 (Exhibit USA-55) (BCI).
[133] In its redetermination, the USDOC requested additional information from the GOK. This redetermination occurred after the Panel was established, and does not fall within the terms of reference. Nonetheless, Korea raised this redetermination in its first written submission, and it is a fact that can be taken into account by the Panel.
[134] GOK May 30, 2014 QR (Exhibit USA-60) (BCI)

The USDOC asked for the total number of companies that applied for, but were denied, assistance under the program.	The GOK responded that it does not track this information, and added that "there is no instance where a company that applied for, but was denied… to the extent all information is accurately reported… which is found to satisfy the eligibility requirements."
June 9, 2014 USDOC Second Supplemental Questionnaire[135]	
The USDOC asked for the aggregated taxable income and calculated tax amount for the 100 largest corporate tax returns for which the GOK provided RSTA Article 10(1)(3) tax credits.	The GOK responded that taxable income and calculated tax amount are on a tax return form different than the form used to claim RSTA Article 10(1)(3). As such, the GOK did not provide this information.
June 24, 2014 USDOC Supplemental Questionnaire[136]	
The USDOC asked for taxable income and calculated tax amount for the 100 largest corporate tax returns again, noting that the GOK was able to provide customize tax data on the USDOC's request on previous occasions.	The GOK provided the requested information for 2010 and 2011.
	The GOK also stated that linking the RSTA Article 10(1)(3) credits to industries by using self-reporting of industries in the tax return form (as opposed to the tax credit form, which is a separate form) would be meaningless, because self-reporting of industries is unreliable.

135. The USDOC requested the following information from Samsung relevant to the disproportionality inquiry and Samsung's participation in the RSTA Article 10(1)(3) program:

February 15, 2012 USDOC Initial Questionnaire[137]	
USDOC Request from Samsung	**Samsung Response**
The USDOC requested information about the eligibility criteria that Samsung was required to satisfy to receive the tax credit.	Samsung explained that the tax credit was for R&D expenses incurred in 2010.

[135] GOK June 13, 2014 QR (Exhibit USA-61).
[136] GOK July 1, 2014 QR (Exhibit USA-62) (BCI).
[137] *See* Samsung April 12, 2012 QR at Ex. 22 (Exhibit KOR-72) (BCI) for full questions and responses.

The USDOC requested a description of the application and approval process which Samsung undertook.	Samsung explained that the tax reduction must be claimed in its tax filings, but that it did not need separate approval from the National Tax Service of Korea.
The USDOC asked about the records that Samsung maintained regarding the benefit received, including the executed application forms and other documents, as well as approval documentation.	Samsung explained that the benefit was reflected in its corporate income tax return and provided the tax returns for tax year 2010 (filed in 2011).
The USDOC requested the amount of tax savings under the program, as well as supporting calculations and documentation.	Samsung submitted the differences between the taxes it paid with the tax credit and what it would have paid absent the credit.
May 18, 2012 USDOC Second Supplemental Questionnaire[138]	
The USDOC asked Samsung to place its final calculation memoranda and spreadsheets and verification report from the CVD investigation of BMRF from Korea on the record.	Samsung submitted the requested documents. The final calculation memoranda demonstrated Samsung's share of the RSTA Article 10(1)(3) tax credits in 2010 (tax year 2009) (*i.e.*, [[***]] percent).
June 8, 2012 USDOC Third Supplemental Questionnaire[139]	
The USDOC asked Samsung to submit its verification exhibits from the Korean BMRF CVD investigation, as well as its tax returns for 2007 through 2010.	Samsung provided the requested documentation, which supported the figures discussed in the verification report and included tax returns filed in 2008, 2009, and 2010.

ii. Did the USDOC request any information pertaining to qualifying investments?

136. As noted above, the USDOC requested all information required by the GOK from tax filers claiming a tax credit under RSTA Article 10(1)(3). The GOK provided the blank form used for claiming the credit as part of a company's tax return filing, but declined to provide

[138] Samsung May 22, 2012 QR at Ex., Att. 6 (Exhibit USA-53) (BCI).
[139] Samsung June 25, 2012 QR at 1-2 and Ex. 1, VE-14 (Exhibit USA-54) (BCI).

specific details about the information contained in the filed tax returns, which would have reflected each company's qualifying investments.[140]

137. The USDOC also requested information from Samsung relating to its participation in the RSTA Article 10(1)(3) program, including completed application forms and other application documents (which would show the amount of qualifying expenses incurred). The chart summarizing these requests, and Samsung's response, is set out above, in response to Panel Question No. 3.1(i).

iii. What of the requested information was provided?

138. Please see response to Panel Question No. 3.1(i), above.

iv. What of the information provided was used by the USDOC?

139. The USDOC relied on all factual information on the administrative record. From this information, the USDOC noted, in particular, that two companies – Samsung and LG – received a combined total of [[***]] percent of all subsidies conferred under the RSTA Article 10(1)(3) program, with Samsung alone accounting for [[***]] percent of the total.[141] Indeed, Samsung received more than [[***]] times the amount conferred on the average recipient.[142]

140. The USDOC considered this distribution in light of a range of factors, including:

- the fact that the program had nearly 12,000 participants;[143]
- the absence of sectoral or other *de jure* restrictions on eligibility;[144]
- the fact that subsidies were not conferred using a common formula that applied to all participants based on eligible investments, but were instead the product of any of four different formulas, deferrals, and other tax planning considerations;[145]
- the age of the program, which had been in existence since 1982;[146] and

[140] *See* GOK April 9, 2012 QR at 110 (Exhibit KOR-75) (BCI); GOK April 9, 2012 QR, Ex. D-7 (Exhibit USA-50).
[141] Washers Final CVD I&D Memo at 35-36 (Exhibit KOR-77); Washers Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[142] Washers Final CVD I&D Memo at 35-36 (Exhibit KOR-77); Washers Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[143] Washers Final CVD I&D Memo at 35-36 (Exhibit KOR-77); Washers Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI); *see also* Washers CVD Redetermination at 3-4 (Exhibit KOR-44) (BCI).
[144] U.S. First Written Submission, paras. 343, 374; Washers Final CVD I&D Memo at 12, 35-36 (Exhibit KOR-77).
[145] U.S. First Written Submission, paras. 343-344, 347-348, 379, 399; Washers Samsung CVD Verification Report, at 15 (Exhibit KOR-79) (BCI); Samsung April 12, 2012 QR, Ex. 22 at 1 (Exhibit KOR-72) (BCI); GOK April 9, 2012 QR, at 108 (Exhibit KOR-75) (BCI); *see also* Washers CVD Redetermination at 6-9 (Exhibit KOR-44) (BCI).
[146] U.S. First Written Submission, paras. 345, 389-391; Washers CVD Preliminary Determination, 77 Fed. Reg. at 33,187 (Exhibit KOR-85).

- the fact that Korea is one of the world's largest, most diversified economies.[147]

141. Based on consideration of these factors, the USDOC concluded that the distribution was contrary to what would be expected, and indicated disproportionality.[148] The USDOC also considered at length the explanations for this distribution proffered by the parties – in particular, the common formula and "size" arguments. As discussed in the U.S. first written submission, the USDOC ultimately rejected these arguments, and provided a reasoned and adequate explanation for its overall conclusion on disproportionality, which was supported by positive evidence.[149]

3.2. What is the meaning of the term "enterprise" as used in Article 2.2. of the AD Agreement? Is this term restricted to the legal address of an entity, the place(s) of economic activity of an entity, or otherwise?

142. The term "enterprise" in Article 2.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement")[150] is part of a compound, defined term – "certain enterprises."[151] The *chapeau* of Article 2.1 defines "certain enterprises" as "an enterprise or industry or group of enterprises or industries." In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body analyzed the ordinary meaning of "certain enterprises," as follows:

> [T]he word "certain" is defined as "[k]nown and particularized but not explicitly identified: (with sing. noun) a particular. (with pl. noun) some particular, definite." The word "group," in turn, is commonly defined as "[a] number of people or things regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose, or classed together because of a degree of similarity." Turning to the nouns qualified by "certain" and "group," we see that "enterprise" may be defined as "[a] business firm, a company," whereas "industry" signifies "[a] particular form or branch of productive labour; a trade, a manufacture." We note that the panel in *US – Upland Cotton* considered that "an industry, or group of 'industries,' may be generally referred to by the type of products they produce;" that the "breadth of this concept of 'industry' may depend on several factors in a given case." The above suggests that the term "certain enterprises" refers to a single enterprise or industry or a class of enterprises or industries that are known and particularized.[152]

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[147] U.S. First Written Submission, paras. 386-389, 392-394; GOK April 9, 2012 QR at Ex. Gen-2 at "Minister's Forward" (Exhibit USA-27); *see also* Washers CVD Redetermination at 4 (Exhibit KOR-44) (BCI).
[148] U.S. First Written Submission, paras. 372-375; U.S. Opening Statement at the First Panel Meeting, para. 40.
[149] U.S. First Written Submission, paras. 376-382; *see also* U.S. Opening Statement at the First Panel Meeting, paras. 41-42.
[150] Although the question refers to the AD Agreement, we presume that the intended reference is to the SCM Agreement.
[151] *See, e.g., US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.128 (term "certain enterprises" in Article 2.2 is defined in *chapeau* of Article 2.1).
[152] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

143. Based on this reasoning, the term "certain enterprises" encompasses a wide variety of economic structures and activities. The phrase includes any kind of business firm or company, and even extends to the concept of an "industry" – which transcends individual entities (i.e., any "form or branch of productive labour" or "trade"). As a further indication of the expansive reach of this phrase, the term "certain enterprises" is defined to include "groups" or classes of companies or industries.

144. The breadth of this definition thus enables WTO panels and investigating authorities to discern specificity and apply subsidy disciplines in light of the myriad ways in which Members may impose limitations on subsidies. This is consistent with the Appellate Body's observation that "*a limitation on access to a subsidy may be established in many different ways* and that, whatever the approach investigating authorities or panels adopt, they must ensure that the requisite limitation on access is clearly substantiated on the basis of positive evidence."[153]

145. In the context of Article 2.2, specificity is grounded in geographic limitations – i.e., "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific." If a region has been designated for purposes of limiting the scope of a subsidy program, that program "*shall be specific*."[154]

146. Article 2.2 thus sets out a particular case of specificity, wherein the "certain enterprises" in question are those enterprises and industries (or groups thereof) that are located within a designated geographical region. As the panel observed in *US – Anti-Dumping and Countervailing Duties (China)*, regional specificity appears in its own article, separate from the general provisions of Article 2.1.[155] The panel rejected the argument that Article 2.2 is limited to situations of *de facto* specificity, and found that this interpretation "is considerably less plausible than one that would read Article 2.2 as a particular case of specificity, on the basis of geographic limitations, which could arise in either the *de jure* or the *de facto* sense."[156]

147. Contrary to Korea's suggestion,[157] there is no basis for inferring that Article 2.2 applies only where a regional subsidy limitation is expressly tied to the location of a company's head office or a particular legal entity. For purposes of Article 2.2, the fundamental issue is whether the granting authority has limited the subsidy to a designated geographical region. In doing so, a Member will, by extension, limit that subsidy to enterprises or industries within that region.

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[153] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413 (emphasis supplied); *see also id.*, paras. 411-414 (finding that panel did not err in finding that the USDOC committed no legal error in basing its determination of regional specificity based on the relevant financial contribution, as opposed to expressly basing that determination on the benefit conferred).

[154] *See, e.g., EC – Large Civil Aircraft (Panel)*, para. 7.1222 ("Article 2.2 establishes that a subsidy *shall* 'shall be specific' if it is 'limited to certain enterprises located within a designated geographical region within the territory of the granting authority'" (emphasis in original)).

[155] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.124.

[156] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.124 (emphasis supplied).

[157] Korea Oral Statement at the First Panel Meeting, paras. 85-86; Korea First Written Submission, paras. 328-329.

148. Moreover, an enterprise or industry can be "located" in a variety of places, including the site of a head office, branch, manufacturing facility, or other asset or investment.[158] As discussed above, the term "certain enterprises" encompasses a broad array of economic structures and activities. The fact that the term encompasses "industries" renders it particularly inappropriate to draw formalistic distinctions about location (e.g., an "industry" does not have a head office, but can be "located" at the site of assets or facilities). For instance, in *EC – Large Civil Aircraft*, Airbus received numerous subsidies in Spain that were found to be regionally specific, based on the location of Airbus-owned facilities in various designated regions – and not the location of its headquarters.[159]

149. Indeed, depending on the type of analysis being performed, a given enterprise or industry can simultaneously fall within and without a designated region. For instance, a company may receive a subsidy based on the location of a manufacturing facility (which falls within the designated region), while its head office is located outside the region. This would not render the subsidy program any less geographically limited, or render Article 2.2 inapplicable. But that is precisely what Korea suggests here. Although Samsung received subsidies under the RSTA Article 26 program based on its investment in facilities located outside the Seoul overcrowding region, Korea points to the fact that Samsung is also "located" (presumably through its head office) in the excluded Seoul overcrowding region.[160] This kind of hair-splitting is not supported by the text of Article 2.2.

150. Further, Korea's argument – if adopted – would create a major loophole in subsidy disciplines. Subsidy disciplines easily could be circumvented if, for example, subsidies to manufacturing facilities in a specific region were deemed to be non-specific based only on the location of associated headquarters operations.[161]

3.3 United States

3.10. Does the United States agree with Korea's assertion, at para. 266 of its first written submission, that the USDOC explicitly found that a determination of specificity could not be based on the fact that a company receives an amount of subsidy different from the amount received by another company?

151. No. Korea's characterization of the USDOC's *de jure* specificity analysis, which is discussed at paragraph 266 of its first written submission, is inaccurate. Consistent with Article 2.1(a) of the SCM Agreement, the USDOC considered whether the granting authority (here, Korea) explicitly limited access for the RSTA Article 10(1)(3) subsidy program to "certain enterprises." In its final determination, the USDOC found that "the language of the law for this

[158] The verb "locate" is defined in relevant part as "[e]stablish oneself or itself in a place; take up residence or business in a place . . . [f]ix or establish in a place . . . be situated." 1 *New Shorter Oxford English Dictionary* 1614 (1993) (Exhibit USA-48).
[159] *EC – Large Civil Aircraft (Panel)*, paras. 7.1207-7.1210, 7.1235-7.1236, 7.1243-7.1244; *see also id.*, paras. 7.1206, 7.1235, 7.1243 (finding that subsidies are regionally specific based on location of Airbus facility in Nordenham); U.S. First Written Submission, para. 419.
[160] Korea First Written Submission, para. 329.
[161] *See* U.S. First Written Submission, para. 420 & n.523.

program as well as the language of the implementing provisions for this tax program do not limit eligibility to a specific enterprise or industry or group thereof."[162] Accordingly, the USDOC found that the program was not *de jure* specific.[163]

152. Contrary to Korea's suggestion, the USDOC's *de jure* specificity finding was not grounded in consideration of the relative amounts of subsidy that might be conferred under the program. Nor was it implicit in the USDOC's *de jure* specificity findings that "a determination of specificity could not be based on the fact that a company receives an amount of subsidy different from the amount received by another company." Instead, the USDOC considered whether, on the face of the legislation and implementing provisions, there were explicit limitations on access.

153. Absent such explicit restrictions, the USDOC then turned to analyze whether the program was *de facto* specific. In particular, the USDOC considered whether disproportionately large amounts of subsidy were conferred on "certain enterprises," within the meaning of Article 2.1(c) of the SCM Agreement.[164] As described in the US response to Panel Question No. 3.1(iv), above, the USDOC considered, among other factors, the amount of subsidy received by certain enterprises in comparison with the total amount of subsidy distributed under the program, and with the amount received by the average recipient. In other words, the USDOC's finding of disproportionality was not based on the mere fact that one company received subsidies in an amount that differed from the amount received by another company.

3.11. At para. 40 of the US oral statement, the United States stated that "Commerce found that this disparity was contrary to what would be expected, and indicated disproportionality". What was the expected distribution? What criteria were used to come to that?

154. In its response to Panel Question No. 3.1(iv), above, the United States explains the basis for the USDOC's disproportionality finding, and the criteria that were taken into account in determining that the distribution deviated from what would be expected. The USDOC did not expressly state what would have been a "proportionate" or "expected" distribution. But it is clear from the USDOC's determination that it would have expected a more even distribution.

155. The United States also notes that the SCM Agreement does not require hypothetical findings of what type of distributions – if present on a certain set of facts – would **not** be disproportionate.[165] For example, in *US – Large Civil Aircraft*, the Appellate Body did not express in quantitative terms the allocation of benefits it *would have expected* given the eligibility criteria. This is consistent with the panel's observation in *US – Upland Cotton* that

[162] Washers Final CVD I&D Memo at 12 (Exhibit KOR-77).
[163] Washers Final CVD I&D Memo at 12, 34 (Exhibit KOR-77).
[164] Washers Final CVD I&D Memo at 12, 34-37 (Exhibit KOR-77).
[165] U.S. First Written Submission, para. 375.

"specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition."[166]

3.12. It appears that the US used two criteria for establishing disproportionality, namely 1) the amount of the credit received as of the total amount of credits; 2) the amounts received by the other recipients.

i. Did the USDOC take into account any other criteria? If yes, please indicate what information was requested by the USDOC, what information was provided, and what information was used by the USDOC in its determination.

156. Please see the U.S. response to Panel Question No. 3.1(iv), above.

ii. With regard to para. 353 of the United States' first written submission, on what basis did the USDOC conclude that it would not expect each beneficiary to receive an equal percentage of total benefits?

157. The USDOC's conclusion – i.e., that it would not expect each beneficiary to receive an equal percentage of total benefits – is based on the record before it. In particular, and as discussed in response to Panel Question No. 3.1, above, the USDOC found that the RSTA Article 10(1)(3) program had nearly 12,000 participants, and that the amount of subsidy conferred on these companies would be expected to reflect differing amounts of eligible expenditures, the application of different formulas, compliance with Minimum Tax requirements, and individualized tax planning decisions.

iii. Did the USDOC assess the size of each company's R&D investments relative to their economic weight?

158. No. The USDOC did not assess the size of each company's R&D investments relative to data concerning its economic weight.

159. As an important initial matter, the United States notes that the USDOC did not have access to information on the eligible expenses or "economic weight" for each one of the companies in Korea that were eligible for or received this subsidy. In response to the USDOC's requests, the GOK stated that Korean tax confidentiality laws prevented it from providing the individual tax returns that contained each company's R&D expenditure information.[167] Nor would the GOK provide the amounts of subsidy conferred on any individual company other than Samsung and LG.[168] And as discussed in response to Panel Question No. 3.19, below, the GOK took the position that these same laws prevented it from providing any data on the "economic

[166] *US – Cotton (Panel)*, para. 7.1142; see U.S. First Written Submission, para. 375.
[167] *See, e.g.*, GOK April 9, 2012 QR at 109-110 (Exhibit KOR-75) (BCI) (providing tax credit amounts for Samsung but declining to provide more specific tax return information).
[168] GOK April 9, 2012 QR, at 110, 116 (Exhibit KOR-75) (BCI). Even if the USDOC had received information regarding the amount of tax credits granted to each individual recipient, it would have been impossible to derive the amount of R&D expenditures underlying that credit because the relationship between these amounts is subject to numerous variables (*e.g.*, application of one of four formulas, deferrals, etc.).

weight" of individual recipients (e.g., as measured by taxable income or calculated tax amount). In any event, as a practical matter, it would have been virtually impossible for the USDOC to evaluate each of the nearly 12,000 recipients' qualifying expenses and "economic weight" for the 2010 tax year,[169] given the limited timeframe in which proceedings must be conducted under Article 11.11 of the SCM Agreement.[170]

160. The United States also notes that neither the amount of eligible investments nor the "economic weight" of a recipient provides a meaningful basis for assessing disproportionality in this case. As discussed in response to Panel Question No. 3.1, the amount of eligible research and human resources development expenses does not dictate the amount of subsidies received, given the application of varying formulas, deferrals, and tax planning considerations. So the amount of qualifying investments would not provide a sufficient explanation of the distribution of subsidy in this case, or support a finding that the distribution is not disproportionate.

161. Nonetheless, the USDOC did evaluate the parties' "size defense" – *i.e.*, the argument that large companies normally invest more in R&D, and thus receive more subsidies. As discussed in the U.S. first written submission and oral statement at the first Panel meeting, this argument is unsupported and fails to explain the extreme disparity in subsidy distribution evident in the program. This argument is also inconsistent with the purpose of the disproportionality inquiry.[171]

162. In its redetermination, the USDOC obtained evidence concerning the size of recipients, primarily in the form of aggregate data on taxable income.[172] Based on this data, the USDOC found that, even among "large" companies and controlling for size, Samsung received overwhelmingly disproportionate amounts of subsidy.[173]

3.13. With regard to para. 353 of the United States' first written submission, did the USDOC equate disproportionality with significance, in the sense that a company receiving a significant percentage of total benefits would necessarily receive a disproportionate amount of benefit? Please explain.

163. No. At paragraph 353 of its first written submission, the United States quoted from pages 35-36 of the USDOC's Issues and Decision Memorandum in the washers CVD investigation. By using the term "significant" in this passage, the USDOC did not equate disproportionality with "significance," or imply that a company receiving a "significant" percentage of all benefits necessarily receives a disproportionate amount of the benefit.

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[169] As previously noted, the USDOC evaluated program beneficiaries for 2010 (*i.e.*, tax year 2009) because the GOK could not provide aggregate information for 2011. *See* GOK April 9, 2012 QR at 102 (Exhibit KOR-75) (BCI).
[170] SCM Agreement, Article 11.11 ("Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.").
[171] U.S. First Written Submission, paras. 380-382; U.S. Oral Statement at the First Panel Meeting, paras. 41-42.
[172] The USDOC redetermination occurred after the Panel was established, and thus falls outside the Panel's terms of reference. Nonetheless, Korea submitted this redetermination as an exhibit, and it is a fact that may be considered by the Panel.
[173] U.S. First Written Submission, paras. 399-402; U.S. Oral Statement at the First Panel Meeting, para. 43.

164. From the outset, the USDOC stated that it would approach the disproportionality inquiry on a case-by-case basis, taking into account all the facts and circumstances.[174] Thus, the USDOC confirmed that it would not employ a mechanistic approach to disproportionality.

165. Turning to the facts of the case, the USDOC found that "it is a significant indicator of" disproportionality that two companies (Samsung and LG) received a "very large" ([[***]] percent) proportion of all subsidies when the program had nearly 12,000 participants, and observed that, even though it "would not expect" an equal percentage to be conferred on all recipients, the distribution (in which Samsung received [[***]] times more subsidy than the average recipient) was "significant."[175] The USDOC found that this distribution was "significant" because it deviated considerably from what would be expected under the circumstances (e.g., the fact that the program had nearly 12,000 participants and no restrictions on eligibility). And the USDOC went on to consider the alleged explanation for this disparity proffered by Samsung – i.e., size of the recipient and application of a common formula.[176]

166. Although the USDOC's redetermination occurred after this panel was established, it has been brought forward by Korea, and it re-affirms this disproportionality analysis:

> As previously explained by the GOK, RSTA Article 10(1)(3) aims to facilitate Korean corporations' investment in their research and development activities, and thus boosts the general national economic activities in all sectors. The GOK also stated that all Korean corporations are eligible to utilize this program as long as they satisfy the requirements set forth in the statute. According to the GOK, over 11,000 Korean corporations received this tax credit in 2010. Furthermore, the record indicates that Korea, as a member of the G-20, is one of the twenty major economies in the world.
>
> With these facts in mind, i.e., that the tax credit is available to all Korean corporations in one of the world's largest economics, and that over 11,000 companies used the credit, the Department determined (and continues to find) that a single company receiving [[***]] per cent of all the program's total credits, compared to the average of [[***]] percent, has received a disproportionately large amount of those credits.[177]

3.14. At para. 365 of its first written submission, the United States asserts that the USDOC found that Samsung received amounts of subsidy that were "relatively too large". What was the relational comparison undertaken by the UDSDOC? In other words, "too large" relative to what?

[174] Washers Final CVD I&D Memo at 35 (Exhibit KOR-77).
[175] Washers Final CVD I&D Memo at 35-36 (Exhibit KOR-77). In its Issues and Decision Memorandum, the USDOC referred to the data and analysis in its separate calculation memoranda, which contain the actual figures. *Id.*
[176] Washers Final CVD I&D Memo at 36-37 (Exhibit KOR-77).
[177] Washers CVD Redetermination at 3-4 (Exhibit KOR-44) (BCI) (emphasis supplied).

167. The USDOC conducted a relational comparison consistent with the text of Article 2.1(c) of the SCM Agreement and the Appellate Body's guidance in *US – Large Civil Aircraft*. In that dispute, the Appellate Body observed that:

> The language of Article 2.1(c) indicates that the first task is to identify the "amounts of subsidy" granted. Second, an assessment must be made as to whether the amounts of subsidy are "disproportionately large." This term suggest that disproportionality is a relational concept that requires an assessment as to whether the amounts of subsidy are out of proportion, or relatively too large. When viewed against the analytical framework set out above regarding Article 2.1(c), this factor requires a panel to determine whether the actual allocation of the "amounts of subsidy" to certain enterprises is too large relative to what the allocation would have been is the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b). In our view, where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, a panel will be required to examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to certain enterprises.[178]

168. As discussed above in response to Panel Question Nos. 3.1(iv) and 3.13, the USDOC considered the extraordinary amounts of subsidy granted to Samsung and LG, and found that these amounts were relatively too large (i.e., higher than what would have been expected) in comparison with the total amounts of subsidy provided under the program and with the amount received by the average recipient, and given several factors – including the absence of sectoral or other restrictions on eligibility, and the fact that the program boasted nearly 12,000 participants.

3.15. Regarding para. 376 of the United States' first written submission, did the USDOC determine that, or even consider whether, the amounts received by Samsung were disproportionate to the amounts invested by Samsung?

169. The USDOC did not base its disproportionality conclusion on a determination that the amounts of subsidy received by Samsung were "disproportionate to the amounts invested by Samsung." Instead, the USDOC based its disproportionality findings on a comparison between the amounts of subsidy received by Samsung and the total amount of subsidies conferred under the program, as well as the amount received by the average recipient. The USDOC considered this distribution in light of several contextual factors and explanations offered by the parties.

170. But the USDOC did consider (and reject) Samsung's argument – which Korea adopts in this dispute – that the subsidies it received were "proportionate" by virtue of being calculated from its eligible expenses, using a common formula. According to this argument, as long as subsidies are disbursed according to this common formula (i.e., discretion is not exercised), then the result is by definition what would be expected, and not disproportionate.

[178] *US – Large Civil Aircraft (AB)*, para. 879 (emphasis supplied).

171. Korea's argument is premised on a misreading of Article 2.1(c). As discussed in the U.S. first written submission,[179] Korea's approach would conflate the disproportionality inquiry under Article 2.1(c) with the analysis under Article 2.1(b) concerning the existence of "objective criteria and conditions," and with the separate inquiry under Article 2.1(c) regarding the "manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy." This approach would also be inconsistent with the object and purpose of the SCM Agreement, as it would allow Members to evade subsidy disciplines by structuring payment and eligibility criteria through formulas that favor certain enterprises.

172. In any event, Korea's argument is factually unsupported. As discussed in response to Panel Question No. 3.1, the amount of subsidies received by Samsung reflects the application of a complex formula, based on a comparison of total eligible expenses with the annual average of eligible expenditures over the past four years, subject to deferrals based, *inter alia*, on compliance with Korea's Minimum Tax Law. Thus, the amount of subsidy received by Samsung was not a straightforward, "proportionate" function of the eligible research and human resources development expenses that it incurred in the previous tax year.

3.16. At para. 377 of its first written submission, the United States refers to the USDOC's statement that its "analysis of disproportionality examines a respondent's use of the program in comparison to the universe of companies who use the program". Does the notion of "use" necessarily relate to the proportionality, or disproportionality, of benefits received? If so, why does Article 2.1(c) of the SCM Agreement refer to "use" as a separate basis for determining de facto specificity?

173. Paragraph 377 of the U.S. first written submission quotes from page 35 of the USDOC's Issues and Decision Memorandum in the washers CVD investigation. The USDOC's reference to the "use" of the program must be read in context with the disproportionality analysis that it carried out in this case. As discussed in response to Panel Question No. 3.14, above, the USDOC conducted a relational comparison that considered, among other things, the total amounts of subsidy received under the program and the amount received by the average recipient.

174. With this context in mind, it is clear that the USDOC employed the term "use" as a proxy for the amounts of subsidy received by the "universe of companies who use the program." The USDOC did not conflate the disproportionality inquiry with the separate analyses available under Article 2.1(c), which focus on the "use of a subsidy programme by a limited number of certain enterprises" and the "predominant use by certain enterprises."

3.17. The United States asserts, at para. 480 of its first written submission, that applicants submit a pool of aggregate expenditures, and receive a reduction in their tax liability on an aggregate basis. Is the USDOC's decision to discount the potential benefit of Article 10(1)(3) tax credits for Samsung's global production operations consistent with this focus on an aggregated analysis of benefit? Please explain.

[179] U.S. First Written Submission, paras. 377-378.

175. In calculating the denominator of the subsidy ratio for Samsung, the USDOC did not "discount the potential benefit of Article 10(1)(3) tax credits for Samsung's global production operations." Instead, the USDOC found that Korea did not bestow these subsidies on products manufactured overseas. This approach is consistent with the structure, design, and operation of the subsidy – including the fact that recipients submit a pool of aggregate expenditures and receive a reduction in their tax liability on an aggregate basis.

176. We recall that Korea hinges its attribution claims on finding specific obligations in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement for how a Member should allocate the numerator and denominator when calculating CVD ratios. But as discussed in the U.S. first written submission, these provisions do not dictate precisely how the rate of subsidization is to be calculated.[180] They certainly do not mandate that an investigating authority incorporate overseas manufacturing in the denominator of subsidy ratios.

177. Indeed, Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement both focus exclusively on domestic production. Article VI:3 of the GATT 1994 states that duties may be imposed to offset subsidies granted on the "manufacture, production or export of such product *in the country of origin or exportation*."[181] Likewise, Article 19.4 of the SCM Agreement frames the subsidy calculation in terms of "subsidization per unit of the *subsidized and exported product*."[182]

178. Here, the facts in this case confirmed that Korea bestowed subsidies on domestic production – not overseas manufacturing.[183] The USDOC considered the following:

- the "laws creating these tax credits," which limit eligibility to Korean companies and only confer subsidies in connection with research and human resources development activities that occur *within Korea*.[184]

- Korea's statement on the record of the investigation that RSTA Article 10(1)(3) "aims to facilitate Korean corporations' investment in their respective research and development activities, and thus to *boost the general national economic activities* in all sectors."[185]

[180] U.S. First Written Submission, paras. 437-462.
[181] Emphasis supplied.
[182] Emphasis supplied. These provisions reflect the fact that Members generally grant subsidies to generate economic activities within their borders. It would be unusual, to say the least, for a Member to bestow subsidies on outsourced or overseas manufacturing. U.S. Oral Statement at the First Panel Meeting, para. 65; U.S. First Written Submission, para. 489.
[183] As discussed in the U.S. first written submission, the facts relating to the granting authority's bestowal of the subsidy are a key consideration in subsidy attribution. U.S. First Written Submission, paras. 446-448. The term "bestow" is defined in relevant part as "[s]pend, lay out . . . [c]onfer as a gift." 1 *New Shorter Oxford English Dictionary* 219 (1993) (Exhibit USA-47).
[184] U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77).
[185] GOK April 9, 2012 QR at App. Vol. 108 (emphasis supplied) (Exhibit KOR-75); U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77).

- The tax returns, which do not identify or include any expenses incurred outside Korea, or otherwise indicate any intent by Korea to subsidize overseas production.[186]

179. Based on these facts, the USDOC found that the subsidies were not bestowed on overseas manufacturing, and divided the subsidies over Samsung's adjusted sales of domestically produced merchandise.[187] The USDOC provided a reasoned and adequate explanation for its approach, which was supported by positive evidence.

180. The USDOC's determination was thus consistent with the structure, design, and operation of RSTA Article 10(1)(3). The fact that subsidies are distributed based on a pool of aggregate expenses, not connected with a given product, does not mean that Korea bestowed subsidies on overseas manufacturing. One does not follow from the other.

3.18. Is the USDOC's decision to include only the sales value of Samsung's domestic operations in the denominator for the Article 10(1)(3) tax credits consistent with the USDOC's view that it is not required to trace the effect of tax credit subsidies? Did the USDOC not effectively determine that the relevant tax credits only benefited Samsung's domestic production operations? Please explain.

181. As discussed in the U.S. response to Panel Question No. 3.17, the USDOC's decision to calculate the denominator of the subsidy ratio based on sales of products manufactured in Korea reflects the facts relating to the "bestowal" of the subsidy. This determination was not grounded in the potential effects of subsidies, and does not imply an attempt to trace those effects.

182. Thus, the USDOC did not determine that the research and human resources development subsidies "only benefitted" domestic operations – i.e., that these subsidies only had an effect on domestic operations. As discussed in the U.S. first written submission and oral statement at the first panel meeting,[188] the attribution inquiry need not involve speculation about whether such effects may occur, but instead appropriately focuses on the facts relating to the bestowal of the subsidy. As discussed above, the subsidy program only confers subsidies on Korean companies, in connection with research and human resources development activities that occur within Korea.

3.19. At para. 400 of its first written submission, the United States refers to the tax credits claimed by the largest 100 corporations that participated in the RSTA Article 10(1)(3) tax credit scheme. What was the economic weight of Samsung compared to that of the next largest corporation in that category?

183. Paragraph 400 of the U.S. first written submission refers to the results of the investigation conducted in connection with the USDOC's redetermination. In its questionnaire, the USDOC asked the GOK to report the taxable income, calculated tax amount, and amount of RSTA Article 10(1)(3) tax credit received by each of the largest 100 companies (as defined by taxable

[186] U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77).
[187] Washers Final CVD I&D Memo at 52 (Exhibit KOR-77).
[188] U.S. First Written Submission, paras. 485-501; U.S. Oral Statement at the First Panel Meeting, paras. 64-70.

income).[189] The USDOC made clear that the individual recipient companies need not be identified.[190]

184. Yet the GOK declined to provide the requested information, stating that "the GOK is unable to provide specific tax information relating to individual persons or individual corporations with respect to their tax payments or reductions due to the statutory obligation under Article 81-13 of the *Basic Act of the National Taxes* of Korea."[191] Thus, the USDOC was only able to evaluate tax data for the largest 100 recipients on an aggregate basis.[192]

185. As a result of these limitations, the data collected by the USDOC do not permit a comparison between the "economic weight" of Samsung (i.e., based on taxable income) and that of the other individual recipients within the group of 100 companies.

3.20. At para. 40 of its oral statement, the United States asserts that the amount of subsidy received by Samsung compared to other recipients "indicated" disproportionality. Did the USDOC determine that the amounts received by Samsung were disproportionate, or merely that there was an indication of disproportionality?

186. At paragraph 40 of its oral statement, the United States explained that the USDOC's evaluation of the amounts of the subsidy conferred under RSTA Article 10(1)(3) "indicated," but did not conclusively demonstrate, disproportionality.

187. The USDOC found that Samsung and LG received very large amounts of subsidy relative to the total amounts distributed under the program, as well as the average recipient. But the USDOC did not consider this data in isolation. As explained in the U.S. response to Panel Question No. 3.1(iv), the USDOC considered this data in light of several contextual factors and the explanations offered by the parties. This approach is consistent with Article 2.1(c) of the SCM Agreement and the Appellate Body's guidance in *US – Large Civil Aircraft*.

3.21. According to para. 309 of Korea's first written submission, the USDOC preliminarily determined in Washers that Samsung's RTSA Article 10(1)(3) tax credits benefited Samsung's global production operations. Is this correct? Regarding para. 68 of the United States' oral statement, how was the USDOC able to discharge the administrative burden of tracing the effects "across the globe" in its preliminary determination? In addition, why did the USDOC change its position in the final determination?

188. Korea is correct that, in its preliminary determination, the USDOC calculated the denominator of Samsung's subsidy ratio based, in part, on the sales of merchandise manufactured overseas. But Korea neglects to mention that this was only due to the fact that

[189] GOK May 30, 2014 QR at 5-6 (Exhibit USA-60) (BCI).
[190] GOK May 30, 2014 QR at 6 (Exhibit USA-60) (BCI).
[191] GOK May 30, 2014 QR at 6 (Exhibit USA-60) (BCI).
[192] U.S. First Written Submission, paras. 399-400 & n.488.

Samsung incorrectly submitted global sales information, in response to a question that asked for domestic sales information.

189. In its initial questionnaire, the USDOC asked Samsung for sales information related to Samsung's total domestic production:

> Please provide {the quantity and f.o.b. value of total sales (both subject and non-subject merchandise) to all markets (domestic and foreign)} for your company for the {period of investigation}. Do not include the volume and value of merchandise produced outside Korea or returned merchandise.[193]

190. In response, Samsung attested that it was providing "{t}he requested quantities and values for January 1 through December 31, 2011."[194] The USDOC relied on this representation, and used these quantities and values to calculate Samsung's *ad valorem* subsidy rate in the preliminary determination, in the belief that it was calculating subsidy rates for Korean production.[195]

191. In a supplemental questionnaire, however, the USDOC asked Samsung to "confirm that the sales figures that Samsung provided in its response are exclusive of {the volume and value of merchandise produced outside Korea}" and to provide the correct information if it had not already done so.[196] Samsung admitted that "{t}he sales information reported in Exhibit 8 of Samsung's April 29, 2012 questionnaire response did include sales of merchandise produced outside Korea" and submitted the corrected sales information.[197] The USDOC used this corrected information in its final determination.

192. Thus, the USDOC's "change in position" – as Korea puts it[198] – between its preliminary and final determination was not a change in position at all. Instead, the difference between the preliminary and final determinations reflected the correction of Samsung's misreported data. The USDOC did not determine that subsidies under RSTA Article 10(1)(3) were tied to global production, and did not trace the effects "across the globe."

3.22. Please comment on Korea's assertion, at para. 78 of its oral statement, that the payment of royalties by Samsung's affiliate in Mexico shows that the Article 10(1)(3) tax credits benefit Samsung's global production operations.

193. Korea's reliance on payments by Samsung's affiliate in Mexico is something never argued for by Samsung or Korea in the investigation, and is substantively without merit. In their submissions to the USDOC in the washers CVD investigation, neither the GOK nor Samsung argued that these payments supported the incorporation of overseas manufacturing into the

[193] Samsung April 9, 2012 QR at 6 (Exhibit USA-49) (emphasis supplied).
[194] Samsung April 9, 2012 QR at 7 & Ex. 8A (Exhibit USA-49).
[195] Samsung Preliminary CVD Calculation Memo, Att. 3 (Exhibit KOR-56) (BCI).
[196] Samsung Aug. 30, 2012 QR at 1 (Exhibit USA-56) (BCI).
[197] Samsung Aug. 30, 2012 QR at 2 (Exhibit USA-56) (BCI).
[198] Korea Oral Statement at the First Panel Meeting, para. 75.

denominator of the subsidy ratio. Nor did Korea raise these payments in its first written submission in this dispute. It was only in its oral statement at the first Panel meeting that Korea alluded to these payments.

194. At the Panel meeting, Korea drew on a brief mention in the Issues and Decision Memorandum of an anti-dumping investigation involving a different product, a different country of origin, and a different type of trade remedy (anti-dumping duties vs. countervailing duties) – i.e., the Anti-Dumping Investigation of Bottom Mount Refrigerator-Freezers in Mexico.[199]

195. These separate anti-dumping proceedings, however, have no bearing on this dispute. The anti-dumping investigation did not involve or address the subsidy program at issue here – i.e., RSTA Article 10(1)(3) – much less the calculation of subsidy ratios. Further, that investigation had its own, separate administrative record; Korea provides no rationale for why any evidence submitted in this different proceeding would have any relevance to whether the administrative record in the *washers CVD* investigation supports the USDOC's determinations in the *washers CVD* investigation.

196. Furthermore, the portion of the Issues and Decision Memorandum that Korea points to is irrelevant, as it addresses the method of calculating cost of production for refrigerator-freezers manufactured in Mexico.[200] This analysis follows the criteria set out in Article 2 of the AD Agreement. For instance, Article 2.2.1.1 of the AD Agreement provides that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration." In other words, authorities are to determine which costs are "associated with" a product, and presumptively base their cost allocations on the books and records of the producer in question.

197. The analysis called for under the countervailing duty provisions of the GATT 1994 and SCM Agreement is very different. Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that the purpose of countervailing duties is to "offset" any subsidy "bestowed directly or indirectly upon the manufacturing, production or export" of the relevant merchandise. The question of whether and how a Member has "bestowed" a subsidy on products, and in what amounts, is a qualitatively different line of inquiry.

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[199] Issues and Decision Memorandum for the Antidumping Duty Investigation of Bottom Mount Refrigerator-Freezers from Mexico, A-201-839, March 16, 2012, at 95-96 ("Refrigerators AD I&D Memo (Mexico)") (Exhibit USA-59). Samsung cited this I&D Memo, as well as the I&D Memo from the Korean refrigerators anti-dumping investigation, in a single paragraph of its case brief, which it submitted in November 2012 – nearly two months after the record closed, and eight months after the Mexican memo was issued. Samsung Washers CVD Case Brief at 50 (Exhibit KOR-90). This was the first and only time in the washers CVD investigation that the parties relied on the cost allocation in the refrigerators anti-dumping proceedings to argue that the subsidy ratio for washers should incorporate overseas manufacturing. Although the parties argued separately that royalty payments should be incorporated in the denominator as a revenue source (an argument they have abandoned in this dispute), they did not argue that such royalties or reimbursement fees supported the incorporation of sales of goods manufactured overseas. This is an entirely new argument, asserted for the first time in this dispute.

[200] Refrigerators AD I&D Memo (Mexico) at 94-99 (Exhibit USA-59).

198. As discussed above in response to Panel Question No. 3.17, the USDOC appropriately considered the facts relating to the bestowal of the subsidy, including its structure, design, and operation. Based on those facts, the USDOC found that Korea did not bestow the RSTA Article 10(1)(3) subsidies on Samsung's overseas manufacturing. The USDOC was not required to speculate on or trace the possible benefits or knock-on effects from these subsidies that might accrue to overseas facilities.

199. Korea's contrary approach – which conflates R&D cost allocation with the bestowal of subsidies – would be particularly inappropriate here. The RSTA Article 10(1)(3) subsidies were bestowed at a different point in time than the expenses. Subsidies were conferred on Samsung in 2011, whereas the R&D expenses at issue in the Mexican anti-dumping investigation were incurred in 2010.[201] Moreover, as discussed in response to Panel Question No. 3.1, Samsung received subsidies in 2011 based on the difference between the amount of eligible expenses incurred in 2010 and the annual average of those expenses in the preceding four years. Samsung also deferred a portion of its credits to 2012, to comply with Minimum Tax requirements. And to make matters even more confusing, a large part of the subsidies received in 2011 were carried forward from 2010 – i.e, they were based on expenses incurred in 2009.

200. Finally, Korea's reliance on the Mexican subsidiary's payment of "reimbursement fees" undercuts its theory. If the Mexican subsidiary is paying its parent for the value of the R&D work carried out, then it is difficult to see how subsidies conferred on the Korean parent would "pass through" to its overseas affiliate. This confirms the distinction between the R&D activity and expenses, on the one hand, and the subsidies, on the other.

201. In sum, the payments by Samsung's Mexican subsidiary do not support, and in fact undermine Korea's theory that subsidy attribution should be based on the potential knock-on benefit or effect of R&D expenses overseas – as opposed to the bestowal of the subsidy, including its structure, design, and operation.

3.23. With reference to the USDOC's determination that the Article 10(1)(3) tax credits were provided to "boost the general national economic activities" (United States' first written submission, para. 490), would royalties/dividends/profits paid by Samsung Mexico to Samsung Korea have boosted the national economy?

202. Any benefit to the Korean economy from such royalties would have no bearing on the attribution of RSTA Article 10(1)(3) subsidies. At paragraph 490 of the U.S. first written submission, the United States highlighted the GOK's statement during the investigation that RSTA Article 10(1)(3) "aims to facilitate Korean corporations' investment in their respective research and development activities, and thus to *boost the general national economic activities* in all sectors."[202] This statement should be read in light of the structure, design, and operation of the subsidy. As discussed in response to Panel Question No. 3.17, access to RSTA Article 10(1)(3) is limited to Korean companies, based on qualifying research and human resources

[201] Refrigerators AD I&D Memo (Mexico) at 3 (Exhibit USA-59) (period of investigation is January 1, 2010 through December 31, 2010).
[202] GOK April 9, 2012 QR, Section II at 108 (emphasis supplied) (Exhibit KOR-75).

development activities occurring in Korea. Given this evidence, it was appropriate for the USDOC to view these subsidies as bestowed on domestic production.

203. Thus, there is no basis for inferring that the GOK's stated objective of "boosting" national economic activities is in any way connected to the possibility of an intra-corporate transfer from an overseas subsidiary. Nor is there anything in the structure, design, and operation of the subsidy to suggest such a connection.

3.24. At para. 41 of its oral statement, the United States refers to the USDOC's statement that there was no evidence on the USDOC's record that large companies invest more in R&D than smaller companies. Did the USDOC request any such information?

204. The issue of disproportionality in the context of large and small companies was addressed in the investigation in the course of USDOC's consideration of Samsung's "size defense." The USDOC properly investigated this issue, and found that even with full consideration of Samsung's and Korea's arguments in the investigation, the subsidy was disproportionate.

205. *First*, as discussed in response to Panel Question Nos. 3.12(iii) and 3.19, above, the GOK stated that Korean law prohibited it from disclosing information regarding individual corporations' tax returns, which would have included information on qualifying R&D investments.[203] Thus, the USDOC could not obtain information on the amounts of qualifying R&D investments in the first place, much less their relationship with company size.

206. *Second*, the GOK and Samsung did not assert their unsupported size argument until after the record had closed. The GOK and Samsung made this argument for the first time in their case briefs, which were filed on October 31 and November 2, 2012, respectively – nearly two months after the record had closed. They asserted – without explanation or evidence – that large firms inherently receive large amounts of subsidy because they "typically" invest more in R&D than smaller firms.[204]

207. Samsung and the GOK had ample opportunity to raise this theory earlier in the proceedings, but failed to do so. In response to questionnaires, Samsung asserted that the RSTA Article 10(1)(3) tax subsidy was not specific, but offered no analysis or evidence to support this assertion,[205] and failed to address specificity at all in its pre-preliminary determination comments.[206] Had Samsung or the GOK raised this theory earlier, it would have allowed both sides – petitioner and respondent – to adduce evidence and argument on this point. But once the record had closed, the USDOC was unable to solicit new evidence, and neither side requested that it re-open the record to do so.

208. Nor should the USDOC be faulted for failing to divine and pursue this speculative hypothesis on its own. As the Appellate Body observed in *US – Wheat Gluten*, investigating

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[203] *See, e.g.*, GOK April 9, 2012 QR at 110 (Exhibit KOR-75) (BCI).
[204] Samsung CVD Case Brief at 26 (Exhibit USA-58) (BCI); GOK CVD Case Brief at 12 (Exhibit USA-57) (BCI).
[205] Samsung April 9, 2012 QR at 24 (Exhibit USA-49).
[206] Samsung May 16, 2012 QR at 5-9 (Exhibit USA-52) (BCI).

authorities do not have "an open-ended and unlimited duty to investigate all available facts that might possibly be relevant."[207] Indeed, in *US – Large Civil Aircraft*, the respondent bore the burden of articulating and supporting with evidence its explanation for the disparate distribution of subsidy.[208] Although *US – Large Civil Aircraft* was an actionable subsidy case, respondents in subsidy investigations should be held to a similar standard. It is reasonable to expect interested parties in investigations to substantiate their arguments, and to do so in a timely manner.[209]

209. *Third*, even if Samsung and GOK's "size" theory were factually correct, the USDOC determined that it still could not accept this argument, because to do so would "undermine the purpose" of the disproportionality inquiry.[210] This argument would tend to favor large companies, making it less likely that subsidies conferred on them would be found specific. Members could readily design subsidy programs 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.[211] The USDOC cannot be criticized for failing to pursue evidence with respect to a theory that it viewed as legally untenable.

210. *Finally*, in its redetermination, the USDOC further addressed the parties' "size defense" by soliciting evidence concerning the distribution of subsidies among the 100 largest corporations. As discussed in response to Panel Question No. 3.12(iii), the USDOC solicited evidence concerning the aggregate distribution of subsidies among the largest recipients, by taxable income. This evidence confirmed that even among "large" companies, Samsung received overwhelmingly disproportionate amounts of subsidy.

3.25. Does the United States agree with Korea's assertion, at para. 50 of its oral statement, that "[a]ny other company that made a similar sized investment would have received the same tax credit benefit"? If not, please explain.

211. No. Korea's assertion is factually inaccurate. A company that incurs the same amount of eligible expenditures as Samsung could receive a very different amount of subsidy. As discussed in response to Panel Question No. 3.1, that company may elect to apply a different formula than Samsung. For instance, the company may choose to receive 6% of the eligible expenditures that it incurred in the tax year. By comparison, Samsung elected to take to 40% of the difference between the expenses in the tax year and the annual average over the past four years. To comply with Minimum Tax requirements, a company might also carry forward credits from previous years or defer credits to later years, in amounts that differ from Samsung.

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[207] *US – Wheat Gluten (AB)*, para. 56.
[208] *US – Large Civil Aircraft (AB)*, para. 888 (finding that the respondent did not provide "sufficient reasons supported by evidence to undermine the assessment that the granting to Boeing and Spirit of 69% of the amounts o f IRB subsidy represents an allocation at variance from what would have been expected . . . ."); *see also id.*, para. 887.
[209] *Cf. US – Hot-Rolled Steel (AB)*, para. 102 (although investigating authorities in anti-dumping proceedings cannot impose unreasonable requests, "in order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters.").
[210] Washers Final CVD I&D Memo at 37 (Exhibit KOR-77).
[211] U.S. Oral Statement at the First Panel Meeting, para. 42; U.S. First Written Submission, para. 382.

3.26. Please explain where in Article 26 program is indicated that the eligibility of the subsidy is not available to all companies regardless of location.

212. Eligibility for the RSTA Article 26 program is defined in the Presidential Enforcement Decree. Article 26(1) of the RSTA provides that tax credits are available for "an investment prescribed by the Presidential Decree."[212] In turn, Article 23(1) of the Presidential Enforcement Decree defines eligible investments as "the investment (which is only for business assets out of overcrowding control region of the Seoul Metropolitan Area) . . . for newly acquiring facilities falling under the asset for business . . . ."[213]

213. Thus, the Enforcement Decree expressly limits eligibility to investments in newly-acquired "facilities" located outside the Seoul overcrowding region. As discussed in the U.S. response to Panel Question No. 3.2, above, and in the U.S. first written submission,[214] this is precisely the kind of geographic limitation that Article 2.2 of the SCM Agreement was intended to address. By limiting access to a designated geographical region (i.e., the area outside the Seoul overcrowding region), Korea limited the subsidy program to "certain enterprises." Indeed, enterprises and industries may be "located" where facilities and investments are found. The fact that eligibility is conditioned on the location of a company's facilities within a designated region – as opposed to the location of a company's head office or other legal structure – is of no moment.

[212] RSTA Article 26 (Exhibit KOR-81).
[213] Article 23(1) of the Enforcement Decree (Exhibit KOR-81) (emphasis supplied). .
[214] U.S. First Written Submission, paras. 403-420.