PUBLIC VERSION

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

(DS464)

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

March 10, 2015

Madame Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel. The United States appreciates this opportunity to present its views on the issues in this dispute. As evidenced by the first written submissions of the parties and the third party written submissions, this dispute places before the Panel a number of important questions concerning the proper interpretation and application of the AD Agreement,[1] the SCM Agreement,[2] and the GATT 1994.[3] Resolving this dispute will require the Panel to discern the meaning of various provisions of these agreements through the application of the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU.[4]

2. In its first written submission, Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from those rules. Most troubling is Korea's invitation for the Panel to read out of the AD Agreement an entire sentence, one that reflects a finely balanced compromise reached during the Uruguay Round negotiations. Consistent with the principle of effectiveness, which the Appellate Body has recognized as one of the corollaries to the "general rule of interpretation" in the *Vienna Convention on the Law of Treaties*,[5] the second sentence of Article 2.4.2 of the AD Agreement must be interpreted in a way that gives that provision meaning. Korea's proposed interpretation would render the second sentence of Article 2.4.2 *inutile*, and thus it must be rejected.

3. Indeed, as demonstrated in the U.S. first written submission, all of Korea's proposed interpretations, when they are subjected to scrutiny, simply are not supported by the ordinary meaning of the text of the covered agreements, in context, and in light of the object and purpose of the agreements. Accordingly, all of Korea's legal claims lack merit, and the Panel should reject them.

4. The U.S. first written submission responds in great detail to Korea's claims and arguments. We will not attempt to repeat in this statement all of the arguments presented in our first written submission. We would, however, like to highlight some of the issues that we believe will be critical to the Panel's resolution of this dispute.

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

A. Zeroing Is Necessary for the Alternative, Average-to-Transaction Comparison Methodology To Have Any Effect

5. The U.S. first written submission presents a thorough discussion of the questions of "when" and "how" an investigating authority may employ the exceptional average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.[6]

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] *Agreement on Subsidies and Countervailing Measures*.
[3] *General Agreement on Tariffs and Trade 1994*.
[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.
[5] *See Japan – Alcoholic Beverages II (AB)*, p. 12; *US – Gasoline (AB)*, p. 23.
[6] *See* U.S. First Written Submission, paras. 40-264.

These are questions of first impression. While the issue of "zeroing" has been considered previously – by one Member's count, in "[n]o less than 17 disputes"[7] – neither the Appellate Body nor any panel has been presented with a dispute that actually involved a Member's application of the alternative comparison methodology set forth in the second sentence of Article 2.4.2. The Appellate Body has even explicitly stated that it "has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2."[8]

6. Accordingly, there is no truth whatsoever to Korea's suggestion that the United States has attempted to "circumvent" or "evade" the recommendations and rulings of the Dispute Settlement Body.[9] Neither is there any truth to the argument by Korea and certain of the third parties that the Appellate Body's previous findings demonstrate that zeroing is impermissible under any methodology.[10] That assertion, forcefully made by Canada, is particularly curious, given that Canada's own Canada Border Services Agency has taken the position that, despite the findings of the Appellate Body, zeroing is necessary when antidumping duties are collected because:

> [T]he elimination of zeroing would undermine the primary purpose of *SIMA* [Canada's antidumping law], which, it says, is to protect Canadian producers. Importers could import dumped goods that injure domestic producers without attracting anti-dumping duties if they also import the same goods at prices that are not dumped.[11]

In any event, the questions presented here concerning the interpretation and application of the second sentence of Article 2.4.2 of the AD Agreement are new and have not been decided previously. The Panel will need to resolve them by applying the customary rules of interpretation pursuant to Article 3.2 of the DSU.

7. Of course, even though the Appellate Body previously has made no findings with respect to the permissibility of zeroing under the alternative, average-to-transaction comparison methodology when the conditions of the second sentence of Article 2.4.2 are satisfied, the United States recognizes that a number of Appellate Body and panel reports include findings that bear on the interpretive questions before the Panel. The Panel should take into account the relevant findings in adopted panel and Appellate Body reports where it finds the reasoning in those reports persuasive.[12] The U.S. first written submission discusses many of the Appellate Body and panel findings related to zeroing and the interpretation of the second sentence of Article 2.4.2. None of those findings compels the Panel to rule against the United States. On the contrary, when understood in the context in which they were made, the logical extension of the

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[7] Brazil Third Party Written Submission, para. 1.
[8] *US – Stainless Steel (Mexico) (AB)*, para. 127. *See also US – Zeroing (Japan) (AB)*, paras. 135-136; *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.
[9] Korea First Written Submission, paras. 3 and 5.
[10] *See* Canada Third Party Written Submission, paras. 6-8.
[11] Canadian International Trade Tribunal, Appeal No. AP-2011-027, *Aluminart Products Limited v. President of Canada Border Services Agency* (19 April 2012), pp. 6-7 (Exhibit USA-32).
[12] *See Japan – Alcoholic Beverages II (AB)*, p. 14.

Appellate Body's zeroing findings is that zeroing is permissible – indeed, it is necessary – under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2.

8. The second sentence of Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."[13] The Appellate Body has found that Members must offset positive and negative comparison results when using the "normal" comparison methodologies, and must calculate an aggregate margin of dumping for an exporter for the product as a whole. However, in a situation where a pattern of significantly different export prices is observed among different purchasers, regions, or time periods, such offsetting may "mask" what has been referred to as "targeted" dumping. Unmasking such dumping requires not offsetting the lower-priced export sales with the higher-priced export sales; that is, it requires zeroing.

9. The Appellate Body has further observed that the third methodology is an "exception"[14] to the comparison methodologies that "normally" are to be used. As an exception, the third methodology, logically, *should* "lead to results that are *systematically* different"[15] from the two "normal" comparison methodologies when the conditions for its use have been met.

10. That is why, after presenting an analysis of the ordinary meaning of the text of the second sentence of Article 2.4.2, in its context, which is, of course, the foundation of any interpretive analysis under the customary rules of interpretation, the U.S. first written submission goes on at some length about what has been called the "mathematical equivalence" argument.[16] The concept of mathematical equivalence is critical to the resolution of the interpretive questions before the Panel because, if a proposed interpretation of a provision of the AD Agreement would lead to the alternative comparison methodology set forth in the second sentence of Article 2.4.2 yielding, in all cases, results that are identical to the results of the average-to-average comparison methodology, then that proposed interpretation cannot be accepted. Such an interpretation would render the second sentence of Article 2.4.2 ineffective, which would be inconsistent with the customary rules of interpretation.

11. That is precisely what would happen under Korea's proposed interpretations. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology will always yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all.

12. Japan and China (and this morning Korea) address the mathematical equivalence argument in their third party written submissions, and they suggest that the Appellate Body has

[13] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[14] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.
[15] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93 (emphasis added).
[16] *See* U.S. First Written Submission, paras. 181-241.

already rejected the mathematical equivalence argument in the past.[17] The U.S. first written submission discusses at some length the Appellate Body's consideration of the mathematical equivalence argument in previous disputes.[18] As we have demonstrated, the Appellate Body's prior consideration of the mathematical equivalence argument neither supports nor compels rejection of the mathematical equivalence argument in this dispute. The Appellate Body has never considered the mathematical equivalence argument in the context of an actual application of the average-to-transaction comparison methodology as an alternative to the "normal" average-to-average comparison methodology, nor with the benefit of record evidence underlying the challenged antidumping measure. The Appellate Body has never considered the argument in a situation in which finding that the use of zeroing is prohibited in connection with the alternative methodology would, in fact, result in mathematical equivalence, as is the case here. And, finally, the Appellate Body has never considered the mathematical equivalence argument in the context of an interpretive analysis of the *second* sentence of Article 2.4.2.

13. Japan, China, and this morning Korea further suggest that the mathematical equivalence argument must fail because it rests on particular "assumptions."[19] They identify two assumptions on which the mathematical equivalence argument is premised: first, that the same export prices are used when applying both the normal and the alternative comparison methodologies, and second, that weighted average normal value is calculated in the same manner when applying both the normal and the alternative comparison methodologies. The mathematical equivalence argument is, indeed, premised on these two assumptions, as it should be. Japan and China are incorrect, however, that those assumptions may be changed to achieve a different mathematical result, with the consequence that the mathematical equivalence argument fails.

14. The United States discusses both of these "assumptions" in the U.S. first written submission.[20] With respect to export prices, the transaction-specific export prices used in both comparison methodologies would, of course, be the same. We have explained, though, that limiting the application of the alternative, average-to-transaction methodology only to the "targeted" export sales raises at least two potential concerns. First, doing so in a way that would exclude entirely from the dumping calculation other "non-targeted" sales would be akin to what, in the U.S. first written submission, we have called "double zeroing." In that case, the value of the export sale price is removed both from the numerator and from the denominator of the dumping margin calculation, which would result in the calculation of even higher dumping margins.[21] The United States does not consider that the text of Article 2.4.2 permits excluding export prices from the dumping calculation in this way.

15. Second, another possibility that has been suggested would entail applying the alternative, average-to-transaction comparison methodology to the "targeted" sales while applying the "normal" average-to-average comparison methodology to the remaining sales, and then combining the results, with any negative results offsetting positive results, to determine the

[17] *See* Japan Third Party Written Submission, paras. 19-23; China Third Party Written Submission, paras. 89-92.
[18] *See* U.S. First Written Submission, paras. 216-241.
[19] Japan Third Party Written Submission, para. 20; China Third Party Written Submission, para. 89.
[20] *See* U.S. First Written Submission, paras. 164-166 (normal value assumption); 226-240 (export price assumption).
[21] *See* U.S. First Written Submission, para. 230.

overall, aggregate, margin of dumping. As demonstrated in the U.S. first written submission, however, this would also lead to a result that is mathematically equivalent to the application of the average-to-average comparison methodology to all export sales.[22] Thus, the identification of an assumption about export prices is no answer to the mathematical equivalence argument.

16. Likewise, identifying an assumption about the calculation of normal value does not mean that the mathematical equivalence argument fails. Nothing in the text of Article 2.4.2 suggests that the "weighted average normal value" described in the first sentence of Article 2.4.2 is any different from the "normal value established on a weighted average basis" described in the second sentence of Article 2.4.2. To the contrary, these phrases are almost identical in form and convey the same meaning based on their ordinary meaning, suggesting that they should be understood to refer to the same concept. Accordingly, there is no reason why a weighted average normal value would be calculated any differently when applying the average-to-average comparison methodology pursuant to the first sentence of Article 2.4.2 and when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2.

17. Japan and China emphasize that "different temporal bases *may* be used to calculate average normal value."[23] For example, an investigating authority might use a period-wide average normal value on the one hand and multiple, monthly average normal values on the other. Japan and China suggest that the effect would be that the alternative, average-to-transaction comparison methodology would not necessarily yield a result that is mathematically equivalent to the result of the average-to-average comparison methodology. Neither Japan nor China, however, explains *why* manipulation or adjustment of the calculation of normal value, which is based on sales prices in the *home* market, would be appropriate to address a potential issue where there is a pattern of prices that differ significantly in the *export* market. The lower-price *export* sales are "masked" by other higher-price *export* sales. How would calculating *normal value* differently help "unmask targeted dumping"?

18. Changing the basis for the normal value *might* result in somewhat different outcomes. However, the actual outcome in any given situation would be unpredictable and dependent upon the mix of home market transactions that are used as the basis for the multiple normal values. But how would getting an unpredictably different mathematical result by using different *normal values* address the concern about a pattern of *export prices* that differ significantly among different purchasers, regions, or time periods? China and Japan offer no answers to these questions in their third party written submissions, because these questions appear to have no answers. Logically, using different normal values would not help "unmask targeted dumping" at all, and the identification of the normal value assumption is no response to the mathematical equivalence argument.

19. In sum, the objections to the mathematical equivalence argument offered by the third parties are not well founded, and no Member has provided an alternative understanding of the second sentence of Article 2.4.2 that gives meaning to that provision without using zeroing. We

[22] *See* U.S. First Written Submission, paras. 231-240.
[23] China Third Party Written Submission, para. 91 (emphasis in original); *see also* Japan Third Party Written Submission, paras. 22-23.

are aware of at least two Members – Australia[24] and the European Union[25] – that have come to the same conclusion as the United States on the question of mathematical equivalence and the use of zeroing in connection with addressing "targeted" dumping. We further note that it even appears that the economist to whose work Japan makes reference in its third party written submission agrees that "[t]he average-to-average and average-to-transaction method would result in the same duty were it not for the use of zeroing."[26]

20. As a closing comment on zeroing, we would emphasize the caution exercised by the Appellate Body in previous disputes, and the carefully limited scope of the Appellate Body's zeroing findings. For example, Korea argues that the Appellate Body previously found that zeroing is inconsistent with Article 2.4 of the AD Agreement, because it purportedly is not consistent with the obligation to make a "fair comparison." Thus, Korea contends, zeroing must be impermissible when applying the alternative, average-to-transaction comparison methodology. However, locating a prohibition on zeroing in the term "fair comparison" in Article 2.4 would be very troublesome, for the reasons we have described relating to mathematical equivalence, and because of the exceptional nature of the alternative, average-to-transaction comparison methodology. That is why, unsurprisingly, the Appellate Body has not gone nearly as far as Korea suggests when it has made findings under Article 2.4.

21. If the Appellate Body had found that the prohibition on zeroing flows from Article 2.4 of the AD Agreement, it is unlikely that the Appellate Body would have made the observation it did in *US – Softwood Lumber V (Article 21.5 – Canada)*. There, the Appellate Body said that "the United States' 'mathematical equivalence' argument assumes that zeroing is prohibited under the methodology set out in the second sentence of Article 2.4.2. The permissibility of zeroing under the weighted average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is not before us in this appeal, nor have we examined it in previous cases."[27]

22. The Appellate Body had long before discussed the "fair comparison" obligation in connection with the use of zeroing when applying the average-to-average comparison methodology – in *EC – Bed Linens*[28] – and even discussed "fair comparison" in relation to the transaction-to-transaction comparison methodology in the *US – Softwood Lumber V (Article 21.5 – Canada)* Appellate Body report itself.[29] The Appellate Body did so as part of contextual analyses of Article 2.4.2 of the AD Agreement. The Appellate Body has never suggested that Article 2.4 is itself the source of any general prohibition on zeroing. The Appellate Body has

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[24] *See* Australian Government, Anti-Dumping Commission, *Statement of Essential Facts No. 219: Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* (18 September 2014), p. 49 (Exhibit USA-33), *affirmed in Anti-Dumping Notice No. 2014/132: Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* (10 December 2014) (Exhibit USA-34).

[25] Council of the European Union, *Council Implementing Regulation No. 78/2013*, of 17 January 2013, *imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain tube and pipe fittings of iron or steel originating in Russia and Turkey*, para. 31(Exhibit USA-35).

[26] Exhibit JPN-3, p. 17.

[27] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.

[28] *See, e.g., EC – Bed Linens (AB)*, paras. 55 and 59.

[29] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 138-140.

been far more careful than that, and Korea's overbroad reading of the past Appellate Body reports should be rejected.

B. If Application of the Alternative, Average-to-Transaction Comparison Methodology Is Limited Only to Lower-Priced Sales, then the Exceptional Methodology Would Have No Effect

23. Related to Korea's zeroing claims is Korea's claim that Commerce acted inconsistently with Article 2.4.2 of the AD Agreement by "apply[ing] the [average-to-transaction] comparison methodology to all of LG's and Samsung's sales, not merely to those transactions which it found to constitute a pattern of export prices that differed among purchasers, regions and periods of time."[30] This claim is related to zeroing because, if zeroing is prohibited, then it does not matter whether the average-to-transaction comparison methodology is applied to all or just some export sales. If zeroing is prohibited, then, after the intermediate calculations are aggregated, the mathematical result will be the same as it would be if the "normal" average-to-average comparison methodology had been used.

24. Assuming that zeroing is permissible, and that it is permitted because it is necessary to give effect to the exception in the second sentence of Article 2.4.2 of the AD Agreement, then it must also be permissible to apply the average-to-transaction comparison methodology not only to the export sales that are at significantly lower prices, but also to the higher-priced export sales that may "mask" the dumping evidenced by the lower-priced export sales.

25. "Masked" or "targeted" dumping involves both export sales priced below normal value, which are evidence of dumping, as well as export sales priced above normal value, which may mask such dumping. Such "targeted" dumping is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced export sales, and by ensuring that the higher-priced export sales do not offset dumping that properly should be evidenced by the lower-priced export sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

26. We recall that the "pattern" referred to in Article 2.4.2 of the AD Agreement is "a pattern of export prices which differ significantly *among* different purchasers, regions or time periods" (emphasis added). Accordingly, when analyzing export prices to purchasers, for example, any "pattern" must transcend at least two purchasers. The "pattern" is not exclusively the lower-priced export sales to one particular purchaser that are observed, but the difference or differences between export prices to one purchaser and export prices to another purchaser, or the differences among multiple purchasers.

27. In *US – Zeroing (Japan)*, when the Appellate Body discussed the second sentence of Article 2.4.2 in connection with its review of the panel's contextual analysis of the first sentence of Article 2.4.2, the Appellate Body did not definitively find that an investigating authority's application of the average-to-transaction comparison methodology must be limited only to those

[30] Korea First Written Submission, para. 168.

transactions found to have been priced significantly lower than other transactions.[31] Logically, the Appellate Body would not have made such a finding, because that would have been at odds with the Appellate Body's recognition that the alternative, average-to-transaction comparison methodology provides Members a means to "unmask targeted dumping."

28. Korea's proposed interpretation would once again deprive the second sentence of Article 2.4.2 of any effect, and must therefore be rejected.

C. The "Pattern Clause"

29. Turning to what we are calling the "pattern clause" of the second sentence of Article 2.4.2, the U.S. first written submission presents an interpretive analysis that is in accordance with the customary rules of interpretation.[32] The conclusion that flows from such an analysis is that the "pattern clause" requires a finding of a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent among different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically. As we have demonstrated, that is precisely what the U.S. Department of Commerce ("Commerce") did in the washers antidumping investigation.[33]

30. Korea urges that, because of the asserted qualitative connotations of the terms "pattern" and "significantly," an analysis pursuant to the "pattern clause" must take into account the qualitative, in addition to the quantitative significance of any observed differences. It is evident from Korea's arguments, though, that Korea means that the differences in export prices must "reflect what reasonably can be inferred to be targeting conduct."[34] However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. That latter question is not germane to an application of the "pattern clause" or to a dumping analysis generally. Lower-price export sales, if they are below normal value, would still constitute evidence supporting an affirmative finding of dumping, regardless of the intention of the exporter. The "reason" for the low prices changes nothing.

31. To be clear, the United States does not take the view that the term "significantly" does not have a qualitative component. However, any qualitative analysis of the significance of differences in export prices would properly focus on how any observed difference in prices is significant in the context of the particular market. Reasons or explanations that interested parties might suggest to explain why an exporter priced differently to certain purchasers, regions, or time periods, but which are not related to unique factors of the market, would not be relevant to such a qualitative analysis.

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[31] *See US – Zeroing (Japan) (AB)*, para. 135 (emphasis added); *see also* U.S. First Written Submission, paras. 145-153.
[32] U.S. First Written Submission, paras. 55-89.
[33] U.S. First Written Submission, paras. 90-99.
[34] Korea First Written Submission, para. 133.

D. The "Explanation Clause"

32. As it does with the "pattern clause," the U.S. first written submission presents an interpretive analysis of the "explanation clause" in the second sentence of Article 2.4.2.[35] When interpreted in accordance with the customary rules of interpretation, the "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear the reason that it is not possible in the dumping calculation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average or the transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

33. In the washers antidumping investigation, Commerce considered whether observed price differences could be taken into account using the average-to-average comparison methodology. Commerce evaluated the difference between what the weighted-average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. Commerce concluded that the observed price differences could not be taken into account using the average-to-average method. Support for this conclusion is found in the fact that there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method.

34. Consistent with the requirements of the "explanation clause," Commerce provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Accordingly, the "explanation" that Commerce provided in the washers antidumping investigation is not inconsistent with Article 2.4.2 of the AD Agreement.

E. Korea's "As Such" Claims Related to the "Differential Pricing Methodology"

35. As a final comment on Korea's claims under the AD Agreement, the United States notes that a number of third parties discussed in their third party written submissions what Korea describes as the "differential pricing methodology." As demonstrated in the U.S. first written submission, however, Korea has failed to adduce evidence sufficient to support its claims regarding the alleged "differential pricing methodology."[36] 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

[35] U.S. First Written Submission, paras. 100-124.
[36] U.S. First Written Submission, paras. 269-319.

speculative complaints about the operation of the so-called "differential pricing methodology." There is nowhere on the record before the Panel evidence from even one final determination showing in detail an actual application of the "differential pricing methodology."

36. Accordingly, while the United States certainly does not agree that there is any validity to Korea's claims, or to the third parties' observations, with respect to the so-called "differential pricing methodology," we continue to consider that Korea has not made a *prima facie* case of inconsistency, and thus the United States is not required to respond to the substance of Korea's unsupported claims.

II. KOREA'S CLAIMS UNDER THE SCM AGREEMENT AND GATT 1994 ARE WITHOUT MERIT

37. Korea's challenge to Commerce's countervailing duty determination is equally without merit. Korea challenges Commerce's findings with respect to two subsidy programs: RSTA Article 10(1)(3), which provides tax credits to companies for investments in "research and human resources development," and RSTA Article 26 (entitled "Tax Deduction for Facilities Investments"), which provides tax credits for eligible investments in facilities. Korea does not dispute that Samsung received massive amounts of subsidy under these programs in 2011 – a total of approximately KRW[[ ]], equivalent to USD[[ ]].[37]

38. But contrary to the rhetoric in Korea's submissions, Commerce's findings were thoughtful, reasoned, and grounded in the evidence. Commerce circulated multiple rounds of questionnaires, reviewed extensive written submissions from the parties, and conducted a hearing – generating an administrative record that runs thousands of pages long. Both Korea and Samsung actively participated in these proceedings and had ample opportunity to offer arguments and evidence. Commerce, in turn, produced lengthy written determinations that expressly addressed this evidence and the parties' arguments and concerns. Out of approximately seventeen programs challenged in the petition, Commerce found that only four conferred countervailable subsidies.[38] And the overall subsidy rate calculated for Samsung was a mere 1.85 percent.[39] These are hardly the acts of an investigating authority bent on delivering results-oriented findings and "artificially inflating" subsidy ratios, as Korea suggests.

39. Instead, it is Korea who has pushed the envelope in this dispute, offering strained, results-driven interpretations of the relevant obligations and Appellate Body guidance, while presenting a distorted picture of the factual record. The Panel should decline Korea's invitation to import new obligations into the SCM Agreement or GATT 1994, and to substitute its own assessment of the facts for that of the investigating authority.

[37] Final Samsung CVD Calculation Memorandum, Attachments 6, 9 (Exhibit USA-26) (BCI).
[38] Washers Final CVD I&D Memo at 8-24 (Exhibit KOR-77).
[39] Washers CVD Final Determination, 77 Fed. Reg. at 75,977 (Exhibit KOR-2).

A. The Department of Commerce's Findings on Disproportionality Were Reasoned and Adequate, and Supported by Positive Evidence

40. Turning to Korea's first claim, the evidence amply supports Commerce's determination that subsidies conferred on Samsung under RSTA 10(1)(3) were *de facto* specific. Samsung received [[ ]] percent of all subsidies distributed in 2010, out of nearly 12,000 participants. By comparison, the average recipient obtained only [[ ]] percent.[40] To put this in context, we could picture the amount of subsidy received by the average recipient as about the length of a car. It would take [[ ]] of these cars, stacked end-to-end, to equal what Samsung alone received. That would stretch about [[ ]] meters long, or [[ ]] feet – more than [[ ]]. Commerce found that this disparity was contrary to what would be expected, and indicated disproportionality – an approach that is fully consistent with the text of Article 2.1(c) of the SCM Agreement and the Appellate Body's findings in the *US – Large Civil Aircraft* dispute.

41. Korea's primary argument – i.e., its "size" defense – has no basis in law or fact. The suggestion is that subsidies conferred on Samsung should be treated as non-specific by virtue of the company's size. In its determination, Commerce found the argument that "large companies by virtue of their success, size, or revenue, naturally invest more in R&D than other companies is speculative, and there is no information on the record supporting such conjecture."[41] Indeed, LG is another "large company," but received only [[ ]] of the amount of subsidy received by Samsung.[42]

42. Commerce further observed that, even if Samsung's size argument were factually accurate, it would still not apply this standard because to do so would "undermine the purpose" of the disproportionality inquiry.[43] The 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. Yet, on Korea's theory, these measures would evade subsidy disciplines.

43. Korea has submitted a copy of a redetermination that the Department of Commerce conducted pursuant to remand from a domestic court. While that redetermination occurred well after this Panel was established, it nonetheless further supports the conclusion that Commerce's specificity findings were not in error. In its redetermination, Commerce issued questionnaires and solicited briefing from the parties with respect to the size of recipients. The results were striking. Samsung received [[ ]] percent of all credits claimed by the 100 largest companies participating in the program, and [[ ]] percent of the combined credits claimed by the other 99 largest recipients.[44] And Samsung received a [[ ]] percent reduction in its tax liability to Korea – more than [[ ]] times greater than the average tax reduction received by the other 99

[40] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26)(BCI).
[41] Washers Final CVD I&D Memo at 37 (Exhibit KOR-77).
[42] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[43] Washers Final CVD I&D Memo at 37 (Exhibit KOR-77).
[44] Washers CVD Redetermination, pp. 10-11 (Exhibit KOR-44) (BCI).

largest companies.[45] In other words, even among other large companies, Samsung's use of the program was overwhelmingly disproportionate.

B. Subsidies Conferred Under RSTA Article 26 are Regionally Specific

44. Equally, there is no basis for Korea's assertion that approximately KRW[[ ]] in facilities subsidies received under RSTA Article 26 (equivalent to USD[[ ]]) should avoid scrutiny under the SCM Agreement. Eligibility is expressly limited to investments located in a designated geographic region – the area falling outside the Seoul overcrowding area. RSTA Article 26 subsidies are thus regionally specific under Article 2.2 of the SCM Agreement.

45. Korea's claim rests on legal theories that have no grounding in the text of the SCM Agreement, and have been repeatedly rejected by WTO panels. For instance, Korea argues that Article 2.2 requires two layers of limitation. According to Korea, to be regionally specific, a subsidy program must be limited first, to a designated geographic region, and second to "certain enterprises" within that region. Yet this "double basis" theory has no grounding in the text of Article 2.2. Indeed, as the panel observed in *EC – Large Civil Aircraft*, this argument would render Article 2.2 redundant.[46]

46. Echoing its "size defense," Korea falls back on the argument that subsidies limited to large designated regions are not regionally specific. According to Korea, because RSTA Article 26 subsidies are available within a large region (*i.e.*, the area outside the Seoul overcrowding region) that accounts for 98 percent of Korean territory, the Panel should effectively round up to 100 percent, and treat the subsidies as non-specific. But Article 2.2 does not privilege or exempt certain categories of region. The panel confirmed in *US – Antidumping and Countervailing Duties (China)* that the term "designated geographical region" can encompass "<u>any</u> identified tract of land within the jurisdiction of a granting authority."[47]

47. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large. And it would be particularly inappropriate to overlook such geographic limitations here. The area excluded from eligibility includes Seoul, the capital of Korea and site of a large proportion of Korea's economy and population.[48]

C. Commerce Appropriately Found that RSTA Subsidies Were Not "Tied" to Particular Products, and Calculated the Subsidy Ratio Accordingly

48. Likewise, there is no basis for Korea's criticism of the ratios calculated with respect to subsidies received by Samsung under RSTA Articles 10(1)(3) and 26. Commerce appropriately found that these subsidies were bestowed on Samsung on an "untied" basis, and divided the total amount of benefit over the adjusted total sales of all products manufactured in Korea.[49]

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[45] Washers CVD Redetermination, pp. 11-14 (Exhibit KOR-44) (BCI).
[46] *EC – Large Civil Aircraft (Panel)*, paras. 7.1224-7.1225; see U.S. First Written Submission, paras. 409-416.
[47] *US – Antidumping and Countervailing Measures (China) (Panel)*, para. 9.140 (emphasis supplied).
[48] U.S. First Written Submission, paras. 426-430.
[49] Washers Final CVD I&D Memo at 41-42 (Exhibit KOR-77).

49. Korea disagrees, and asserts that subsidies should have been attributed based on a novel variation of the "tied" approach to subsidy attribution. According to Korea, the "tie" should be based on an *ex post* forensic investigation of the expenses from which tax credits were ultimately derived. On this theory – which Korea apparently now disavows, based on its oral statement – attribution would then be based on how the subsidies are "used" – here, according to Korea, by "retroactively reducing" past expenses.[50] Korea would carve up the numerator in the subsidy ratio to reflect only those qualifying expenses connected with the Digital Appliances business unit, and then narrow the denominator to reflect only sales from that business unit.[51]

50. Korea attempts to ground its preferred approach in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. These provisions do not support Korea's arguments, but instead undermine them because they do not specify particular attribution methodologies, much less Korea's. Instead, they fix a quantitative ceiling on the amount of duties, which cannot exceed the "amount of the subsidy found to exist." And they confirm that the subsidy must have been "bestowed", directly or indirectly, on the manufacture, production, or export of the imported product. Within these parameters, which support the U.S. approach, these provisions cannot reasonably be construed to dictate specific methodologies for calculating subsidy ratios.

51. Absent rules on applying specific methodologies, an investigating authority must determine an appropriate approach. As the panel observed in *Mexico – Olive Oil*, "in general, unless a specific procedure is set forth in the [SCM] Agreement the precise procedures for how investigating authorities will implement these obligations are left to the Member to decide."[52]

52. As explained in the U.S. first written submission,[53] an investigating authority may derive guidance from certain provisions. As noted above, an investigating authority is charged with determining the amount of the subsidy bestowed or granted, directly or indirectly, on the manufacture, sale, or export of a product. Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that in determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts surrounding the Member's "bestowal" of the subsidy will be a key consideration.

53. Annex IV of the SCM Agreement indicates that both "tied" and "untied" approaches to attribution are, in principle, compatible with the SCM Agreement. But Annex IV does not specify a test for determining when a "tied" or "untied" approach would be more appropriate.

54. Here, the Informal Group of Experts ("IGE") report to the Committee on Subsidies and Countervailing Measures is instructive, although not binding. As discussed in the report, Annex IV, paragraph 3 of the SCM Agreement does not explain when it is appropriate to view a subsidy as "tied" to a particular product for purposes of calculating the *ad valorem* subsidization rate, which informs the serious prejudice analysis under Article 6.1.[54] The IGE report recommended that, while other approaches are possible, "a subsidy [should] be deemed to be tied to a product if

[50] Korea First Written Submission, paras. 297-303.
[51] Korea First Written Submission, paras. 288-290.
[52] *Mexico – Olive Oil (Panel)*, para. 7.26 n.63.
[53] U.S. First Written Submission, paras. 445-462.
[54] IGE Report, para. 62 (Exhibit USA-29).

its intended use is known to the giver, and so acknowledged, prior to or concurrent with the subsidy's bestowal."[55] In other words, a tie would exist if the intended product-specific use of a subsidy was known and acknowledged at the time of bestowal, and thus a basis of the Member's bestowal of that subsidy. (At this point, I would like to depart from my prepared remarks to briefly address Korea's assertion at paragraph 70 of its oral statement that the United States "disingenuously omitted" an aspect of the IGE report in its first written submission. At paragraph 454 of its first written submission, after setting out the IGE's recommended approach, the United States pointed out that "[t]he IGE also considered that other approaches were possible." We made this point expressly. There was no "disingenuous omission.") Reflecting this approach, the IGE recommended that research and development subsidies be presumptively treated as "untied," given the "future orientation of research and development activities."[56]

55. Commerce's determination was consistent with these sources, and grounded in the facts relating to the bestowal of subsidies on Samsung. Neither the RSTA legislation nor Samsung's tax return suggested any product-specific tie, and Korea never acknowledged any product-specific use of RSTA subsidies. In fact, Samsung stated on the record of the investigation that its "tax return did not specify the merchandise for which this reduction was to be provided."[57] As Commerce found, the subsidies "reduce Samsung's overall tax burden," and were bestowed on the company's entire domestic operations.[58] Commerce's determination was reasoned and adequate, and is supported by positive evidence.

56. Korea nonetheless argues that Commerce should have adopted a novel variation of the "tied" approach to attribution, based on the "retroactive" use and effect of the subsidy. And Korea criticizes Commerce for declining to accept and review accounting records that it says would have helped Commerce implement this approach by quantifying the amount of underlying expenses with some connection to washers.[59] These arguments fail, for several reasons.

57. First, Korea has offered no basis in the SCM Agreement to consider that investigating authorities are compelled to calculate subsidy ratios based on how a portion of the benefit is "used." Rather, the texts reviewed above suggest that an investigating authority (or panel in a WTO action) instead may appropriately calculate subsidy ratios based on how the subsidies are "bestowed" on products. Tellingly, the term "use" does not appear in Article 19.4 of the SCM Agreement or Article VI:3 of the GATT 1994.

58. Second, the structure, architecture, and design of the RSTA subsidy programs do not reflect a product-specific tie. It is useful to consider the mechanism by which subsidies were conferred on Samsung:

- First, all eligible expenses were added together. Samsung combined all research and human resources development expenses and facilities expenses incurred in the previous

[55] IGE Report, Recommendation 6, para. 10 (Exhibit USA-29).
[56] IGE Report, Recommendation 20, para. 2 (Exhibit USA-29).
[57] Samsung April 9, 2012 QR at Ex. 24, p. 2 (Exhibit KOR-72).
[58] Washers Final CVD I&D Memo, p. 42 (Exhibit KOR-77) (emphasis supplied).
[59] Korea first written submission, paras. 291-303.

tax year for its entire domestic operations, *without breakdown by product*, and listed these totals in its tax return.

- Second, Samsung applied formulas to these aggregate expense figures. With respect to RSTA Article 10(1)(3), Samsung calculated tax credits by calculating 40 percent of the difference between the *aggregate* research and human resources development expenses incurred in the previous tax year and the *annual average of such expenses* over the previous four years.[60] Samsung calculated its RSTA Article 26 tax credits by taking 7 percent of the *aggregate* facilities expenses incurred in the previous tax year.[61]

- Third, Samsung further reduced and deferred tax credits for Samsung *at the corporate level* into future years to comply with Minimum Tax requirements.[62]

59. Here, Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on formulas that related to *aggregate* and *average* expenses for the *corporation as a whole*. This is fundamental. That is, the credits ultimately earned related to the activities and performance of the entire corporate entity and not to particular products. It is not meaningful to attempt to trace a given KRW of tax credit received to any KRW of underlying expense, much less to a particular product. Thus, Commerce did not err in treating these credits as untied.

60. Third, even aside from the legal flaws in Korea's argument, it also rests on a flawed factual premise. RSTA tax credits do not "retroactively" reduce expenses, much less those related to a particular product. The subsidy was bestowed when the tax authorities processed the tax return, the point at which a financial contribution and benefit were conferred. Until that point, no "subsidy" existed within the meaning of Article 1 of the SCM Agreement. Until that point, Samsung could not have "used" any tax credit subsidy. It certainly could not have "used" such a subsidy when it originally incurred underlying expenses, prior to filing its tax return (expenses whose alleged product-specific nexus was at all times unknown to the granting authority).

61. Finally, the documents that Korea refers to have nothing to do with the "bestowal" of the subsidy. It is undisputed that the granting authority, Korea, was not presented with these documents when it bestowed the tax credits. Indeed, Korea had no knowledge of any expenditure allegedly incurred in connection with a particular product, and did not intend to bestow subsidies in connection with a particular product. Commerce cannot be criticized for not reviewing documents that were irrelevant and that Korea – the subsidizing Member – never saw.

62. And even under Korea's theory, these documents would not enable Commerce to derive a meaningful subsidy ratio that carves out expenses and sales information for washers – as opposed to the entire Digital Appliances unit, which includes a range of product lines, such as refrigerators. Korea only suggests that the documents would confirm the business unit totals

[60] Korea First Written Submission, paras. 288-303.
[61] Korea First Written Submission, paras. 288-303.
[62] Korea First Written Submission, paras. 288-303.

already on the record – not that they would enable a more refined analysis.[63] If one were (hypothetically) able to disaggregate both the expenses and sales data for washers, as opposed to the business unit as a whole, this could yield a very different overall ratio from that which might apply at the business unit level. But even Korea is unable to undertake the kind of forensic analysis that it suggests is needed for a "retroactive" approach.

63. All of this confirms that Korea's preferred approach is not a more "precise" way to attribute subsidies. Commerce was not legally or logically required to attribute subsidies on a "tied" basis, along the lines asserted by Korea. Any attempt to tie tax credits to particular products would have been inconsistent with the nature of the bestowal of the subsidies in this case, and would not generate a meaningful outcome. It was entirely appropriate for Commerce to determine that the subsidies were bestowed on Samsung's domestic operations as a whole, and attribute them accordingly.

D. Korea's Overseas Effects Theory Has No Basis In Law or Fact

64. Korea's final attempt to impugn Commerce's attribution methodology fares no better than its earlier attempts. Korea argues that the denominator in the subsidy ratio for RSTA 10(1)(3) should have included sales of merchandise produced outside Korea – even though the subsidy is only available for activity conducted within Korea, and the RSTA legislation declares that it is intended to benefit *national* economic activities.

65. This argument has no legal basis. Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement do not dictate specific methodologies for calculating subsidy ratios, much less require that these ratios incorporate overseas manufacturing. The language of these provisions focuses on *domestic* production. For instance, 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."[64] Indeed, 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.

66. Consistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, Commerce attributed subsidies based on the way in which they were bestowed on Samsung. Although Korea complains that Commerce's determination simply rested on a presumption, this presumption had no bearing on the outcome, as the facts amply confirmed that the subsidy was not bestowed on overseas production. Commerce found that there is nothing in the RSTA legislation or tax return that would suggest an intent to benefit overseas manufacturing. Eligibility is limited to expenses incurred in Korea and, as Korea stated in its questionnaire responses, the objective of RSTA Article 10(1)(3) is to benefit "national economic activities." Accordingly, Commerce divided the amount of the tax credits received (numerator) by the sales value attributable to domestic production (denominator). There is no "matching" problem here.

67. Korea argues that Commerce instead should have calculated the subsidy ratio based on the possible knock-on effects of subsidies on overseas manufacturing. But it is unclear why this

[63] Korea First Written Submission, paras. 288-303.
[64] Emphasis supplied.

effects-based investigation is required to ensure that the elements in the numerator "match" those in the denominator. An effects-based approach is not rooted in the bestowal of the subsidy, and would conflate the calculation of subsidy ratios with the separate injury analysis called for under Article 15 of the SCM Agreement.

68. Korea's proposed effects-based inquiry would also impose a considerable administrative burden on investigating authorities, with no apparent advantage. Instead of simply calculating the "amount of the subsidy," authorities would be required to launch a qualitatively different line of investigation, centering on the possible spill-over effects of a subsidy outside the jurisdiction of the granting authority. By implication, this would entail a jurisdiction-by-jurisdiction inquiry into how a subsidy affects production across the globe. This task is particularly challenging given the differing legal, tax, and other regulations applicable to overseas operations; complexities in how companies structure their overseas and domestic operations; and the fact that effects may not manifest until years after a subsidy is conferred. A company's overseas operations may even receive subsidies from other Members, further complicating the effects analysis. The bigger the multinational recipient, the more onerous the investigating authority's task would be.

69. Needless to say, neither the Appellate Body nor any WTO panel has ever imposed the requirement that Korea suggests. And there is no basis for disturbing Commerce's considered factual determination that, in this case, subsidies were bestowed on domestic operations.

70. It is significant that Korea does not challenge Commerce's attribution of RSTA Article 26 facilities subsidies to domestic production. Korea asserts that "R&D" subsidies are different, and that they "normally" benefit overseas production.[65] (Korea makes no mention of the "human resources development" subsidies that also form an integral part of RSTA 10(1)(3), or indicate whether these human resources development subsidies benefit overseas operations.) This argument has no basis in the bestowal of the subsidy. But even on a purely effects-based reasoning, Korea's argument is unsupported and untenable. Authorities are not required to presume that R&D subsidies affect overseas manufacturing for attribution purposes. And Korea fails to offer any credible evidence to support this sweeping assertion. Indeed, the effects of R&D subsidies are particularly difficult to trace, and may not manifest themselves for years, much less in overseas operations.

III. CONCLUSION

71. As we have demonstrated in the U.S. first written submission and again this morning, Korea's claims are without merit, and the United States respectfully requests that the Panel reject them.

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

[65] Korea First Written Submission, para. 313.