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

(DS464)

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. This dispute presents novel questions of legal interpretation that have not previously been considered by the Appellate Body or any WTO panel. In its first written submission, Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from the customary rules of interpretation of public international law. The Panel should find that all of Korea's proposed interpretations of the covered agreements simply are not supported by the ordinary meaning of text of those agreements, in context, and in light of the object and purpose of the agreements. Accordingly, all of Korea's legal claims lack merit, and should be rejected.

II. RULES OF INTERPRETATION, STANDARD OF REVIEW, AND BURDEN OF PROOF

2. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination." It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Accordingly, Korea, as the complaining party, must establish a *prima facie* case before the United States, as the defending party, has the burden of showing consistency with that provision.

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

3. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement are questions of first impression for the Panel. 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." Through its "as applied" and "as such" challenges in this dispute, Korea seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement. The Panel should not countenance Korea's efforts in this regard.

Korea's "As Applied" Claims Related to the Washers Antidumping Investigation

4. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

5. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, *should* "lead to results that are systematically different" from the two "normal" comparison methodologies when the conditions for its use have been met.

The "Pattern Clause"

6. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

7. Korea argues that, because of the qualitative connotations of the terms "pattern" and "significantly," the differences in export prices "must not be the result of some random, or exogenous cause, but in fact reflect what reasonably can be inferred to be targeting conduct." 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." Additionally, Korea's reasoning is unsound. "'[L]ow' prices of sales," if they are below normal value, still constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. The "reason" for the low prices changes nothing.

8. Korea argues that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the washers antidumping investigation because it "evaluated whether the prerequisites for invoking [the alternative comparison methodology] had been met exclusively through the use of a computational analysis of the difference in exporters' prices." The USDOC was not obligated to examine *why* there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 of the AD Agreement by not doing so.

9. In the washers antidumping investigation, the USDOC applied a two-part test – the *Nails* test – to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed. In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by Samsung and LG. As reflected in the discussion in the final issues and decision memorandum, the USDOC undertook a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. In addition to explaining its analytical approach, the USDOC addressed numerous arguments raised by interested parties concerning the methodology applied in the

examination of the existence of a pattern of export prices. Accordingly, the USDOC did not act inconsistently with the requirements of the "pattern clause" in Article 2.4.2.

The "Explanation Clause"

10. The second condition in the second sentence of Article 2.4.2, the "explanation clause," provides that an investigating authority may utilize the alternative comparison methodology only "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Since an investigating authority may choose between the average-to-average and transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss the both the average-to-average and transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

11. In the washers antidumping investigation, the USDOC considered whether observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC 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. The USDOC concluded that the average-to-average method does not take into account such price differences because 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. The USDOC 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 the USDOC provided in the washers antidumping investigation is not inconsistent with Article 2.4.2.

Application of the Average-to-Transaction Comparison Methodology to All Sales

12. Korea's claim that the USDOC acted inconsistently with Article 2.4.2 by "apply[ing] the [average-to-transaction] comparison methodology to <u>all</u> 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" lacks merit. When the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is constrained as Korea proposes. The Appellate Body did not definitively declare in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions.

13. Korea's proposed interpretation of Article 2.4.2 is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted

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

Zeroing in Connection with the Average-to-Transaction Comparison Methodology

14. Korea's claims that the USDOC acted inconsistently with Articles 2.4.2 and 2.4 of the AD Agreement by using zeroing in connection with the average-to-transaction comparison methodology are without merit. Prior Appellate Body reports are not "dispositive of the question of whether zeroing is permitted." The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met.

15. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes. That the average-to-transaction comparison methodology is an exception to the comparison methodologies, and that it can be used to "unmask targeted dumping" is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law, in particular the "principle of effectiveness."

16. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results. This is true because, for both methodologies, all of the normal value and export price data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. Those mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. Mathematical equivalence can be demonstrated using hypothetical examples, but the problem is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the washers antidumping investigation, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes, but the factual situations of those disputes can be

distinguished from the factual situation here, and the Appellate Body's prior consideration of the argument neither supports nor compels rejection of the argument in this dispute.

17. The meaning of the second sentence of Article 2.4.2 can be confirmed through recourse to documents from the negotiating history of the AD Agreement, which reflect that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked and that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

18. Korea also claims that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4. Korea overstates the Appellate Body's findings in previous disputes related to zeroing and Article 2.4. The Appellate Body has not found that zeroing breaches Article 2.4 without having first found a breach of another provision. The Panel should recognize the limited nature and application of the Appellate Body's previous findings. Furthermore, there is no basis for finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is not "fair." It is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased.

Korea's "As Such" Claims Related to Zeroing

19. Korea's "as such" claims related to zeroing rely on the same arguments that Korea advances in support of its "as applied" claims. For the reasons given above, those arguments are without merit. Korea's claims under Articles 1, 2.1, and 9.3 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 are dependant upon or consequential of its claims under Article 2.4.2 and 2.4, and thus also should be rejected.

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

20. Korea seeks to "establish that the differential pricing methodology is a measure challengeable in WTO dispute settlement, 'as such'." Korea's effort fails. The evidence Korea adduces to support its claim is insufficient. Korea is inviting the Panel, contrary to the admonition of the Appellate Body, simply to divine the existence of a measure in the abstract on the basis of a string of cases, or repeated action. The Panel should decline Korea's invitation.

21. Assuming *arguendo* that the Panel accepts Korea's claim that the "differential pricing methodology" is a measure that exists and can be subject to an "as such" challenge, for Korea to succeed in its "as such" claim against the alleged "differential pricing methodology" measure, Korea must demonstrate that the "differential pricing methodology" necessarily causes a breach of Article 2.4.2 of the AD Agreement. Korea has failed to do so. Korea has provided no basis to conclude that a differential pricing analysis breaches Article 2.4.2 because it has turned an exception into a "rule," and Korea's contentions are belied by the facts. At the time Korea submitted its panel request, the USDOC had actually used the exceptional, average-to-transaction methodology only about 11 percent of the time as a result of the application of a differential pricing analysis.

22. Korea advances two groups of complaints about the "differential pricing methodology." First, Korea contends that the "differential pricing methodology" is inconsistent with Article 2.4.2 of the AD Agreement, "as such," for the same reasons that it argues that, in the washers antidumping investigation, the USDOC acted inconsistently with Article 2.4.2, on an "as applied" basis. For the same reasons given above, Korea's arguments lack merit.

23. Second, Korea sets forth a number of criticisms that it argues are specific to the "differential pricing methodology." However, Korea has failed to present legal arguments and evidence sufficient to make a *prima facie* case of a breach of Article 2.4.2 of the AD Agreement. Korea premises its arguments exclusively on hypothetical scenarios. Korea makes no reference to any actual evidence. Accordingly, Korea has failed to adduce evidence sufficient to make out a *prima facie* case that the "differential pricing methodology" breaches Article 2.4.2 of the AD Agreement, "as such."

Korea's "Ongoing Conduct" Claims

24. Korea's "ongoing conduct" claims are without merit. The purported "ongoing conduct" "measure" cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU. Additionally, the facts in this dispute do not support the conclusion that the challenged practices "would likely continue to be applied in successive proceedings." Not even one administrative review of the washers antidumping order has been completed. Thus, it is impossible for Korea to establish the "string of determinations, made sequentially. . . over an extended period of time" that would be required to support its claims related to alleged "ongoing conduct," as that concept has been elaborated by the Appellate Body.

Korea's Claim under Article 1 of the AD Agreement

25. None of the antidumping measures challenged by Korea in this dispute is inconsistent with Article VI of the GATT 1994 or any provision of the AD Agreement. Accordingly, the Panel should deny Korea's request for a finding that the challenged U.S. measures are inconsistent with Article 1 of the AD Agreement.

IV. KOREA HAS FAILED TO ESTABLISH THAT THE USDOC'S COUNTERVAILING DUTY DETERMINATION WAS INCONSISTENT WITH THE SCM AGREEMENT OR GATT 1994

26. Korea asserts that the USDOC incorrectly found that subsidies under RSTA Article 10(1)(3) were *de facto* specific – despite overwhelming evidence that Samsung received disproportionately large amounts of these subsidies. Korea's second claim – i.e., that RSTA Article 26 subsidies are not specific – fares no better. This subsidy program falls squarely within Article 2.2 of the SCM Agreement, and is limited to a designated geographical region.

27. In addition, Korea challenges the method by which Samsung's subsidy rate was calculated. Korea attempts to introduce obligations into the SCM Agreement and GATT 1994 that are not set out in the text. There is nothing in these agreements that requires an investigating

authority to treat subsidies as "tied" to a product, based on how a recipient chooses to "use" the benefit that it receives and any alleged effects of that use on a product. And the agreements do not require authorities to apply this use and effects inquiry to include offshore manufacturing.

RSTA Article 10(1)(3)

28. The USDOC's findings are fully consistent with the text of Article 2. Korea errs in asserting that the specificity determination is somehow at odds with the Appellate Body's approach in *US – Large Civil Aircraft*. Two companies received a substantial share of all benefits disbursed under a subsidy program. The absence of any restrictions on eligibility means that benefits would have been expected to be distributed more evenly across the program's 11,764 recipients. Thus, there was a significant disparity between the expected distribution of subsidy based on those conditions of eligibility and the actual distribution.

29. Equally groundless is Korea's assertion that the subsidies were "proportionate" because they were calculated using the same formula available to all Korean companies. Use of a common formula could indicate "objective criteria or conditions," but an indication of non-specificity under Article 2.1(b) does not preclude a finding of *de facto* specificity. At most, the exercise of discretion would be relevant to a different analysis under Article 2.1(c).

30. Likewise, there is no merit to Korea's suggestion that the distribution of benefits reflects the fact that Samsung is a large company, and that any tax credit reflects a large company's research and human resources development activities. Korea's hypothesis is unsupported by evidence. The fact that a company is large does not mean that, where it receives a subsidy that is larger, in relative and absolute terms, than that received by other recipients, such a subsidy inherently cannot be found specific under Article 2.1(c). The USDOC found that to accept such an argument would "undermine the purpose" of the disproportionality inquiry.

31. Here, neither of the two factors identified in the third sentence of Article 2.1(c) has any bearing on the specificity inquiry. The considerable age of this subsidy program eliminates certain complications that can arise with new programs. And the USDOC was aware of the publicly known fact that Korea is one of the wealthiest and most diversified economies in the world – a fact that Korea neither raised nor contested.

32. The USDOC's remand redetermination supplements and reaffirms these findings. The USDOC drew upon newly-obtained information to address Samsung's argument that its share of the tax credits merely reflected the large size of the company. Even among other large companies, Samsung's use of the program was "overwhelming[ly] disproportionate."

RSTA Article 26

33. The USDOC's specificity determination is a straightforward application of Article 2.2 of the SCM Agreement. The RSTA Article 26 program is expressly limited to investments in facilities located in a designated region – i.e., the territory of Korea that falls outside the Seoul overcrowding area.

34. To evade these findings, Korea attempts to rely on legal theories that have been rejected by WTO panels. Korea asserts that RSTA Article 26 subsidies are available to all enterprises located *within the designated region*. The panel in *EC – Large Civil Aircraft* refused to accept this argument, which would require specificity "on a double basis" within Article 2.2. As the panel observed, this interpretation would render Articles 2.2 and 8.2(b) redundant. More recently, the panel in *US – Anti-dumping and Countervailing Measures (China)* rejected the "double basis" interpretation of Article 2.2.

35. Equally deficient is Korea's argument that a finding of non-specificity under Article 2.1(b) trumps a finding of regional specificity under Article 2.2. This interpretation has no grounding in the text of Article 2 and would make Article 8.2(b) redundant.

36. Korea attempts to re-characterize the RSTA Article 26 subsidies. But this program does not address the "use" of a subsidy, and instead ties eligibility to the geographic location of facilities. The fact that the restriction in RSTA Article 26 is addressed to the location of the facilities, as opposed to the head office of the recipient, is of no moment. Article 2.2 does not impose a "head office" test or similar restriction.

37. Likewise, Article 2.2 does not require that any geographic region be designated "explicitly," as Korea suggests. Nor is there any basis for Korea's apparent attempt to limit Article 2.2 to situations of *de jure* specificity. It is of no moment that the language of the relevant law designates a geographical region through language of inclusion or exclusion.

38. There is also no basis for Korea's assertion that larger regions (which are subject to "exclusions" such as the Seoul overcrowding area) should be exempted from the disciplines of Article 2.2. Article 2.2 does not depend on the relative proportion of land mass covered or excluded by a region. Although Korea suggests that large regions with "sensible exclusions" do not distort trade, the inquiry under Article 2.2 is not one of trade distortion; that comes into play in the context of a panel's adverse effects analysis or an investigating authority's injury analysis. To provide an exemption for geographically limited programs would invite circumvention of the subsidy disciplines of the SCM Agreement. And the alleged "exception" at issue here – the Seoul overcrowding region – is hardly a negligible exclusion that should be overlooked.

39. Korea falls back on "policy" arguments, but essentially concedes that RSTA Article 26 is a regional assistance program. The RSTA Article 26 program falls squarely within the regional specificity provisions of Article 2.2.

The Calculation of Samsung's Subsidy Rate

40. Korea challenges the method by which Samsung's countervailable subsidy rate was calculated. But its arguments are not well-founded in any specific obligation, and it points to no error in the calculation of that rate. Nor has any previous panel or Appellate Body report endorsed the interpretations put forward by Korea.

Korea Seeks to Create Rules that Are Not Set Out In the Agreements

41. Korea hinges its claims on finding specific obligations in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement on how a Member should allocate the numerator and denominator when calculating CVD ratios. Yet these provisions do not dictate precisely how the rate of subsidization is to be calculated.

42. In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts relating to the granting authority's bestowal of the subsidy are a key consideration. A Member may examine a subsidy and determine that it is appropriate to treat that subsidy as essentially "untied" for attribution purposes. Alternatively, a Member may examine a subsidy and determine that there is a product-specific "tie." The Member may allocate the subsidy entirely to that product and divide the benefit by only the sales of the product that it views as "tied" to that subsidy.

43. The use of both approaches is reflected in Annex IV of the SCM Agreement, which informs serious prejudice analysis. The Informal Group of Experts ("IGE") established by the Committee on Subsidies and Countervailing Measures developed recommendations to address when a subsidy is "tied" for purposes of paragraph 3. One acceptable method is to determine whether "the intended use of a subsidy is known to the giver, and so acknowledged, prior to or concurrent with the subsidy's bestowal." The IGE report also recommends that research and development subsidies presumptively be treated as untied. Other relevant context suggests the appropriateness of an approach that looks to the conditions of the granting of the subsidy.

Attribution of Subsidies On A "Tied" Basis

44. According to Korea, in apparently every case, a Member must analyze the actual use and effects of a subsidy in connection with a particular product, and apply a "tied" attribution methodology. But the terms of the SCM Agreement and the GATT 1994 do not impose a specific test for determining when a subsidy is "tied" to the production or sale of a particular product – either the approach employed by the USDOC or alternatives.

45. Korea's approach may yield results that are speculative and arbitrary. Adoption of Korea's use/effects approach could impose significant administrative burdens, and may be difficult or impossible to implement in a meaningful way.

46. Korea also relies on inapposite jurisprudence to support its position. Here, there are no allegations of pass-through or privatization, and it is undisputed that the RSTA subsidies at issue exist and benefit the products.

47. It was appropriate for the USDOC to employ an untied approach on the facts of this case. The design, structure, and operation of these RSTA programs do not suggest a product-specific tie. To the extent that the RSTA programs induce investment *ex ante* (i.e., by encouraging companies to invest in anticipation of receiving tax credits) they would not do so at the product level. Indeed, companies only receive credits for a percentage of their aggregate investment costs. The aggregate tax credits received by the company are more appropriately viewed as fungible, benefitting the entire company. Even if Samsung maintained underlying records to

support the expenses it claimed in its return, in case the Korean authorities decided to conduct an audit, the Korean authorities did not receive or review these underlying documents in connection with the bestowal of the subsidies, and did not acknowledge any product-specific tie.

Sales of Products Manufactured Outside Korea

48. Equally, there is no basis for Korea's assertion that the USDOC was required to include in the denominator the sales value of products manufactured *outside Korea*. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require Members to take into account products manufactured outside the territory of the subsidizing Member when calculating subsidy rates. Members generally grant subsidies to generate benefits within their borders.

49. The USDOC explained that it was not appropriate to attribute subsidies to overseas production. There was no evidence that the granting Member intended to subsidize overseas production, and no connection between the structure and operation of the subsidy program and overseas production.

50. Korea asserts that the USDOC failed to "match" the elements in the numerator and denominator. This "matching" argument rests on a flawed premise – namely, that the inquiry hinges on the possible indirect effects of subsidies overseas. But even if an investigating authority were required to consider effects-based considerations for purposes of attribution, Korea offers no evidence of these supposed overseas effects.

51. Korea wrongly criticizes the USDOC for its alleged use of a presumption in favor of attributing subsidies to domestic sales. WTO panels and the Appellate Body have endorsed the use of presumptions where they are reasonable and rebuttable. Here, the USDOC will examine any relevant evidence and can draw the opposite conclusion. The record was devoid of evidence establishing that the grant of subsidy was intended to benefit overseas production.

52. Finally, Korea fails to account for the administrative burden associated with its overseas effects theory. Taken to its logical conclusion, Korea's theory would mean that Members would have to evaluate which sales of goods produced overseas were linked in some way to the subsidy, on a country-by-country basis, to determine the denominator in the subsidy ratio.

Korea's Claims Under Articles 10 and 32.1 of the SCM Agreement

53. Korea has failed to establish that the USDOC's specificity determinations and subsidy rate calculations are inconsistent with Article VI:3 of the GATT 1994 or Articles 1.2, 2 and 19.4 of the SCM Agreement. Accordingly, the USDOC's determination is not inconsistent with Articles 10 or 32.1 of the SCM Agreement.

V. CONCLUSION

54. For the foregoing reasons, the United States respectfully requests that the Panel reject Korea's claims.