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

(DS464)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

(Public Version)

November 24, 2014

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full Citation
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
China – Autos (US) (Panel)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Large Civil Aircraft (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
India – Patents (US) (AB)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Japan – DRAMS (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007

Short Form	Full Citation
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008
Thailand – Cigarettes (Philippines) (Panel)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
Thailand – H-Beams (AB)	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Carbon Steel (India) (Panel)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, circulated 14 July 2014
US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Cotton Yarn (AB)	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Countervailing Measures on Certain EC Products (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – Countervailing Measures (China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, circulated 14 July 2014
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

Short Form	Full Citation
US – Lamb (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Large Civil Aircraft (2^{d} Complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Lead and Bismuth II (AB)	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000
US – Lead and Bismuth II (Panel)	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Softwood Lumber IV (Panel)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Softwood Lumber V (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 1 September 2006
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006

Short Form	Full Citation
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1
US – Zeroing (EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

TABLE OF EXHIBITS

Exhibit No.	Description
USA-1	*Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006)
USA-2	*Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3,783 (January 26, 2007)
USA-3	*Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (February 14, 2012)
USA-4	Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com)
USA-5	Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com)
USA-6	Definition of "among" from Oxford English Dictionary Online (http://www.oed.com)
USA-7	Definition of "significantly" from Oxford English Dictionary Online (http://www.oed.com)
USA-8	Definition of "take" from Oxford English Dictionary Online (http://www.oed.com)
USA-9	Definition of "account" from Oxford English Dictionary Online (http://www.oed.com)
USA-10	Definition of "explanation" from Oxford English Dictionary Online (http://www.oed.com)
USA-11	Definition of "compare" from The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 457
USA-12	Definition of "associative" from The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 133
USA-13	Definition of "commutative" from The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 456
USA-14	Definition of "distributive" from The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 709
USA-15	*Communication from the Delegation of Hong Kong*, GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1 (December 22, 1989)
USA-16	*Communication from Japan*, GATT Doc. No. MTN.GNG/NG8/W/30 (June 20, 1988)
USA-17	*Communication from Japan*, GATT Doc. No. MTN.GNG/NG8/W/81 (July 9, 1990)

Exhibit No.	Description
USA-18	*Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989*, MTN.GNG/NG8/13 (November 15, 1989)
USA-19	*Multilayered Wood Flooring from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 64,318 (October 18, 2011)
USA-20	Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Multilayered Wood Flooring from the People's Republic of China (October 11, 2011) (excerpted)
USA-21	USDOC Determinations in which a Differential Pricing Analysis Was Applied and the Comparison Methodology Ultimately Used (through the date of Korea's Panel Request, December 5, 2013)
USA-22	19 C.F.R. § 351.204
USA-23	19 C.F.R. § 351.301
USA-24	19 C.F.R. § 351.525
USA-25	CVD Preamble, 63 Fed. Reg. 65348 (November 25, 1998)
USA-26 **[BCI]**	*Final Countervailing Duty Determination: Large Residential Washers from the Republic of Korea, Calculations for Samsung Electronics Co., Ltd.* (USDOC, December 18, 2012)
USA-27	Response of the Government of Korea to the Department of Commerce's Questionnaire, *Large Residential Washers from the Republic of Korea* (April 9, 2012)
USA-28	Uruguay Round Agreements Act, H.R. 5110, 103rd Cong., 2d sess., § 251(a) (1994) (codified as amended at 19 U.S.C. § 1677(5A)(D))
USA-29	Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures, G/SCM/W/415/Rev.2 (May 15, 1998)
USA-30	Decision of the WTO Committee on Subsidies and Countervailing Measures regarding Informal Group of Experts, G/SCM/5 (June 22, 1995)
USA-31	Definitions of "Designate", "Geography", and "Region" from The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, pp. 645 and 1079, and Vol. 2, p. 2527

I. INTRODUCTION

1. In its first written submission, the Republic of Korea ("Korea") asserts that the U.S. Department of Commerce ("the USDOC") has "incorrectly interpreted and arbitrarily applied" certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"), and has done so "in order to protect its domestic industries."[1] This accusation is baseless.

2. Indeed, much of Korea's first written submission relies on this kind of hyperbolic rhetoric rather than on sound legal reasoning. For example, Korea asserts that:

- the USDOC has attempted to "circumvent the recommendations and rulings of the DSB";[2]
- the USDOC has "grossly misinterpreted and misapplied" and "flagrantly disregarded the requirements" of the AD Agreement;[3]
- "[t]he United States has done all of this in a cynical attempt to evade the consistent recommendations and rulings of the DSB";[4]
- there are a number of "major flaws" in the USDOC's countervailing duty determination;[5] and
- the USDOC "misinterpreted and misapplied the relevant provisions of the SCM Agreement so as to unlawfully inflate the margin of subsidization."[6]

None of Korea's rhetorically charged allegations has any basis in truth.

3. In reality, when one puts aside the hyperbole in Korea's first written submission, this dispute is like all others brought before World Trade Organization ("WTO") dispute settlement panels. It involves a good faith disagreement among Members about the proper interpretation and application of the provisions of the covered agreements. Contrary to Korea's representations,[7] this dispute presents novel questions of legal interpretation that have not previously been considered by the Appellate Body or any WTO panel. Resolving this dispute will require the Panel to discern the meaning of various provisions of the AD Agreement and the SCM Agreement through the application of the customary rules of interpretation of public international law.

---

[1] First Written Submission of Korea (Confidential), para. 2 (September 29, 2014) ("Korea First Written Submission").
[2] Korea First Written Submission, para. 3.
[3] Korea First Written Submission, para. 4.
[4] Korea First Written Submission, para. 5.
[5] Korea First Written Submission, para. 12.
[6] Korea First Written Submission, para. 12.
[7] *See, e.g.*, Korea First Written Submission, para. 62.

4. In its first written submission, Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from those rules. For example, contrary to the customary rules of interpretation, Korea would interpret Article 2.4.2 of the AD Agreement in a manner that reads the second sentence of that provision out of the agreement entirely. Such an interpretation cannot be accepted. Indeed, as demonstrated in this submission, the Panel should find that, when they are subjected to scrutiny, 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.

5. This submission is organized as follows: after a brief discussion of relevant factual and procedural background in section II and a discussion of the rules related to interpretation, standard of review, and burden of proof in section III, we respond to Korea's claims related to the challenged antidumping measures in section IV, and we respond to Korea's claims related to the challenged countervailing duty measures in section V.

6. With respect to Korea's claims under the AD Agreement, section IV.B addresses Korea's "as applied" claims related to the USDOC's final determination in the antidumping investigation of large residential washers from Korea. Korea's claims concern both when and how an investigating authority may establish margins of dumping utilizing the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 of the AD Agreement.

7. Section IV.B.2 discusses what is entailed in finding "a pattern of export prices which differ significantly among different purchasers, regions or time periods," and section IV.B.3 discusses what is entailed in providing 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."[8] We demonstrate that, in the washers antidumping investigation, the USDOC did not act inconsistently with Article 2.4.2 of the AD Agreement in finding that the conditions of what we call the "pattern clause" and the "explanation clause" were met.

8. Then, sections IV.B.4 and IV.B.5 discuss how the alternative, average-to-transaction comparison methodology provided in Article 2.4.2 of the AD Agreement is to be applied. We demonstrate why the USDOC's application of the average-to-transaction comparison methodology to all sales in the washers antidumping investigation, as well as the USDOC's use of zeroing in connection with its application of the alternative comparison methodology is not inconsistent with Article 2.4.2 or any other provision of the AD Agreement.

9. Sections IV.C, IV.D, IV.E, and IV.F address, respectively, Korea's "as such" claims related to zeroing, Korea's "as such" claims regarding an alleged "differential pricing methodology," Korea's so-called "ongoing conduct" claims, and Korea's consequential claims related to the AD Agreement. We demonstrate that none of these claims has merit.

[8] AD Agreement, Art. 2.4.2, second sentence.

10. In section V, we address Korea's claims with respect to the USDOC's countervailing duty determination. As the USDOC found, in 2011 the Korean company, Samsung Electronics Co., Ltd. ("Samsung"), received KRW[[***]] subsidies under two government programs – equivalent to USD[[***]].[9] Korea does not contest the fact that the funds received by Samsung were subsidies, within the meaning of Article 1 of the SCM Agreement. But Korea challenges the USDOC's determination that these subsidies are specific, and its method for calculating and attributing these subsidies. As we explain below, these claims have no basis in fact or law.

11. In sections V.A and V.B, we address Korea's challenge to the USDOC's specificity determinations. We demonstrate in section V.A that Samsung received disproportionately large amounts of subsidy under Article 10(1)(3) of the Restriction of Special Taxation Act ("RSTA"). The USDOC's finding that these subsidies were *de facto* specific was consistent with the text of Article 2 of the SCM Agreement and the Appellate Body's guidance. This finding was amply supported by the evidence.

12. Likewise, in section V.B, we refute Korea's challenge to the USDOC's finding that subsidies conferred under Article 26 of the RSTA were regionally specific. These subsidies were limited to a designated geographical region – the area outside the overcrowding region of Seoul – and fall squarely within Article 2.2 of the SCM Agreement. Korea's efforts to overcome the plain language of this provision are unavailing.

13. Finally, in section V.C, we address Korea's claims concerning the USDOC's method of calculating and attributing these subsidies. We explain that Korea attempts to introduce obligations into the SCM Agreement and General Agreement on Tariffs and Trade 1994 ("GATT 1994") that are not set out in the text of these agreements. Contrary to Korea's assertion, these agreements do not logically or legally require investigating authorities to treat subsidies as "tied" to particular products where, as here, nothing in the structure, design, and operation of these measures suggests a product-specific tie. As we explain below, authorities are not compelled to conduct a forensic accounting inquiry into how the recipient chooses to use those subsidies and the alleged effects of that use on a particular product. Equally, the agreements do not require authorities to expand this use and effects inquiry to include offshore manufacturing operations, and incorporate sales of goods manufactured overseas into the denominator of subsidy ratios.

II. FACTUAL AND PROCEDURAL BACKGROUND

14. In this section, the United States offers a summary of the relevant factual background of the antidumping and countervailing proceedings on large residential washers from Korea, as well as the procedural background of this dispute.

[9] Final Samsung CVD Calculation Memo, Attachments 6, 9 (Exhibit USA-26).

A. Factual Background of the Antidumping Duty Proceeding on Large Residential Washers from Korea

15. On January 19, 2012, following the filing of an antidumping duty petition by a U.S. producer of washing machines, Whirlpool Corporation ("petitioner"), the USDOC initiated an antidumping investigation on large residential washers from Korea.[10] The period of investigation was October 1, 2010, through September 30, 2011.[11] Between March 2012 and July 2012, the USDOC issued questionnaires to Samsung, LG Electronics, Inc. ("LG"), and Daewoo Electronics Corporation ("Daewoo"), and received responses from Samsung and LG. Daewoo did not respond to the USDOC's questionnaire.[12]

16. During the course of the investigation, the USDOC received an allegation from the petitioner that respondents Samsung and LG were engaged in "targeted dumping."[13] Specifically, the petitioner alleged the existence of a pattern of prices that differed significantly among different time periods, regions, and purchasers during the period of investigation for both Samsung and LG.[14] The petitioner subsequently revised its targeted dumping allegation for LG based on revised sales databases provided by LG.[15]

17. On August 3, 2012, the USDOC published its preliminary determination of sales at less than fair value.[16] The USDOC preliminarily determined, with regard to LG, the existence of a pattern of U.S. prices for comparable merchandise that differed significantly among certain time periods, purchasers, and regions.[17] The USDOC also preliminarily determined, with regard to Samsung, that a pattern of U.S. prices that differed significantly among certain time periods, purchasers, and regions existed.[18] For both respondents, the USDOC found that the significant price differences could not be taken into account using the standard average-to-average comparison methodology because that comparison methodology "conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group."[19] The USDOC also determined that application of the alternative, average-to-transaction comparison methodology resulted in a material difference in the calculated dumping margins, as compared to the results using the standard average-to-average comparison methodology.[20] Accordingly, the USDOC

---

[10] *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 46,391 (August 3, 2012) ("Washers Preliminary AD Determination") (Exhibit KOR-32). The USDOC concurrently initiated an investigation on the same product from Mexico. *See id.*, at note 1.
[11] *See* Washers Preliminary AD Determination, at 46,392 (Exhibit KOR-32).
[12] *See* Washers Preliminary AD Determination, at 46,391 (Exhibit KOR-32).
[13] *See* Washers Preliminary AD Determination, at 46,391 and 46,394-46,395 (Exhibit KOR-32).
[14] *See* Preliminary AD Determination, at 46,391 and 46,394-46,395 (Exhibit KOR-32); *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,988 (December 26, 2012) ("Washers Final AD Determination") (Exhibit KOR-1), and accompanying Issues and Decision Memorandum, Comment 3, p. 12 ("Washers Final AD I&D Memo") (Exhibit KOR-18).
[15] *See* Washers Preliminary AD Determination, at 46,391 (Exhibit KOR-32).
[16] *See* Washers Preliminary AD Determination (Exhibit KOR-32).
[17] *See* Washers Preliminary AD Determination, at 46,394-46,395 (Exhibit KOR-32).
[18] Washers Preliminary AD Determination, at 46,395 (Exhibit KOR-32).
[19] Washers Preliminary AD Determination, at 46,395 (Exhibit KOR-32).
[20] Washers Preliminary AD Determination, at 46,395 (Exhibit KOR-32).

applied the average-to-transaction comparison methodology to all of LG's and Samsung's U.S. sales, and did not offset positive comparison results with negative comparison results (*i.e.*, the USDOC used what has been described in previous WTO disputes as zeroing).[21]

18. Between August 2012 and September 2012, the USDOC conducted cost and sales verifications of Samsung and LG in Korea and of their respective affiliates in the United States.[22] The USDOC also solicited and received further questionnaire responses from Samsung and LG subsequent to the preliminary determination.[23] LG, Samsung, and the petitioner each submitted case and rebuttal briefs following the USDOC's preliminary determination. A hearing was held at the USDOC on November 14, 2012.[24]

19. After considering the parties' arguments, the USDOC published the final determination of sales at less than fair value on December 26, 2012.[25] The USDOC continued to apply the alternative, average-to-transaction comparison methodology to LG's and Samsung's U.S. sales.[26] In the final determination, the USDOC considered and addressed respondents' argument that the existence of a pattern of significant price differences can be explained by certain aspects of the washing machine industry.[27] The USDOC also considered the arguments of the interested parties related to zeroing, but found it inappropriate to provide offsets for non-dumped transactions when aggregating the results of average-to-transaction comparisons.[28] The USDOC calculated final estimated weighted average dumping margins of 13.02 percent and 9.29 percent for LG and Samsung, respectively.[29]

20. The USDOC published the antidumping duty order on large residential washers from Korea on February 15, 2013.[30]

21. The USDOC has not, to date, completed an administrative review of the antidumping duty order. However, on April 1, 2014, the USDOC published a notice of initiation of an administrative review of the order for the period August 3, 2012, through January 31, 2014.[31] That administrative review is currently ongoing.

---

[21] Washers Preliminary AD Determination, at 46,395 (Exhibit KOR-32).
[22] *See* Washers Final AD Determination, at 75,991 (Exhibit KOR-1).
[23] *See* Washers Final AD Determination, at 75,989 (Exhibit KOR-1).
[24] *See* Washers Final AD Determination, at 75,989 (Exhibit KOR-1).
[25] *See* Washers Final AD Determination (Exhibit KOR-1); *see also* Washers Final AD I&D Memo (Exhibit KOR-18).
[26] Washers Final AD Determination, at 75,991 (Exhibit KOR-1); *see also* Washers Final AD I&D Memo at 12-24 (Exhibit KOR-18).
[27] Washers Final AD I&D Memo, at 15-17, 23-24 (Exhibit KOR-18).
[28] Washers Final AD I&D Memo, at 24-35 (Exhibit KOR-18).
[29] Washers Final AD Determination, at 75,991-75,992 (Exhibit KOR-1).
[30] *Large Residential Washers from Mexico and the Republic of Korea: Antidumping Duty Orders*, 78 Fed. Reg. 11,148 (February 15, 2013).
[31] *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 79 Fed. Reg. 18,262, 18,264 (April 1, 2014) ("Washers AD and CVD Review Initiation Notice") (Exhibit KOR-43).

B. Factual Background of the Countervailing Duty Proceeding on Large Residential Washers from Korea

22. On January 27, 2012, following the filing of a countervailing duty petition by Whirlpool Corporation, the same Petitioner as in the antidumping case, the USDOC initiated a countervailing duty investigation on large residential washers from Korea.[32] The period of investigation was January 1, 2011, through December 31, 2011.[33] The USDOC initiated the investigation on a number of programs that the petition alleged provided countervailable subsidies to producers and exporters of large residential washers, including pursuant to Articles 10(1)(3) ("Tax Reduction for Research and Manpower Development") and 26 ("GOK Facilities Investment Support") of the RSTA.[34] Upon initiation of the investigation, the USDOC selected Samsung, LG, and Daewoo for individual investigation.[35]

23. Between February 2012 and May 2012, the USDOC issued questionnaires to the Government of Korea ("GOK"), Samsung, LG, and Daewoo, and received responses from the GOK, Samsung, and LG. On March 28, 2012, Daewoo submitted a letter to the USDOC stating that it would not participate in the investigation.[36]

24. On June 5, 2012, the USDOC published its preliminary affirmative countervailing duty determination, finding that pursuant to the program under RSTA Article 10(1)(3), the GOK provided a countervailable subsidy to Samsung and LG.[37] Specifically, the USDOC determined that "the tax credits under this program were provided disproportionately to Samsung and LG," which thus supported a conclusion of *de facto* specificity.[38] Furthermore, the USDOC found that the tax credits pursuant to RSTA Article 10(1)(3) constituted financial contributions in the form of revenue foregone by the government, and provided a benefit to Samsung and LG in the amount of the difference between the taxes they paid and the amount of taxes that they would have paid in the absence of the program, "effectively, the amount of the tax credit claimed on the tax return filed" during the period of investigation.[39]

25. In the preliminary determination, the USDOC also determined that pursuant to the program under RSTA Article 26, the GOK provided countervailable subsidies to Samsung and LG and/or their cross-owned companies.[40] The USDOC found this program to be regionally specific because information provided by the GOK indicated that "the tax credits under this program are limited by law to enterprises or industries within a designated geographical region

---

[32] *Large Residential Washers From the Republic of Korea: Initiation of Countervailing Duty Investigation*, 77 Fed. Reg. 4279 (Dep't of Commerce January 27, 2012) ("Washers CVD Initiation Notice") (Exhibit KOR-73).
[33] Washers CVD Initiation Notice, 77 Fed. Reg. at 4279 (Exhibit KOR-73).
[34] Washers CVD Initiation Notice, 77 Fed. Reg. at 4280-4281 (Exhibit KOR-73).
[35] Washers CVD Initiation Notice, 77 Fed. Reg. at 4281 (Exhibit KOR-73).
[36] *Large Residential Washers From the Republic of Korea: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Determination*, 77 Fed. Reg. 33,181 (Dep't of Commerce June 5, 2012) ("Washers CVD Preliminary Determination") (Exhibit KOR-85).
[37] Washers CVD Preliminary Determination, 77 Fed. Reg. at 33,187-33,188 (Exhibit KOR-85).
[38] Washers CVD Preliminary Determination, 77 Fed. Reg. at 33,187-33,188 (Exhibit KOR-85).
[39] Washers CVD Preliminary Determination, 77 Fed. Reg. at 33,188 (Exhibit KOR-85).
[40] Washers CVD Preliminary Determination, 77 Fed. Reg. at 33,188-33,189 (Exhibit KOR-85).

within the jurisdiction of the authority providing the subsidy."[41] In addition, the USDOC found that the tax credits under the program constituted financial contributions in the form of revenue foregone, and the amount of the benefits to Samsung and LG were calculated as the difference between the taxes they paid and the amount of taxes they would have paid in the absence of this program.[42]

26. During September 2012, the USDOC conducted verification in Korea of the GOK's, LG's, and Samsung's questionnaire responses. The USDOC also solicited and received additional questionnaire responses from the GOK, Samsung, and LG subsequent to the preliminary determination.[43]

27. LG, Samsung, and the GOK each submitted case briefs presenting numerous arguments for the USDOC's consideration in the final determination, and the Petitioner submitted a rebuttal brief. A public hearing was held at the USDOC on November 17, 2012.[44]

28. After considering the arguments of the various parties, the USDOC published its final affirmative countervailing duty determination on December 26, 2012, in which it calculated total estimated net countervailable subsidy rates of 0.01 percent (*de minimis*) for LG and 1.85 percent for Samsung.[45] Out of the approximately seventeen subsidy programs that were subject to investigation, the USDOC found that only four conferred countervailable subsidies at rates above *de minimis* levels.[46] The USDOC continued to find that the subsidies provided to Samsung and LG pursuant to RSTA Articles 10(1)(3) and 26 were countervailable, and included these subsidies in the Samsung rate.[47]

29. The USDOC published the countervailing duty order on Large Residential Washers from Korea on February 15, 2013.[48]

30. On August 8, 2014, the USDOC issued a final redetermination in the countervailing duty investigation pursuant to a remand order of the United States Court of International Trade in the

[41] Washers CVD Preliminary Determination, 77 Fed. Reg. at 33,188 (Exhibit KOR-85).
[42] Washers CVD Preliminary Determination, 77 Fed. Reg. at 33,188-33,189 (Exhibit KOR-85).
[43] *See Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 75,975 (Dep't of Commerce December 26, 2012) ("Washers CVD Final Determination") (Exhibit KOR-2).
[44] Washers CVD Final Determination, 77 Fed. Reg. at 75,975 (Exhibit KOR-2).
[45] Washers CVD Final Determination, 77 Fed. Reg. at 75,977 (Exhibit KOR-2); see also accompanying Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea (December 18, 2012) ("Washers Final CVD I&D Memo") (Exhibit KOR-77). Although a mandatory respondent, Daewoo did not participate in the investigation, and its subsidy rate was calculated based on adverse facts available. Washers CVD Final Determination, 77 Fed. Reg. at 75,977 (Exhibit KOR-2); Washers Final CVD I&D Memo at 6-8 (Exhibit KOR-77).
[46] Washers Final CVD I&D Memo at 8-24 (Exhibit KOR-77).
[47] Washers Final CVD I&D Memo at 11-13, 14-15, 31-42, 44-46 (Exhibit KOR-77).
[48] *Large Residential Washers From the Republic of Korea: Countervailing Duty Order*, 78 Fed. Reg. 11,154 (Dep't of Commerce February 15, 2013) (Exhibit KOR-71). LG was excluded from the order.

case of *Samsung Electronics Co., Ltd. v. United States*.[49] That Court had ordered the USDOC to reconsider its *de facto* specificity finding in the *Final Determination (CVD)* regarding the disproportionately large income tax credit benefit under RSTA Article 10(1)(3) that Samsung received.[50] Pursuant to the Court's remand, the USDOC solicited additional information from Samsung and the GOK, and further explained why Samsung's share of benefits under RSTA Article 10(1)(3) relative to benefits received among the 100 largest recipients under this program in Korea was disproportionate.[51] This litigation remains ongoing.

31. The USDOC has not, to date, completed an administrative review of the countervailing duty order. However, on April 1, 2014, the USDOC published a notice of initiation of an administrative review of the order for the period June 2, 2012, through December 31, 2013.[52] That administrative review is currently ongoing, and no final assessment or collection of duties has yet occurred with respect to Samsung.

C. Procedural Background of this Dispute

32. On August 29, 2013, Korea requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17 of the AD Agreement, and Article 30 of the SCM Agreement with regard to certain antidumping and countervailing duty measures allegedly adopted by the USDOC.[53] Korea's request for consultations identifies as measures the USDOC's antidumping and countervailing duty investigations of large residential washers from Korea, as well as certain alleged measures that Korea claims are inconsistent with the provisions of the AD Agreement "as such." Korea's consultations request articulates various legal claims related to these measures. The United States and Korea held consultations on October 3, 2013, but were unable to resolve the matter.

33. On December 5, 2013, Korea requested the establishment of a panel pursuant to Article 4 of the DSU, Article XXII of the GATT 1994, Article 17 of the AD Agreement, and Article 30 of the SCM Agreement.[54] At a meeting held on January 22, 2014, the WTO Dispute Settlement Body ("DSB") established a panel with the following terms of reference:

> [t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Korea in document WT/DS464/4 and to make such findings as will assist the DSB in

[49] *Samsung Electronics Co., Ltd. v. United States*, Court No. 13-00099, Slip Op. 14-39 (April 11, 2014): Final Results of Redetermination Pursuant to Court Order (August 8, 2014) ("Washers CVD Redetermination") (Exhibit KOR-44 (BCI)).
[50] Washers CVD Redetermination, p. 1 (Exhibit KOR-44) (BCI).
[51] Washers CVD Redetermination, pp. 2-14 (Exhibit KOR-44 (BCI)).
[52] Washers AD and CVD Review Initiation Notice, 79 Fed. Reg. at 18,273 (Exhibit KOR-43).
[53] Request for Consultations by the Republic of Korea, WT/DS464/1, circulated September 3, 2013 ("Consultations Request").
[54] Request for the Establishment of a Panel by the Republic of Korea, WT/DS464/4, circulated December 6, 2013 ("Panel Request").

making the recommendations or in giving the rulings provided for in those agreements.[55]

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

34. 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 Appellate Body has recognized that Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects such customary rules.[56] Article 31 of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A corollary of this customary rule of interpretation is that an "interpretation must give meaning and effect to all the terms of the treaty."[57]

35. 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. Article 11 of the DSU provides that:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

36. Article 17.6 of the AD Agreement provides that:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more

[55] Constitution of the Panel Established at the Request of Korea – Note by the Secretariat, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/5, para. 2 (June 23, 2014).
[56] *US – Gasoline (AB)*, p. 17.
[57] *US – Gasoline (AB)*, p. 23.

> than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

37. 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."[58] It is well-established that the Panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*."[59] Indeed, the Appellate Body has held that a panel breached Article 11 of the DSU where that panel went beyond its role as reviewer and instead substituted its own assessment of the evidence and judgment for that of the investigating authority.[60] At the same time, however, this does not mean that the Panel "must simply *accept* the conclusions of the competent authorities."[61] Examination of the authority's conclusions must be "in-depth" and "critical and searching."[62]

38. Article 17.6 of the AD Agreement imposes "limiting obligations on a panel" in reviewing an investigating authority's establishment and evaluation of facts.[63] The aim of Article 17.6 is "to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective."[64]

39. Finally, 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."[65] Accordingly, Korea, as the complaining party, bears the burden of demonstrating that the U.S. antidumping and countervailing measures within the Panel's terms of reference are inconsistent with a provision or provisions of the AD Agreement, SCM Agreement, or GATT 1994. Korea must establish a *prima facie* case of inconsistency with a provision of a WTO covered agreement before the United States, as the defending party, has the burden of showing consistency with that provision.[66]

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

A. Introduction

40. In its first written submission, Korea insists that its "claims with respect to the application of zeroing in the [average-to-transaction] context present a set of issues of legal interpretation

---

[58] *China – Broiler Products*, para. 7.4 (*citing US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103.).
[59] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 187-188 (emphasis in original)
[60] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 188-190.
[61] *US – Cotton Yarn (AB)*, para. 69, note 42 (emphasis in original) (*citing US – Lamb (AB)*, para. 106, note 41).
[62] *E.g.*, *China – Broiler Products*, para. 7.5 (*quoting US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93).
[63] *Thailand – H-Beams (AB)*, para. 114.
[64] *Thailand – H-Beams (AB)*, para. 117.
[65] *US – Wool Shirts and Blouses (AB)*, p. 14; *see also China – Autos (US) (Panel)*, para. 7.6.
[66] *EC – Hormones (AB)*, para. 109 (*citing US – Wool Shirts and Blouses (AB)*, pp. 14-16); *see also China – Broiler Products*, para. 7.6.

that have already been decided by previous panels and the Appellate Body," and Korea indicates that it "expects" the Panel to follow the Appellate Body's guidance, as Korea articulates it.[67] Contrary to Korea's representations, however, this dispute presents novel questions of legal interpretation that have not previously been considered by the Appellate Body or any WTO panel.

41. No prior WTO dispute has involved a Member's application of the comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. Accordingly, neither the Appellate Body nor any panel has been called upon previously to interpret the terms of the second sentence of Article 2.4.2, or to assess whether an antidumping measure adopted by a Member is consistent with the terms of that provision.

42. 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. Answering these questions will require the Panel to undertake an interpretive analysis of the terms of the second sentence of Article 2.4.2, which must be done in accordance with the customary rules of interpretation. This will, *inter alia*, involve consideration of what is entailed in finding a "pattern of export prices which differ significantly among different purchasers, regions or time periods" and what constitutes a sufficient "explanation" of "why such differences cannot be taken into account" by the average-to-average or transaction-to-transaction comparison methodologies.

43. Of course, there is also the question of the permissibility (and in the U.S. view, the logical necessity) of using zeroing in connection with the application of the alternative methodology in the second sentence of Article 2.4.2. The Appellate Body has explained 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."[68] Hence, that is another interpretive question that the Panel will need to answer for itself in the first instance.

44. For its part, Korea seeks to portray this dispute as one involving an unrepentant WTO Member acting in brazen disregard of earlier DSB recommendations and rulings by continuing to use a methodology that has already been found impermissible.[69] Despite Korea's lengthy recitation of recommendations and rulings in prior disputes,[70] however, the present dispute is not about whether the United States has complied with any earlier findings of the Appellate Body or other panels. The United States has fully complied with those earlier findings.[71] Nor is this

---

[67] Korea First Written Submission, para. 62.

[68] *US – Stainless Steel (Mexico) (AB)*, para. 127. *See also US – Zeroing (Japan) (AB)*, paras. 135-136 (distinguishing the transaction-to-transaction and average-to-transaction comparison methodologies and declining to further address whether zeroing is permitted under the second sentence of Article 2.4.2 when applying the average-to-transaction comparison methodology: "We wish to emphasize, however, that our analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision."); *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98 (Noting that "there is considerable uncertainty regarding how precisely the third methodology should be applied.").

[69] *See, e.g.*, Korea First Written Submission, para. 57.

[70] *See, e.g.*, Korea First Written Submission, paras. 64-70.

[71] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006) (Exhibit USA-1); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in*

dispute about re-litigating previous interpretations of the AD Agreement. In this dispute, the United States does not suggest, let alone argue, that the Panel depart from any prior interpretation of the AD Agreement by the Appellate Body or any other panel.

45. What this dispute is about, as it relates to the USDOC's antidumping duty proceedings, is the correct interpretation of the second sentence of Article 2.4.2 of the AD Agreement. That sentence, 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."[72] 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.

46. Rather, the Panel should, consistent with Articles 11 and 3.2 of the DSU, make an objective assessment of the matter before it and apply the customary rules of interpretation of public international law to ascertain the meaning of the second sentence of Article 2.4.2 of the AD Agreement and assess whether the challenged U.S. measures are inconsistent with that and other provisions of the covered agreements, as Korea claims.

47. In this section, the United States first responds to Korea's "as applied" claims relating to the washers antidumping investigation. The United States then separately addresses Korea's "as such" claims related to zeroing and the differential pricing methodology, as well as Korea's claims related to alleged "ongoing conduct."

48. As demonstrated below, Korea's claims are without merit, and the measures challenged by Korea are not inconsistent with Article 2.4.2 of the AD Agreement or any of the provisions of the covered agreements.

Effective Date of Final Modification, 72 Fed. Reg. 3,783 (January 26, 2007) (Exhibit USA-2); *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,101 (February 14, 2012) (Exhibit USA-3); *see also, e.g., Dispute Settlement Body, Minutes of Meeting Held in the Centre William Rappard on 22 February 2012*, WT/DSB/M/312, paras. 31-48 (May 22, 2012) ("Despite the fundamental disagreement of the United States with the Appellate Body's findings on 'zeroing', the United States welcomed the agreement to end this difficult and long-standing dispute." *Id.*, para. 42. "The EU recognized that significant progress had been made and it hoped and expected that the satisfactory completion of all steps under the roadmap would effectively bring the zeroing disputes to an end." *Id.*, para. 43.).

[72] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62 ("This provision [Art. 2.4.2, second sentence] allows Members, in structuring their anti-dumping investigations, to address three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.").

B. Korea's "As Applied" Claims Related to the Washers Antidumping Investigation Are without Merit

1. Overview of Article 2.4.2 of the AD Agreement

49. Korea claims that the USDOC's final determination in the washers antidumping investigation is inconsistent with Article 2.4.2 of the AD Agreement for a variety of reasons. In this subsection, the United States will address Korea's "as applied" claims related to Article 2.4.2.

50. An interpretive analysis of the second sentence of Article 2.4.2 of the AD Agreement must begin with the text of that provision. Article 2.4.2 of the AD Agreement, in its entirety, provides that:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and 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.

51. On its face, Article 2.4.2 of the AD Agreement sets forth three comparison methodologies by which an investigating authority may determine the "existence of margins of dumping." Per the first sentence, "normally," an investigating authority "shall" do so "on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis." More succinctly, the two primary comparison methodologies available to an investigating authority are the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. The Appellate Body has observed that:

> The first sentence of Article 2.4.2 sets out the two methodologies that "shall normally" be used by investigating authorities to establish "margins of dumping". Although the transaction-to-transaction and weighted average-to-weighted average comparison methodologies are distinct, they fulfil the same function. They are also equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two. An investigating authority may choose between the two depending on which is most suitable for the particular investigation. Given that the two methodologies are alternative means for establishing "margins of dumping" and that there is no hierarchy between them, it would be illogical to interpret the transaction-to-transaction comparison methodology in a manner that

> would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology.[73]

52. 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.[74] 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."

53. The Appellate Body has observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[75] As an exception to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should *not* "lead to results that are systematically different"[76] – the third comparison methodology, by logical extension, *should* "lead to results that are systematically different" when the conditions for its use have been met.

54. As noted above, when and how a Member may utilize the comparison methodology described in the second sentence of Article 2.4.2 of the AD Agreement are the two principle questions before the Panel, with respect to the challenged AD measures. So, with this overview of the structure of Article 2.4.2 in mind, the United States will turn to a discussion of each of the conditions set out in the second sentence of Article 2.4.2 (*i.e.*, *when* a Member may utilize the alternative comparison methodology), as well as a discussion of the proper understanding of the application of the alternative methodology (*i.e.*, *how* a Member may use it). In doing so, the United States also will demonstrate that the USDOC's application in the washers antidumping investigation of what it called the "targeted dumping" methodology, as well as its use of zeroing in connection with the application of the average-to-transaction comparison methodology, were not inconsistent with the requirements of Article 2.4.2, or any other provision of the AD Agreement or the GATT 1994. Separately, in a later subsection, we will address Korea's claims

---

[73] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

[74] We note here that Korea suggests that the second sentence of Article 2.4.2 imposes three conditions on the use of the alternative comparison methodology, rather than two. *See, e.g.*, Korea First Written Submission, para. 124. The United States does not agree with Korea, though this may be a distinction without a difference. The word "pattern" in the second sentence of Article 2.4.2 is modified by "of export prices," which, in turn, is modified by "which differ significantly among different purchasers, regions or time periods." The appropriate meaning of the word "pattern," and its connection to the word "of," is discussed further below. Logically, all of these terms should be read together to form one condition, not two separate conditions. That being said, however, the United States agrees with Korea that for an investigating authority to find that the condition in what we call the "pattern clause" has been met, it must find a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

[75] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97 ("[T]he methodology in the second sentence of Article 2.4.2 is an exception."); *see also US – Zeroing (Japan) (AB)*, para. 131 ("The asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which are normally to be used.").

[76] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

related to the "differential pricing" analysis, which likewise is not inconsistent with any provision of the AD Agreement or the GATT 1994.

2. The First Condition for Resorting to the Alternative Comparison Methodology: The "Pattern Clause"

a. "A Pattern of Export Prices which Differ Significantly among Different Purchasers, Regions or Time Periods" Is a Regular and Intelligible Form or Sequence of Export Prices which Are Unlike in an Important Manner or to a Significant Extent

55. An interpretation of what we call the "pattern clause" in the second sentence of Article 2.4.2 of the AD Agreement, undertaken in accordance with the customary rules of interpretation of public international law, requires an analysis of the ordinary meaning of the terms of the "pattern clause" in their context and in light of the object and purpose of the AD Agreement.[77] Such an analysis demonstrates that the phrase "a pattern of export prices which differ significantly among different purchasers, regions or time periods" means 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.

56. While Article 2.1 of the AD Agreement suggests that the term "export price" should be understood "[f]or the purpose of [the AD] Agreement" as the "price of the product exported from one country to another,"[78] the remaining terms in the "pattern clause" of the second sentence of Article 2.4.2 are not defined in the Agreement.

57. The Appellate Body has explained that an ordinary meaning analysis "may start with the dictionary definitions of the terms to be interpreted," but the Appellate Body has cautioned that "dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words–be those meanings common or rare, universal or specialized."[79] Rather, as the panel explained in *US – Section 301 Trade Act*:

> For pragmatic reasons the normal usage … is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose.[80]

58. The word "pattern," for example, has a wide variety of dictionary definitions, including the noun and adjective forms, as well as numerous compound forms. Altogether, there are dozens of entries in the dictionary for the word "pattern," ranging, for example, from "a model, example, or copy" and "an example or model to be imitated," to "a quantity of material sufficient

[77] *See* Vienna Convention, Art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.").
[78] In its first written submission, Korea does not suggest a different definition for the term "export price."
[79] *US – Gambling (AB)*, para. 164 (citations omitted; emphasis in original).
[80] *US – Section 301 Trade Act*, para. 7.22 (cited by the Appellate Body in *US – Gambling (AB)*, note 191).

for making a garment," or "a regular or decorative arrangement," or "the distribution of shot fired from a gun."[81]

59. The most apt definition, though, as Korea appears to agree,[82] is "a regular and intelligible form or sequence discernible in certain actions or situations; esp[ecially] one on which the prediction of successive or future events may be based."[83] The *Oxford English Dictionary*, from which all of the above definitions are drawn, notes that this definition is used "[f]req[uently] with *of*, as *pattern of behaviour*." In the second sentence of Article 2.4.2, the word "pattern" appears together with "*of* export prices . . .," which is a contextual indication of the proper ordinary meaning of the word "pattern" as it is used there. Thus, it would appear that the term "pattern of export prices . . ." can be understood to mean a regular and intelligible form or sequence discernible in export prices.

60. The relevant pattern at issue in the second sentence of Article 2.4.2 is that of export prices "which differ significantly . . . ." The dictionary contains several definitions of the word "differ."[84] The most appropriate definition, in the sense in which the term is used in the second sentence of Article 2.4.2, appears to be "to have contrary or diverse bearings, tendencies, or qualities; to be not the same; to be unlike, distinct, or various, in nature, form, or qualities, or in some specified respect."[85] This is confirmed when the word "differ" is read together with the word "among."

61. The preposition "among" is defined, *inter alia*, as "of relation between object and objects"; "of the relation of a thing (or things) to the whole surrounding group or composite substance"; "of the relation of anything in a local group to the other members of the group, although these do not actually surround it; as of an individual to the other members of the same community"; "of the relation of a thing to others in the same nominal or logical group: In the number or class of"; and "*esp.* of things distinguished in kind from the rest of the group: Preeminent among, as distinguished from, in comparison with, above the others."[86] The preposition "among" thus references a relationship between one thing, for example, a purchaser, region, or time period, and other similar things of the same type, *e.g.*, other purchasers, regions, or time periods.

62. Thus, when the second sentence of Article 2.4.2 refers to "exports prices which differ significantly among different purchasers, regions, or time periods," this suggests the need for a comparison, for example, of export prices to one purchaser with export prices to another

[81] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-4).
[82] Korea First Written Submission, para. 131.
[83] *See* Definition of "pattern" from Oxford English Dictionary Online (http://www.oed.com), definition 11 (Exhibit USA-4).
[84] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-5).
[85] *See* Definition of "differ" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-5). The word "differ" is also defined as "to put apart or separate from each other in qualities." Along with being described as "now unusual" in the dictionary, the term is also a transitive verb, suggesting action, while the definition above is that of an intransitive verb. Thus, this definition seems less apt. Also, it is unlikely that a definition related to "heraldry" is appropriate; nor does a definition relating to holding different opinions or being in disagreement (in that same sense) appear suitable.
[86] *See* Definition of "among" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-6).

purchaser or purchasers to ascertain whether the export prices to the former are not the same, or are unlike, or are distinct from the export prices to the latter in some respect.[87]

63. The word "differ" in the second sentence of Article 2.4.2 is modified by the word "significantly." Thus, not only must there be a pattern of export prices that "differ" among purchasers, regions, or time periods, the export prices must differ "significantly." The word "significantly," when used as an adverb, as it is in the "pattern clause," is defined as "in a significant manner; *esp.* so as to convey a particular meaning; expressively, meaningfully"; "importantly, notably"; or "to a significant degree or extent; so as to make a noticeable difference; substantially, considerably."[88]

64. Korea, in its first written submission, notes that "[t]he first definition of the word ['significant'] provided by the New Shorter Oxford English Dictionary is '[h]aving or conveying a meaning.'"[89] However, another definition of "significant" in the same dictionary entry is "important, notable; consequential."[90] This latter definition of the word "significant" has been accepted by the Appellate Body, which has observed that "[t]he term 'significant' has been understood by the Appellate Body as 'something that can be characterized as important, notable, or consequential.'"[91]

65. Viewed together, the terms of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement provide that, in order for an investigating authority to use the average-to-transaction comparison methodology in an investigation, the investigating authority first must find a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as between different purchasers, regions, or time periods.

66. Additionally, we note, as context, that the "pattern clause" appears in the second sentence of Article 2.4.2 of the AD Agreement and is a condition for resorting to the "exceptional"[92] average-to-transaction comparison methodology, which is an alternative to the comparison methodologies that investigating authorities "normally"[93] are to use. Logically, one would expect that the conditions for resorting to the "exceptional" alternative methodology "normally" would not be met. Accordingly, an investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically to ascertain whether a pattern of differences in export prices exists,

---

[87] We refer in this sentence only to an analysis of purchasers for the sake of clarity. There does not appear to be any disagreement between the parties that the appropriate comparison is between the export prices to one purchaser and the export prices to another purchaser or purchasers, or between the export prices to one region and the export prices to another region or regions, or between the export prices in one time period and the export prices in another time period or time periods. No party appears to suggest that the second sentence of Article 2.4.2 calls for a comparison, for example, of export prices to a purchaser with export prices to a region.

[88] *See* Definition of "significantly" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-7).

[89] Korea First Written Submission, para. 134.

[90] The New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 2, p. 2860 (Exhibit KOR-23).

[91] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (*citing US – Upland Cotton (AB)*, para. 426).

[92] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.

[93] AD Agreement, Art. 2.4.2, first sentence.

and whether the price differences among different purchasers, regions, or time periods are significant.

67. Finally, the United States observes that the interpretation of the "pattern clause" set forth above is consistent with and supports the object and purpose of the AD Agreement. While the AD Agreement "does not contain a preamble or an explicit indication of its object and purpose,"[94] guidance can be found in Article VI:1 of the GATT 1994, in which Members have recognized that injurious dumping "is to be condemned." Of course, the AD Agreement also provides detailed rules governing the application of antidumping measures, including procedural safeguards for interested parties and substantive rules on the calculation of dumping margins. The AD Agreement thus appears to be aimed at providing a balanced set of rights and obligations regarding the use of antidumping measures.

68. The second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[95] in "exceptional"[96] situations. Interpreting the "pattern clause" as discussed above – *i.e.*, as requiring an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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 – serves the aim of the second sentence of Article 2.4.2 and is consistent with the overall balance of rights and obligations struck in the AD Agreement.

69. As discussed below, in the washers antidumping investigation, in which it applied what Korea terms the "targeted dumping" analysis, as well as in the instances in which it has applied what Korea terms the "differential pricing" analysis, the USDOC has not acted inconsistently with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.

b. The Words "Pattern" and "Significantly" in the Second Sentence of Article 2.4.2 of the AD Agreement Do Not Require an Investigating Authority to Examine the "Design," "Meaning," or "Purpose" Underlying the Significant Differences in Export Prices

70. Before turning to a discussion of the USDOC's application of the "pattern clause" in the washers antidumping investigation, we first respond to certain arguments Korea raises in its first written submission concerning the interpretation of the terms "pattern" and "significantly." Korea argues that "[e]ach of these terms carries qualitative connotations that the USDOC's purely quantitative tests for invoking the exception to Article 2.4.2 improperly ignore." Because of these purported qualitative connotations, Korea argues that an investigating authority must examine the "design," "purpose," or "meaning" underlying any significant differences in export prices.[97] Korea's contention lacks merit.

---

[94] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 118.
[95] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[96] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.
[97] *See, e.g.*, Korea First Written Submission, paras. 131, 133, 138.

71. With respect to the word "pattern," as noted above, Korea and the United States both suggest that the same dictionary definition is most apt, in the context of the "pattern clause" in the second sentence of Article 2.4.2.[98] Thus, in English, a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations."[99] Korea also references French and Spanish language dictionaries and presents definitions for the corresponding terms in the French and Spanish language texts of the AD Agreement. The United States does not take issue with the French and Spanish definitions to which Korea draws the Panel's attention.

72. The United States does take issue, however, with certain conclusions Korea draws from the dictionary definitions on which it relies. For example, Korea argues, based on the definition of the English word "pattern," that "there must be some *predictable* repetition or form that can be discerned from the sample of prices at issue."[100] While the dictionary definition of the word "pattern" referenced above suggests that a regular and intelligible form or sequence may be predictive of successive or future events, it is difficult to contemplate what the relevance would be of predicting future export prices. An antidumping investigation is concerned exclusively with sales during the period of investigation, which necessarily is *in the past*. Nothing in the "pattern clause" or anywhere else in Article 2.4.2 of the AD Agreement relates to predicting future sales.

73. Korea also contends that a "pattern" within the meaning of Article 2.4.2 cannot simply be the result of random price variation.[101] The United States agrees. Of course, the "pattern clause," according to its terms, is not intended to capture random price differences. Rather, it is intended to capture a pattern of export prices that differ significantly among different purchasers, regions, or time periods. The notion of a "regular" and "intelligible" form or sequence simply means that the form or sequence (*i.e.*, pattern) must be discernible; it must be capable of being observed and identified. As discussed below, when the USDOC has examined whether a pattern of export prices exists, its conclusions certainly have not rested on "random" differences in export prices.

74. The thrust of Korea's argument, though, appears not to be that a "pattern" cannot merely reflect random price variation (indeed, there is no dispute on that point), but rather that the significant price differences under Article 2.4.2 can only exist for a particular reason. The United States disagrees, because there is no support in the text of the AD Agreement for this proposition. Before we elaborate further, though, we address Korea's related arguments concerning the term "significantly."

75. Korea contends that, "[i]n English, the word 'significant' conveys both qualitative and quantitative aspects."[102] Korea again presents arguments relating to the terms in the French and Spanish texts of the AD Agreement to support its position, and also undertakes a contextual consideration of the term "significant" as it is used elsewhere in the AD Agreement.

---

[98] *See* Korea First Written Submission, para. 131.
[99] Korea First Written Submission, para. 131 (*citing* the dictionary entry provided in Exhibit KOR-22).
[100] Korea First Written Submission, para. 131 (emphasis added).
[101] *See, e.g.*, Korea First Written Submission, paras. 132-133.
[102] Korea First Written Submission, para. 134.

76. The United States agrees, as the Appellate Body has suggested, that the term "significant" "*can* have both quantitative and qualitative dimensions."[103] Korea is incorrect, however, when it contends that "the use of the word 'significantly' (and its equivalent in the equally authentic French and Spanish texts of the Anti-Dumping Agreement) to describe the price differences that must be found to trigger the exception in Article 2.4.2 must mean something other than merely 'large' quantitative differences."[104] Korea's understanding, ironically, would read the quantitative dimension out of the term "significantly," necessitating an exclusive focus on Korea's understanding of the qualitative dimension. This would be inconsistent with the ordinary meaning of the term "significantly" in its context, and also with the Appellate Body's guidance regarding the meaning of the term "significant."[105]

77. In *US – Large Civil Aircraft (Second Complaint)*, the Appellate Body considered whether lost sales could be considered "significant" within the meaning of Article 6.3(c) of the SCM Agreement. It was there that the Appellate Body observed that the term "significant" can be understood as "something that can be characterized as important, notable or consequential."[106] The Appellate Body further observed that "an assessment of whether a lost sale is significant can have both quantitative and qualitative dimensions."[107] The Appellate Body found that:

> [A]s we have noted above, these campaigns were highly price-competitive, not only because of the direct consequence for LCA manufacturers in terms of revenue and production effects associated with the sale of multiple LCA, but also because of the strategic importance of securing a sale from a particular customer. For these reasons, we consider that these lost sales campaigns are significant within the meaning of Article 6.3(c) of the *SCM Agreement*.[108]

78. What the Appellate Body was suggesting in this passage from *US – Large Civil Aircraft (Second Complaint)* is that lost sales might be considered "significant" if there is a high number of lost sales, but equally might be considered "significant" where there is a lower number of lost sales, but the sales are of particular importance.

79. The same may be true when applying the "pattern clause" in the second sentence of Article 2.4.2 of the AD Agreement. If the difference between export prices to different purchasers, regions, or time periods is numerically large, that would justify finding that they are "significant" within the meaning of the second sentence of Article 2.4.2. Alternatively, if the difference between export prices is smaller, but price competition in the particular industry is such that even small price differences are important, that might also justify finding that the difference is "significant," in a qualitative sense. In this way, the term "significantly" in the "pattern clause" can have both quantitative and qualitative dimensions.

---

[103] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (emphasis added).
[104] Korea First Written Submission, para. 138.
[105] *See US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.
[106] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272 (*citing US – Upland Cotton (AB)*, para. 426).
[107] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.
[108] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.

80. That, however, is not the way that Korea attempts to use the qualitative dimension of the term "significantly" in support of its position. Korea argues that, because of the qualitative connotations of the terms "pattern" and "significantly," the differences in export prices "must reveal a particular design or purpose,"[109] and they must "reflect a meaning or purpose other than random price variation or price differences that reflect normal commercial factors."[110] Korea further suggests, more specifically, that the significantly differing 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."[111] This last contention is particularly striking because Korea supports it with a footnote that reads as follows:

> This meaning is clearly conveyed by the term "*targeted* dumping", which is the title of the U.S. statutory provision implementing Article 2.4.2 and is used in the USDOC regulatory provision implementing that statutory section.[112]

Korea's interpretive approach, in this regard, is utterly divorced from the customary rules of interpretation of public international law. Nothing in the Vienna Convention supports the notion that the meaning of a provision of an international agreement may be ascertained from the title of one Member's statutory provision and the use of a term in a provision of a regulation promulgated by one of that same Member's executive agencies.

81. Furthermore, Korea's proposed interpretation is at odds with the text and context of the "pattern clause." What must be identified is "a pattern of export prices which differ significantly." Thus, 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. That is, do the export prices differ in a way that qualitatively is notable or important, and thus is "significant"? Under Korea's notion of a qualitative analysis, the investigating authority would ask *why* the export prices are different.

82. Indeed, Korea criticizes the USDOC for not considering whether there were commercial reasons, market explanations, or other exogenous factors for the pattern of export prices identified.[113] Korea cites to seasonal pricing patterns, such as year-end or "Black Friday" holidays, the timing of the introduction of new models, and the differences in quantities sold for different models of washers. According to Korea, the "pattern clause" is not meant to capture purely commercial conditions or market fluctuations.

83. These questions all go to *why* differences may exist between export prices. However, answering them would not provide information about *how* the export prices are different, and whether the observed differences are "significant." Thus, such questions are not germane to an

[109] Korea First Written Submission, para. 131.
[110] Korea First Written Submission, para. 138.
[111] Korea First Written Submission, para. 133.
[112] Korea First Written Submission, note 124 (emphasis in original). We note that Korea is incorrect, as a factual matter about the title of the U.S. statutory provision to which it refers. 19 U.S.C. § 1677f-1(d)(1)(B), to which Korea appears to refer, is entitled "(d) Determination of less than fair value, (1) Investigations, (B) Exception." *See* Exhibit KOR-4. Korea appears to have intended to refer to the title of a withdrawn USDOC regulation, 19 C.F.R. § 351.414(f). *See* Exhibit KOR-8 and Exhibit KOR-9.
[113] *See* Korea First Written Submission, paras. 148-153.

application of the "pattern clause," which is a condition for using the alternative comparison methodology to "unmask targeted dumping."[114]

84. Korea emphasizes that:

> the issue before the Panel is not whether the USDOC would have considered respondents' evidence and arguments meritorious, had it bothered to consider them. Rather, the issue is whether, by refusing even to consider the respondents' proffered reasons for the observed price differences, and relying exclusively on a mathematical analysis, the USDOC has invoked the second sentence of Article 2.4.2 without properly determining whether the mathematical differences in prices constituted a "pattern" of prices that differ "significantly".

85. Korea goes on to assert, without any support, that the exception in Article 2.4.2:

> was created to address the situation where an exporter's dumping is "targeted" in the sense that the exporter makes dumped prices to a subset of the market, and "masks" any dumping in that subset by selling at higher, non-dumped prices in its other U.S. sales.

86. Here, though, Korea confuses the "pattern of export prices which differ significantly," which is described in the text of the "pattern clause" in the second sentence of Article 2.4.2, with the intention of an exporter to "target" its dumping and "mask" that dumping. As written, the "pattern clause" is passive and not active, such that the investigating authority is charged with finding whether a pattern of export prices exists, not with finding that an exporter has intentionally patterned its export prices to target and mask dumping. Nothing in Article 2.4.2 or any other provision of the AD Agreement supports Korea's proposed notion that significant price differences – or dumping for that matter – must be found to be predatory or the result of some "guilty" intent or motivation. These concepts simply are foreign to the AD Agreement, and reading into the "pattern clause" an obligation that an investigating authority must examine an exporter's intent would be inconsistent with the customary rules of interpretation of public international law.

87. Additionally, Korea's reasoning is unsound. Korea asserts that "[t]he entire basis for the exception disappears if the 'low' prices of sales to the subset are caused by some exogenous factor or the normal commercial conditions within an industry."[115] However, such "'low' 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. That dumping may still be injurious to the domestic industry, again, regardless of the intention of the exporter. The "reason" for the low prices changes nothing.

88. Furthermore, the particular, so-called "exogenous" factors to which Korea refers actually just confirm that the "'low' prices of sales to the subset" were indeed "targeted" to particular time periods and customers. Regardless of whether Samsung and LG intended to "dump" large

[114] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[115] Korea First Written Submission, para. 153.

residential washers, their admittedly "low price" targeting in the United States, as Commerce ultimately discovered, when compared with average normal value in Korea, actually resulted in "targeted dumping" that would be "masked" by higher price sales if the average-to-average comparison methodology were used. Accordingly, Korea's arguments about the "reasons" for the pattern of significant price differences do not support the conclusion that there was no "targeted dumping" in the washers antidumping investigation.

89. For these reasons, Korea's arguments relating to the interpretation of the terms "pattern" and "significantly" are without merit.

c. The USDOC's Application of the "Pattern Clause" in the Washers Antidumping Investigation Is Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement

90. In its first written submission, Korea presents only one argument in support of its request that the Panel find that the USDOC's determination in the washers antidumping investigation – *i.e.*, that there existed a pattern of export prices that differed significantly among different purchasers, regions, or time periods – was inconsistent with the second sentence of Article 2.4.2 of the AD Agreement. Specifically, Korea complains that the USDOC "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."[116] Korea contends that:

> USDOC's refusal to consider the evidence and arguments indicating that the differences by time period, customer and region in LG's and Samsung's export prices were caused by normal commercial considerations unrelated to potential "targeting" was inconsistent with the requirement of the second sentence of Article 2.4.2 that price differences do not justify invocation of the second sentence unless they form a "pattern" of prices that differ "significantly".[117]

91. As explained above, Korea's proposed interpretation of the "pattern clause," and specifically the terms "pattern" and "significantly," is not supported by the text of the second sentence of Article 2.4.2, read in its context. 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.

92. In the washers antidumping investigation, the domestic industry alleged that "targeted dumping" was occurring with respect to washers produced and exported by each of the Korean respondents, Samsung and LG, and that for each of the Korean respondents there existed a

[116] Korea First Written Submission, para. 148-153.
[117] Korea First Written Submission, para. 152.

pattern of U.S. sale prices[118] for washers that differed significantly among different purchasers, regions, and time periods.[119]

93. The USDOC applied a two-part test developed in the context of antidumping duty investigations of steel nails from China and the United Arab Emirates[120] – the *Nails* test – to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed based on the domestic industry's allegation that certain purchasers, regions, and time periods had been "targeted." In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by Samsung and LG.

94. Part of the USDOC's analysis involved a "standard-deviation test."[121] As Korea recognizes in its first written submission, "[a] 'standard deviation' is a common statistical measure of how much variation can be found in a set of data. It is calculated as the average amount by which the data points depart from the overall average of the data."[122]

95. The USDOC's analysis also included an examination, for each alleged target, of those sales that passed the "standard-deviation test" to determine whether the total volume of such sales for which the difference between the weighted average sale price to the alleged target and the next higher weighted average sale price for a non-targeted member of the corresponding group exceeded the average differences in the weighted average sale prices, weighted by sales volume, between the non-targeted members of that group. The next higher price is the weighted average sale price to a non-targeted member of the group that is greater than the weighted average sale price to the alleged target.[123]

96. As reflected in the discussion in the final issues and decision memorandum,[124] 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.

97. In addition to explaining its analytical approach in the final issues and decision memorandum, the USDOC addressed numerous arguments raised by interested parties

[118] U.S. sale prices are "export prices" within the meaning of the second sentence of Article 2.4.2 of the AD Agreement.
[119] *See* Washers Final AD I&D Memo, Comment 3, p. 12 (Exhibit KOR-18)
[120] *See Certain Steel Nails From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (June 16, 2008), and accompanying issues and decision memorandum (excerpted) (Exhibit KOR-27), and *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value*, 73 Fed. Reg. 33,985 (June 16, 2008), and accompanying issues and decision memorandum (excerpted) (Exhibit KOR-29) (collectively, *Nails*)), as modified in *Multilayered Wood Flooring from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 Fed. Reg. 64,318 (October 18, 2011) (Exhibit USA-19), and accompanying issues and decision memorandum (excerpted), Comment 4, pp. 28-36 (Exhibit USA-20).
[121] Washers Final AD I&D Memo, p. 19 (Exhibit KOR-18).
[122] Korea First Written Submission, note 92.
[123] *See* Washers Final AD I&D Memo, p. 20 (Exhibit KOR-18).
[124] *See* Washers Final AD I&D Memo, pp. 18-24 (Exhibit KOR-18).

concerning the methodology applied in the examination of the existence of a pattern of export prices which differed significantly among different purchasers, regions, or time periods. For example, the USDOC responded to arguments concerning the use of weighted average sales prices in its analysis,[125] the use of a one-standard-deviation threshold versus a two-standard-deviation threshold,[126] whether other statistical tests should be applied,[127] and whether a *de minimis* threshold should apply.[128] In many cases, the USDOC had previously considered these arguments, and thus the final issues and decision memorandum makes reference to prior USDOC determinations that discuss the USDOC's positions.

98. The United States notes that the parties are generally in agreement on the standard of review to be applied by the Panel. As discussed above, and as demonstrated in the final issues and decision memorandum in the washers antidumping investigation, (a) the USDOC's conclusion that there existed a pattern of export prices which differed significantly among different purchasers, regions, and time periods is reasoned and adequate in light of the evidence on the record; (b) the USDOC's reasoning is coherent and internally consistent; (c) the explanations disclose how the USDOC treated the record evidence and whether positive evidence supported each inference that the USDOC made and each conclusion that the USDOC reached; (d) the explanations demonstrate that the USDOC took proper account of the relevance of the evidence before it; and (e) the USDOC explained why it rejected or discounted alternative explanations and interpretations of that evidence.[129]

99. For these reasons, the Panel should find that, in the washers antidumping investigation, the USDOC did not act inconsistently with the requirements of the "pattern clause" in the second sentence of Article 2.4.2 of the AD Agreement, as that clause is properly interpreted.

3. The Second Condition for Resorting to the Alternative Comparison Methodology: The "Explanation Clause"

a. The "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement 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

100. The second condition set forth in the second sentence of Article 2.4.2 of the AD Agreement is that an investigating authority may utilize the alternative comparison methodology

[125] *See* Washers Final AD I&D Memo, pp. 20-21 (Exhibit KOR-18).
[126] *See* Washers Final AD I&D Memo, pp. 21-22 (Exhibit KOR-18).
[127] *See* Washers Final AD I&D Memo, p. 22 (Exhibit KOR-18).
[128] *See* Washers Final AD I&D Memo, pp. 22-23 (Exhibit KOR-18).
[129] *See* Korea First Written Submission, para. 22 (summarizing the Appellate Body's discussion in *US – Softwood Lumber VI (Article 21.5 – Canada)* of the standard of review to by applied by panels).

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."

101. As we did with the "pattern clause" above, we will examine the meaning of what we call the "explanation clause" by considering the ordinary meaning of the terms of the "explanation clause" in their context. As explained below, applying the customary rules of interpretation of public international law leads to the conclusion that 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.

102. It appears clear, and it seems as though it should be uncontroversial that, while written in the passive voice, the "explanation" to be "provided" pursuant to the "explanation clause" must be provided by the same "authorities" required earlier in the second sentence of Article 2.4.2 to "find a pattern," those being the investigating authorities undertaking the antidumping investigation.

103. It also appears clear that the term "such differences" in the "explanation clause" refers to the differences in "export prices," which have been found to "differ significantly" pursuant to the operation of the "pattern clause," as set forth earlier in the second sentence of Article 2.4.2.

104. Korea points out that the word "explanation" is linked contextually with the word "why," such that it is an "explanation why" that is required by the "explanation clause." The United States agrees with Korea's observation, and with Korea's suggestion that the ordinary meaning of the word "why" includes "for what reason."[130]

105. The United States also agrees with Korea that the word "cannot" means that something "is not possible."[131] Though, as noted below, the word "cannot" is linked contextually with the word "appropriately," and this must be considered in the interpretive analysis.

106. Korea does not discuss at any length what is "not possible" in the "explanation clause." Per the terms of the "explanation clause," the investigating authority must explain the reason that it is "not possible" for the significant differences in export prices to "be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

107. The most relevant definition of the verb "take" is "to proceed to deal with mentally; to consider; to reckon,"[132] and the most relevant definition of "account" is "counting, reckoning, enumeration; computation, calculation; (also) a style or mode of reckoning; an amount established by counting."[133] The dictionary also defines "to take account of" as "to include

[130] Korea First Written Submission, para. 156.
[131] Korea First Written Submission, para. 158.
[132] *See* Definition of "take" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-8).
[133] *See* Definition of "account" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-9).

(something) in an account or reckoning" and "to take into consideration, esp. as a contributory factor; to notice."[134] For something to be "taken into account," then, it must be "deal[t]" or "reckon[ed]" with in a "computation" or "calculation," or it must be "notice[d]." In the context of the "explanation clause," the investigating authority must explain why it is "not possible" to "deal" or "reckon with" the significantly differing export prices "appropriately" in the dumping "computation" or "calculation" using one of the two "normal[]" comparison methodologies, or, alternatively, why one of the two normal comparison methodologies would not "appropriately" "notice" such significantly differing export prices.

108. The term "appropriately" is not defined in the AD Agreement, but the Appellate Body has considered the meaning of the word "appropriate" in the context of an interpretive analysis of Article 19.3 of the SCM Agreement:

> [W]e note that the relevant dictionary definitions of the term "appropriate" include "proper", "fitting" and "specially suitable (*for*, *to*)". These definitions suggest that what is "appropriate" is not an autonomous or absolute standard, but rather something that must be assessed by reference or in relation to something else. They suggest some core norm – "proper", "fitting", "suitable" – and at the same time adaptation to particular circumstances.[135]

109. As already noted, the word "appropriately" also is linked contextually with the word "cannot." Thus, it is not the case that the investigating authority must explain why it is not possible *at all* to take into account significantly differing export prices using one of the two normal comparison methodologies. Rather, the investigating authority must explain why the significant differences in export prices cannot be taken into account in a manner that is "proper," "fitting", or "suitable" using one of the normal comparison methodologies, given, *inter alia*, the particular circumstance of the "pattern clause" condition having been met.

110. We now come to the primary focus of Korea's discussion of the "explanation clause" in its first written submission, the meaning of the word "explanation" itself.[136] The dictionary defines the word "explanation" as "[t]he action or process of explaining"; "[t]hat which explains, makes clear, or accounts for; a method of explaining or accounting for; a statement that makes things intelligible."[137] Korea appears to agree that these are relevant dictionary definitions, as it cites to the panel report in *Thailand – Cigarettes (Philippines)*, wherein the panel relied on similar definitions from another version of the *Oxford English Dictionary*.[138]

111. Taking all of the above textual and contextual considerations together, what is required of the "explanation" described in the "explanation clause" in the second sentence of Article 2.4.2 is a "statement" by the investigating authority that "makes clear" or "intelligible" – or, in Korea's

---

[134] *See* Definition of "account" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-9).
[135] *See US – Anti-Dumping and Countervailing Measures (China)*, para. 552 (quoting *Shorter Oxford English Dictionary*, 6th edn., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 106).
[136] *See* Korea First Written Submission, paras. 154-167.
[137] *See* Definition of "explanation" from Oxford English Dictionary Online (http://www.oed.com) (Exhibit USA-10).
[138] *See* Korea First Written Submission, para. 155-156.

formulation, "give[s] details"[139] 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.

112. This is the meaning that results from a proper application of the customary rules of interpretation of public international law. Where an investigating authority provides such an "explanation," and that "explanation" is "reasoned and adequate," as that standard of review has been elaborated by the Appellate Body,[140] the investigating authority's "explanation" should not be found to be inconsistent with the requirements of the second sentence of Article 2.4.2 of the AD Agreement.

b. Korea Is Incorrect when It Contends that the "Explanation" Required by the Second Sentence of Article 2.4.2 of the AD Agreement Must Be "Detailed" and "Extensive"

113. Contrary to the correct interpretation that follows from a proper application of the customary rules of interpretation of public international law, Korea contends that something more is required by the "explanation clause." Korea argues as follows:

> Under the fundamental principle of "due process", a respondent may effectively exercise its respective rights under Articles 13 and 17 of the Anti-Dumping Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the use of the [average-to-transaction] comparison methodology by the investigating authority was consistent with the importing Member's WTO obligations. Therefore, the obligation of "explanation" imposed on an investigating authority sets a high standard. In light of this high standard, the meaning of "explanation" under Article 2.4.2 of the Anti-Dumping Agreement must be sufficiently extensive and detailed.[141]

114. Korea's reasoning is flawed. To the extent that the AD Agreement includes principles of procedural fairness, those principles are reflected in specific provisions of the AD Agreement, such as in the procedural obligations under Article 6. Korea's suggested approach of adding new obligations to the AD Agreement because – according to Korea – they would promote procedural fairness is fundamentally at odds with basic principles of treaty interpretation. Moreover, Korea's contention – namely, that procedural fairness would require that "the obligation of 'explanation' imposed on an investigating authority set[] a high standard" – is without any basis in logic. In short, Korea's argument simply is a *non sequitur*. Korea offers no support either for its contention that, as a procedural matter, the AD Agreement sets a "high standard" for the explanation obligation, or for its contention that an explanation "must be sufficiently extensive and detailed." There simply is no support for these contentions in the text of the AD Agreement.

---

[139] Korea First Written Submission, para. 156.
[140] *See, e.g., US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186.
[141] Korea First Written Submission, para. 157.

115. We recall that Korea relies on the panel report in *Thailand – Cigarettes (Philippines)* – a dispute which involved customs valuation, not antidumping measures – as support for its proposed interpretation of the term "explanation."[142] Korea suggests that "[t]he panel's interpretation of the meaning of ' [sic] the term 'explanation' under Article 16 of the [*Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994* ("Customs Valuation Agreement")] provides relevant guidance for the Panel in relation to its understanding of the same term in Article 2.4.2 of the Anti-Dumping Agreement."[143]

116. The *Thailand – Cigarettes (Philippines)* panel, in its report, recalled "the transparency and due process objective that Article 16 [of the Customs Valuation Agreement] is intended to achieve," and recognized that "an explanation under Article 16 enables importers and foreign governments to effectively exercise their respective rights under Articles 11 and 19 of the Customs Valuation Agreement when requesting domestic reviewing tribunals, courts and WTO panels to determine whether the manner or means of valuation by a customs authority was consistent with the importing Member's WTO obligations."[144] Korea appears to have paraphrased these observations of the panel in making its own argument.[145]

117. Unlike Korea, however, the panel in *Thailand – Cigarettes (Philippines)* did not reason from these observations about transparency and due process to the conclusion that *every* "explanation" is subject to a "high standard" and must be "extensive and detailed." The panel actually came to the opposite conclusion. Examining the term "explanation" in its context in Article 16 of the Customs Valuation Agreement, the panel observed that:

> [T]he extent of an explanation to be provided under Article 16 is not the same as that under the equivalent provisions of the WTO agreements on trade remedy measures. The obligations imposed on domestic authorities to explain determinations in the context of the trade remedy rules are much more detailed and specific. For example, Article 12.2 of the Anti-Dumping Agreement refers to "*sufficiently detailed* explanations" and "a *full* explanation". Article 4.1(c) of the Agreement on Safeguards requires a *detailed* analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. In contrast to these provisions, Article 16 of the Customs Valuation Agreement contains succinct language that the importer shall have the right to "an explanation ... as to how the customs value of the importer's goods was determined". The absence of any modifying words such as "detailed" or "full" before the term "explanation" in Article 16 should be taken into account in clarifying the extent of the explanation under Article 16. Moreover, the obligation to provide "an explanation in writing" under Article 16 arises only if there is a written request from the importer. This too shows that the standard for the explanation required under Article 16 of the Customs Valuation Agreement is

[142] Korea First Written Submission, paras. 155-156.
[143] Korea First Written Submission, para. 156.
[144] *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.234.
[145] *See* Korea First Written Submission, para. 157.

> less stringent than that under the Anti-Dumping Agreement, the SCM Agreement or the Agreement on Safeguards.[146]

118. The language in the second sentence of Article 2.4.2 of the AD Agreement is like that in Article 16 of the Customs Valuation Agreement, in that Article 2.4.2 also "contains succinct language" about "an explanation" without "any modifying words such as 'detailed' or 'full' before the term 'explanation.'"[147] This contrasts with other instances of the use of the word "explanation" in the AD Agreement, such as in Article 12, as the panel in *Thailand – Cigarettes (Philippines)* explained. The United States agrees with the *Thailand – Cigarettes (Philippines)* panel that this "should be taken into account in clarifying the extent of the explanation" required by the "explanation clause" in the second sentence of Article 2.4.2. The conclusion to be drawn from such consideration is that the standard for the explanation required by the "explanation clause" is "less stringent" than that under other provisions of the AD Agreement.

119. That being said, the United States agrees that the "explanation" required by the "explanation clause" must be *sufficiently* extensive and detailed. As the Appellate Body has explained of an investigating authority's explanation generally, "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case."[148] A relatively brief and not particularly detailed explanation may suffice when, for example, it is readily apparent from a comparison of the results of the application of one of the normal comparison methodologies and the results of the application of the alternative comparison methodology that using one of the normal comparison methodologies would lead to the "masking" of dumping to a material or meaningful degree. In such a situation, it is clear that the significantly differing export prices cannot be "deal[t]" or "reckon[ed]" with in the dumping "computation" or "calculation" using one of the normal methodologies, because those differences would not be "notice[d]" using one of the normal methodologies.

c. Korea Is Incorrect when It Contends that the "Explanation" Required by the Second Sentence of Article 2.4.2 of the AD Agreement Must Include a Discussion of Both the Average-to-Average and Transaction-to-Transaction Comparison Methodologies

120. Finally, Korea argues that, if an investigating authority's "explanation" does not include, in addition to a discussion of the average-to-average comparison methodology, an "explanation as to why the [transaction-to-transaction] comparison methodology [also] cannot take into account appropriately the pattern of significantly different prices found . . . in sales to purchasers and in regions and time periods," then that would constitute "an explicit violation of the requirement in the second sentence of Article 2.4.2 that such an explanation be given."[149] Korea is incorrect.

---

[146] *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.239 (italics in original; underlining added).
[147] *Thailand – Cigarettes (Philippines) (Panel)*, para. 7.239.
[148] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.
[149] Korea First Written Submission, para. 167.

121. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."[150] The Appellate Body has further explained that it would be illogical if these two comparison methodologies were to yield "results that are systematically different."[151]

122. Logically, if the average-to-average and transaction-to-transaction comparison methodologies yield systematically similar results, then there would be no purpose in requiring an investigating authority to explain why a pattern of export prices that differ significantly cannot be taken into account appropriately by the transaction-to-transaction comparison methodology, when the investigating authority already has explained why the pattern of export prices that differ significantly cannot be taken into account appropriately by the average-to-average comparison methodology.

123. The Appellate Body has also acknowledged that "[a]n investigating authority may choose between the two [comparison methodologies in the first sentence of Article 2.4.2] depending on which is most suitable for the particular investigation."[152] A transaction-to-transaction comparison methodology may be particularly unsuitable, and could be quite burdensome, when there is a large number of sales transactions in both the home market and the export market. Nothing in the first sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to apply both comparison methodologies in the course of a single antidumping investigation. This is confirmed by the use of the disjunctive term "or" between the descriptions of the two comparison methodologies in the first sentence of Article 2.4.2.

124. It follows that, when the "explanation clause" is read in the context of Article 2.4.2 as a whole, an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" it provides pursuant to the second sentence of Article 2.4.2.

d. The USDOC's "Explanation" in the Washers Antidumping Investigation Is Not Inconsistent with the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

125. In the washers antidumping investigation, after finding that there was a pattern of export prices that differed significantly among different purchasers, regions, or time periods, the USDOC considered whether the 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 what the weighted average dumping margin would have been as calculated using the average-to-transaction comparison methodology.

[150] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[151] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[152] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

126. The USDOC found that, for the Korean respondent Samsung, the weighted average dumping margin calculated using the average-to-average comparison methodology would have been zero percent, while the weighted average dumping margin calculated using the average-to-transaction comparison methodology would have been 9.29 percent.[153] For the Korean respondent LG, the weighted average dumping margin calculated using the average-to-average comparison methodology would have been [[***]] percent, while the weighted average dumping margin calculated using the average-to-transaction comparison methodology would have been 13.02 percent.[154]

127. The USDOC considered that those differences were "meaningful" because Samsung's weighted average dumping margin was more than 9 percentage points greater using the average-to-transaction methodology, and, importantly, the difference changed the conclusion from a finding of no dumping (using the average-to-average method) to an affirmative finding of a dumping at a rate of 9.29 percent (using the average-to-transaction method). Likewise, LG's weighted average dumping margin increased by approximately [[***]] percent when the average-to-transaction method was used.[155]

128. The USDOC concluded that these "meaningful" differences were evidence that "the average-to-average comparison methodology conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group."[156] In the final antidumping determination, the USDOC explained that its "analysis shows 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 for both respondents."[157]

129. Thus, consistent with the elaboration of the requirements of the "explanation clause" set out above, 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.

130. Korea complains that the USDOC's "statements are wholly conclusory and provide no explanation at all."[158] Korea's assertion is unfounded. The evidence that supports the USDOC's conclusion – that significantly differing export prices cannot be taken into account by the use of

[153] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18); Samsung Final Determination Calculation Memorandum (dated December 18, 2012) ("Final Samsung AD Calculation Memo"), at Attachment 2, pg. 125 (p. 281 of the PDF version of Exhibit KOR-41).
[154] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18); Final Determination Margin Calculation for LG Electronics Inc. and LG Electronics USA, Inc. (dated December 18, 2012) ("Final LG AD Calculation Memo"), at Attachment 2, pg. 127 (p. 325 of the PDF version of Exhibit KOR-42); Final AD Determination, at 75,992 (Exhibit KOR-1).
[155] *See* Washers Final AD I&D Memo, at 20 (Exhibit KOR-18); Final LG AD Calculation Memo, at Attachment 2, pg. 127 (p. 325 of the PDF version of Exhibit KOR-42).
[156] Washers AD Preliminary Determination, p. 46,395 (Exhibit KOR-32).
[157] Washers Final AD I&D Memo, p. 20 (Exhibit KOR-18).
[158] Korea First Written Submission, para. 162.

the average-to-average comparison methodology – was, as explained above, the meaningful differences in the weighted average dumping margins as calculated under that methodology when compared to the weighted average dumping margins as calculated under the average-to-transaction comparison methodology. These differences were meaningful in the sense that they were relatively large and, in the case of Samsung, the difference resulted in a change from a determination of no dumping to an affirmative determination of dumping.

131. Korea argues that:

> It is in the very nature of the [average-to-average] comparison methodology that, through the use of averaging, it will "conceal" the differences between individual prices. It logically follows that this inherent aspect of the [average-to-average] comparison methodology itself cannot provide the required "explanation" as to why that methodology cannot take into account the pattern of lower priced sales found to exist. Indeed, if this were the case, Article 2.4.2 would have set forth a bright line rule that automatically authorized the use of the [average-to-transaction] comparison methodology in all circumstances in which a pattern of significantly different prices was found.[159]

Korea's reasoning is flawed. While it is inherent in the average-to-average comparison methodology that differences between individual prices may be concealed, it will not necessarily always be the case that "targeted dumping" will be "masked"[160] by this "very nature" of that comparison methodology such that the average-to-average comparison methodology cannot account for such differences appropriately.

132. For example, while it may be the case that there is a pattern of export prices that differ significantly among different purchasers, regions, or time periods, *i.e.*, while it may be the case that the "pattern clause" condition has been met, it may also be the case that all such differing export prices nevertheless are above normal value, so that both the average-to-average and average-to-transaction comparison methodologies would lead to a finding of no dumping. Alternatively, it may be the case that all of the export prices are below normal value, and thus no "masking" of dumping is occurring, and the weighted average dumping margin calculated under both the average-to-average and average-to-transaction comparison methodologies would be the same. Apart from these two cases, it may also be the case that the amount of "masking" or the amount of dumping found is relatively small.

133. However, when there is a pattern of export prices that differ significantly, and the export prices that are lower are below normal value while the export prices that are higher are above normal value, that is a situation where, as the Appellate Body has recognized, "targeted dumping" may be "masked."[161] In that case, what Korea terms the "inherent aspect of the [average-to-average] comparison methodology itself" does indeed "provide the required 'explanation' as to why that methodology cannot take into account the pattern of lower priced

[159] Korea First Written Submission, para. 163.
[160] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[161] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

sales found to exist."[162] It is unclear what, other than this "inherent aspect" of the average-to-average comparison methodology, would provide the requisite explanation, and Korea does not elaborate on what, in its view, would suffice to meet the requirement.

134. Rather, Korea argues vaguely that, "notwithstanding the universally held understanding that the [average-to-average] comparison methodology by its very nature may 'conceal' individual price differences, Article 2.4.2 contemplates circumstances where it (and the [transaction-to-transaction] comparison methodology) could still 'take into account appropriately' the observed pattern of significantly different prices."[163] Again, Korea does not elaborate what such "circumstances" might be.

135. However, the United States agrees that such circumstances may exist. Principally, it seems that the most relevant of such circumstances would involve situations where the differences in export prices can be "taken into account appropriately" through the kinds of adjustments contemplated under Article 2.4 of the AD Agreement. It may be the case that raw, unadjusted export prices, when examined together, reflect a pattern of significant differences among different purchasers, regions, or time periods. However, when, in order to make a "fair comparison" with normal value, as required by Article 2.4, the export prices are adjusted,[164] the result may be, as described above, that the outcome of the calculation using the average-to-average comparison methodology is not meaningfully different from the outcome of the calculation using the average-to-transaction comparison methodology. Making such "due allowances" under Article 2.4 would appear to be a way in which a pattern of export prices that differ significantly could be "taken into account appropriately" using one of the normal comparison methodologies.

136. Of course, zeroing cannot be used "appropriately" under the average-to-average and transaction-to-transaction comparison methodologies to take into account a pattern of export prices that differ significantly, as zeroing has been found to be impermissible under those methodologies. However, as the United States demonstrates in section IV.B.5 of this submission, if "targeted dumping" is to be "unmasked" through the use of the average-to-transaction methodology, then zeroing (*i.e.*, not offsetting positive comparison results with negative comparison results) can, and indeed must be used in the application of that methodology.

137. Indeed, Korea makes an important concession when it argues that the average-to-average comparison methodology "by its very nature may 'conceal' individual price differences."[165] The Appellate Body has explained that "dumping arises from the pricing behaviour of an exporter" and "[a] proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transactions over a period of time."[166] The Appellate Body has also explained that the

[162] Korea First Written Submission, para. 163.
[163] Korea First Written Submission, para. 163.
[164] For example, to make "due allowance" for certain "differences" and "costs," as elaborated in Article 2.4 of the AD Agreement.
[165] Korea First Written Submission, para. 163.
[166] *US – Stainless Steel (Mexico) (AB)*, para. 98.

asymmetrical comparison methodology is intended to "unmask" dumping by an exporter.[167] As Korea appears to recognize, averaging would mean that higher-priced export sales may obscure the dumping occurring through lower-priced export sales. Therefore, in the exceptional circumstance of the third comparison methodology, "unmasking" dumping requires examining an exporter's pricing behavior through its sales made below normal value. That is, in order not to conceal or mask the price differences and dumping occurring, the relevant exporter transactions for determining the amount of dumping are the dumped sales.

138. Korea emphasizes that the non-use or use of zeroing is the primary distinction between the USDOC's application of the average-to-average and average-to-transaction comparison methodologies in the washers antidumping investigation.[168] Korea argues that:

> [T]he comparison undertaken by the USDOC is not, in fact, what it purports to be, i.e., a measure of the impact on dumping margins caused by the application of the [average-to-average] vs. the [average-to-transaction] methodologies to a particular set of export prices. Rather it is a measure of the impact of zeroing on the calculation of the dumping margins under those two methodologies, when applied to all of an exporter's sales, not merely to those found to constitute a pattern of significantly difference prices. On its face, it is apparent that this "explanation" does not address the effect of using two different comparison methodologies, as the USDOC claims, let alone articulate a basis for concluding that the [average-to-average] comparison methodology "cannot" take into account appropriately the pattern of price differences found to exist.[169]

139. Korea is wrong, in part. As an initial matter, the USDOC made no effort to hide the fact that the primary distinction between the average-to-average comparison methodology and the average-to-transaction comparison methodology is that the latter features zeroing and the former does not. As explained in the preliminary determination in the washers antidumping investigation, in applying the average-to-transaction methodology, the USDOC did not offset positive comparison results with negative comparison results.[170] That is, the USDOC explained that it used zeroing in its application of the average-to-transaction comparison methodology.

140. If the USDOC's understanding of the distinction between the two comparison methodologies were not clear from the USDOC's statement in the preliminary determination, it is made explicit in the final issues and decision memorandum. Under "Comment 4: Zeroing in the Average-to-Transaction Method," the USDOC states that, "providing offsets is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate

---

[167] *See US – Zeroing (Japan) (AB)*, para. 135.
[168] *See* Korea First Written Submission, paras. 164-165.
[169] Korea First Written Submission, para. 165.
[170] Washers AD Preliminary Determination, p. 46,395 (Exhibit KOR-32). We note that the preliminary determination reads as follows: "In applying this [average-to-transaction] methodology, consistent with our practice, we did not offset negative comparison results with positive comparison results." *Id.* In the quoted text, the words "positive" and "negative" are incorrectly reversed. When zeroing is *not* used, it is *positive* comparison results (*i.e.*, those that provide evidence of dumping) that are offset with *negative* comparison results (*i.e.*, those that mask dumping).

when aggregating the results of average-to-transaction comparisons, such as were applied in this investigation."[171] The USDOC then goes on to explain why that is the case.[172]

141. Hence, the comparison the USDOC undertook was precisely what it purported to be, "a measure of the impact on dumping margins caused by the application of the [average-to-average] vs. the [average-to-transaction] methodologies to a particular set of export prices."[173] Korea is correct, though, when it notes that the USDOC's comparison also was "a measure of the impact of zeroing on the calculation of the dumping margins under those two methodologies."[174] The United States welcomes Korea's recognition that the difference between the weighted average dumping margin calculated using the average-to-average comparison methodology and that calculated using the average-to-transaction comparison methodology is attributable exclusively to zeroing and, without zeroing, the result of the two methodologies would be identical. This is discussed further below, in sections IV.B.5.d and IV.B.5.e.

142. In light of the above, contrary to Korea's suggestion, the USDOC's "explanation" does address the effect of using two different comparison methodologies, and it articulated a basis for concluding that the average-to-average comparison methodology cannot take into account appropriately the pattern of export price differences found to exist. The reason, to be absolutely clear, is that zeroing is not permissible under the average-to-average comparison methodology, and thus cannot be used "appropriately" under that methodology to "unmask targeted dumping."[175]

143. Finally, Korea contends that the USDOC's:

> "comparison" approach amounts to the proposition that in any instance in which application of the [average-to-average] comparison methodology produces a different (i.e., lower) dumping margin than through the application of the [average-to-transaction] comparison methodology, it necessarily follows without any additional analysis that the [average-to-average] comparison methodology "cannot" appropriately take into account the observed pattern of significantly different prices.[176]

As explained above, the USDOC did not take the view in the washers antidumping investigation that "any" difference in the dumping margin that would result from the application of the average-to-average comparison methodology as compared to the average-to-transaction comparison methodology would justify resorting to the alternative methodology. Rather, the USDOC resorted to the alternative comparison methodology because, as it explained, the differences in the calculated weighted average dumping margins were "meaningful," in that the

[171] Washers Final AD I&D Memo, p. 26 (Exhibit KOR-18).
[172] *See* Washers Final AD I&D Memo, pp. 26-33 (Exhibit KOR-18).
[173] Korea First Written Submission, para. 165.
[174] Korea First Written Submission, para. 165.
[175] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[176] Korea First Written Submission, para. 166.

differences were relatively large and, in the case of Samsung, the difference resulted in a change from a determination of no dumping to an affirmative determination of dumping.

144. For these reasons, the "explanation" that the USDOC provided in the washers antidumping investigation as to why significant differences in export prices cannot be taken into account appropriately by the use of the average-to-average or transaction-to-transaction comparison methodologies is not inconsistent with the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.

4. The USDOC's Application of the Alternative Average-to-Transaction Comparison Methodology to All Sales in the Washers Antidumping Investigation Is Not Inconsistent with Article 2.4.2 of the AD Agreement

145. Having addressed Korea's "as applied" claims relating to *when* the alternative comparison methodology may be applied, we now turn to Korea's "as applied" claims relating to *how* the alternative comparison methodology is to be applied. Korea claims that the USDOC acted inconsistently with Article 2.4.2 of the AD Agreement in the washers antidumping investigation 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."[177] Korea's claim is without merit.

146. Korea purports to premise its argument on the "structure and language of Article 2.4.2."[178] In particular, Korea contrasts the use of the term "shall" in the first sentence of Article 2.4.2 with the use of the term "may" in the second sentence of Article 2.4.2.[179] Korea contends that it "naturally follows from this structure that the exception in Article 2.4.2 should be limited in application to those transactions that have justified its use,"[180] by which Korea appears to mean that the application of the average-to-transaction comparison methodology must be limited only to those transactions found to have been priced significantly lower than other transactions, *i.e.*, those found to have been "targeted."[181] The United States does not agree that Korea's proposition "naturally follows" at all.

147. The text of Article 2.4.2 of the AD Agreement supports the conclusion that the second sentence of that provision sets forth a comparison methodology that is an "exception" to the comparison methodologies described in the first sentence, which are to be used "normally." The Appellate Body previously has signalled its agreement with this understanding of Article

[177] Korea First Written Submission, para. 168.
[178] Korea First Written Submission, para. 170.
[179] Korea First Written Submission, para. 171.
[180] Korea First Written Submission, para. 172.
[181] *See* Korea First Written Submission, paras. 172-179. We note, in particular, the "significance" Korea places on what it asserts is evidence that the United States previously agreed with Korea's understanding of the operation of the second sentence of Article 2.4.2. In this regard, Korea points to a withdrawn USDOC regulation that provided that the USDOC "normally will limit the application of the average-to-transaction method to those sales that constitute targeted dumping." Korea First Written Submission, para. 176.

2.4.2.[182] When the conditions for the use of the exceptional comparison methodology are met, however, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is further constrained, as Korea proposes. Rather, when the conditions have been met, the second sentence of Article 2.4.2 simply provides that "[a] normal value established on a weighted average basis may be compared to prices of individual export transactions."

148. In *US – Zeroing (Japan)*, the Appellate Body discussed the text of the second sentence of Article 2.4.2 of the AD Agreement in connection with its review of the panel's contextual analysis of the first sentence of Article 2.4.2. The Appellate Body observed that:

> The emphasis in the second sentence of Article 2.4.2 is on a "pattern," namely a "pattern of export prices which differs [sic] significantly among different purchasers, regions or time periods." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern.[183]

The Appellate Body went on to suggest that "in order to unmask targeted dumping, an investigating authority *may* limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[184] We emphasize in the preceding quotation that the Appellate Body used the word "may." Contrary to Korea's argument, 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.[185]

149. Logically, the Appellate Body would have made no such declaration. Korea appears to harbor a fundamental misconception about the meaning of the phrase "pattern of export prices which differ significantly among different purchasers, regions or time periods" in the second sentence of Article 2.4.2. Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. An export price cannot "differ significantly" on its own. Given that "difference" is a comparative or relative concept, for something to be different, it must differ from something else. Thus, lower export prices, which likely do not differ significantly from one another, cannot form a "pattern of export prices which differ significantly" without reference to the higher export prices from which they differ significantly.

150. In the context of the USDOC's application of the *Nails* test in the washers antidumping investigation, the export prices of those sales that passed the *Nails* test and those of other sales were significantly different from one another. Taken together, and only taken together, all of the export prices examined constituted the "pattern of export prices which differ significantly among

---

[182] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.
[183] *See US – Zeroing (Japan) (AB)*, para. 135.
[184] *See US – Zeroing (Japan) (AB)*, para. 135 (emphasis added).
[185] *See* Korea First Written Submission, paras. 172-179. We note that the Appellate Body emphasized that its "analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision." *US – Zeroing (Japan) (AB)*, para. 136.

different purchasers, regions or time periods."[186] As the USDOC explained in the final issues and decision memorandum:

> If the Department were to apply the average-to-transaction method only to those U.S. sales which pass the *Nails* test, as argued by the respondents, then this approach would include only part of the U.S. sales which constitute the identified pattern. In other words, the U.S. sales which pass the *Nails* test represent only part of the pricing behavior of the respondent, which, in and of themselves, do not constitute the identified pattern which is based on significant price differences between all groups, whether allegedly targeted or not. The identified pattern is defined by all of the respondent's U.S. sales.[187]

As the "pattern" the USDOC identified was revealed by, and therefore comprised, all sales transactions, the USDOC's application of the average-to-transaction comparison methodology to all sales transactions is not at odds with the Appellate Body's suggestion that "an investigating authority may limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[188]

151. Korea's proposed interpretation of Article 2.4.2, on the other hand, is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping."[189] "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. The "targeted" sales identified through the *Nails* test, *i.e.*, lower-priced sales, are identified as sales that may be below normal value and that may be "masked" by sales that are not targeted according to the *Nails* test, which are higher-priced. Accordingly, "targeted dumping" – which is evidenced by lower-priced sales that "differ significantly" from higher-priced sales – 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.

152. Finally, Korea asserts that it is "significant" that the United States purportedly previously shared Korea's understanding of the operation of the second sentence of Article 2.4.2 of the AD Agreement, as evidenced by an obsolete regulation promulgated by the USDOC.[190] The United States does not see how this is "significant," or even relevant at all to an interpretive analysis of Article 2.4.2 undertaken in accordance with the customary rules of interpretation of public international law. A limitation on the application of the alternative comparison methodology that the U.S. investigating authority, for a time, imposed on itself provides no guidance as to the correct interpretation of the terms of Article 2.4.2. Additionally, in withdrawing its regulation, the USDOC acknowledged that it "may have established thresholds or other criteria that have

---

[186] AD Agreement, Article 2.4.2, second sentence.
[187] Washers Final AD I&D Memo, p. 34 (Exhibit KOR-18).
[188] *See US – Zeroing (Japan) (AB)*, para. 135.
[189] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[190] *See* Korea First Written Submission, paras. 176-179.

prevented the use of this comparison methodology to unmask dumping."[191] In sum, the USDOC's withdrawn regulation is of no relevance to the Panel's interpretive analysis of Article 2.4.2.

153. For these reasons, the USDOC's application of the alternative average-to-transaction comparison methodology to all sales in the washers antidumping investigation is not inconsistent with Article 2.4.2 of the AD Agreement.

5. The USDOC's Use of Zeroing in Connection with Its Application of the Alternative, Average-to-Transaction Comparison Methodology in the Washers Antidumping Investigation Is Not Inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement

a. Introduction

154. Korea's other claims relating to *how* the alternative comparison methodology is to be applied concern the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. Korea claims that the USDOC acted inconsistently with Articles 2.4.2 and 2.4 of the AD Agreement in the washers antidumping investigation by using zeroing in connection with the average-to-transaction comparison methodology.[192] Korea's claims are without merit.

155. Korea describes zeroing as follows:

> "Zeroing" in [the average-to-transaction] comparison methodology relates to the methodology whereby the USDOC disregards (i.e. treats as zero) the amount by which the price of individual export transactions exceeds the weighted average normal value, when calculating the weighted average margin of dumping for a particular product and exporter.[193]

The United States can accept this as a working definition of zeroing for the purpose of this dispute.

156. The United States does not accept, however, Korea's argument that "by disregarding the results of intermediate [average-to-transaction] price comparisons when calculating the aggregated margin of dumping for the product as a whole and for the exporter, the USDOC runs afoul of the basic principles of the Anti-Dumping Agreement and of the GATT 1994, such as the definitions of 'dumping', 'margin of dumping', 'product', and 'injury', as interpreted in numerous panel and Appellate Body reports."[194]

---

[191] *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 Fed. Reg. 74,930, 74,931 (December 10, 2008) (Exhibit KOR-9).
[192] *See* Korea First Written Submission, paras. 54-101.
[193] Korea First Written Submission, para. 55.
[194] Korea First Written Submission, para. 55.

157. The United States also does not accept Korea's suggestion that prior Appellate Body reports "are dispositive of the question of whether zeroing is permitted in the context of any anti-dumping proceeding, regardless of the particular price comparison methodology that is applied."[195] The Appellate Body has found zeroing impermissible in the context of the average-to-average[196] and transaction-to-transaction[197] comparison methodologies, which are to be used "normally" under Article 2.4.2. The Appellate Body also has found zeroing impermissible in the context of the U.S. application of an average-to-transaction comparison methodology in administrative reviews, in a situation where the conditions set forth in the second sentence of Article 2.4.2 were not established.[198]

158. The Appellate Body has never found, however, 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. The Appellate Body has not even confronted that situation in any prior dispute. As the Appellate Body emphasized in *US – Stainless Steel (Mexico)*:

> The Appellate Body 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. Nor is it an issue before us in this appeal. As in *US – Zeroing (Japan)*, our analysis here of the second sentence of Article 2.4.2 is therefore confined to addressing the contextual arguments of the Panel based on that provision.[199]

Likewise, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body confirmed that:

> 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.[200]

Accordingly, the permissibility of zeroing under the average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 is an issue of first impression for the Panel.

159. That being said, even though the Appellate Body has not previously made a finding with respect to the permissibility of zeroing under the average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2, the United States recognizes that a number of Appellate Body and panels reports include findings that bear on the interpretive

---

[195] Korea First Written Submission, para. 56.
[196] *See, e.g., US – Softwood Lumber V (AB)*, para. 117; *US – Zeroing (EC) (AB)*, para. 222.
[197] *See, e.g., US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 116; *US – Zeroing (Japan) (AB)*, para. 138.
[198] *See, e.g., US – Zeroing (EC) (AB)*, para. 135; *US – Zeroing (Japan) (AB)*, para. 166.
[199] *See US – Stainless Steel (Mexico) (AB)*, para. 127.
[200] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98. *See also US – Zeroing (Japan) (AB)*, para. 136.

question 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.

160. Appellate Body reports addressing zeroing in other contexts, as well as the interpretation and general applicability of certain terms of the AD Agreement, will be of particular relevance to the Panel's interpretive analysis. For example, in *US – Stainless Steel (Mexico)*, the Appellate Body provided the following summary of its findings relating to the legal interpretation of certain terms in the AD Agreement:

> [I]t is clear from Articles VI:1 and VI:2 of the GATT 1994 and the various provisions of the *Anti-Dumping Agreement* that: (a) "dumping" and "margin of dumping" are exporter-specific concepts; "dumping" is product-related as well, in the sense that an anti-dumping duty is a levy in respect of the product that is investigated and found to be dumped; (b) "dumping" and "margin of dumping" have the same meaning throughout the *Anti-Dumping Agreement*; (c) an individual margin of dumping is to be established for each investigated exporter, and the amount of anti-dumping duty levied *in respect of* an exporter shall not exceed its margin of dumping; and (d) the purpose of an anti-dumping duty is to counteract "injurious dumping" and not "dumping" *per se*.[201]

The Appellate Body also has found that, when examining situations involving multiple transaction-specific comparisons, "the results of the transaction-specific comparisons are not, in themselves, 'margins of dumping'."[202]

161. The United States would like to state from the outset that Korea is incorrect when it suggests[203] that the position of the United States is that the results of transaction-specific comparisons are themselves "margins of dumping" when the average-to-transaction comparison methodology is applied pursuant to the second sentence of Article 2.4.2.[204] Rather, as the Appellate Body has found:

> [W]hen an investigating authority calculates a margin of dumping on the basis of multiple comparisons of normal value and export price, the results of such intermediate comparisons are not, in themselves, margins of dumping. Rather,

---

[201] *US – Stainless Steel (Mexico) (AB)*, para. 94 (italics in original).

[202] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87 (citations omitted).

[203] *See, e.g.*, Korea First Written Submission, para. 63. Korea asserts that "The USDOC's position that zeroing is permissible under the W-T comparison methodology provided in the second sentence of Article 2.4.2 rests entirely on the proposition that when that methodology is used to calculate the margin of dumping, dumping occurs at the transaction-specific level." Korea First Written Submission, para. 63. As support for this proposition, Korea cites to pages 26-29 in the final issues and decision memorandum of the washers antidumping investigation (Exhibit KOR-18). When the Panel examines those pages of the final issues and decision memorandum, it will find no indication that the USDOC maintains the view that "dumping occurs at the transaction-specific level."

[204] Of course, accepting that a transaction-specific comparison is not itself a "margin of dumping" does not mean that a particular transaction cannot constitute evidence of "dumping." Indeed, the Appellate Body has explained that unmasking such "dumping" is the very purpose of the alternative comparison methodology in the second sentence of Article 2.4.2 of the AD Agreement. *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

> they are merely "inputs that are [to be] aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer."[205]

The United States does not ask the Panel to depart from these or any other findings of the Appellate Body related to zeroing. We do ask the Panel, though, to recognize and mirror the caution exercised by the Appellate Body in making those findings and in drawing interpretive conclusions from the text and context of the AD Agreement.

162. As explained below, the Panel should find that 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 conclusion follows from a proper application of the customary rules of interpretation of public international law. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes.

b. Initial Comments on the Text and Context of the Second Sentence of Article 2.4.2 of the AD Agreement

163. We begin by considering the relevant text of the second sentence of Article 2.4.2 of the AD Agreement, in its context. The second sentence of Article 2.4.2 provides, in pertinent part, that, if the two conditions set forth in the "pattern clause" and the "explanation clause" discussed above are met, then:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions . . . .

Read in the context of Article 2.4.2 as a whole, it is evident that the average-to-transaction comparison methodology described in the second sentence of Article 2.4.2 is, like the two comparison methodologies provided in the first sentence of Article 2.4.2, a means by which "the existence of margins of dumping . . . [may] be established."[206]

164. While it is worded somewhat differently, the term "[a] normal value established on a weighted average basis" in the second sentence of Article 2.4.2 appears to have the same meaning as the term "a weighted average normal value" in the first sentence of Article 2.4.2. When read together with Article 2.1 of the AD Agreement, the term "normal value" can be understood to mean "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country,"[207] that is, the price of the like product in the home market (in this dispute, the price of large residential washers in Korea).

165. A weighted average normal value is calculated based on, and incorporates multiple sales transactions in the home market, and can be distinguished from a normal value based on an individual sales transaction in the home market, such as would be used when making "a

---

[205] *US – Zeroing (Japan) (AB)*, para. 115; *see also US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.
[206] AD Agreement, Art. 2.4.2, first sentence.
[207] AD Agreement, Art. 2.1; *see also* AD Agreement, Art. 2.2.

comparison of normal value and export prices on a transaction-to-transaction basis."[208] 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 than the "normal value established on a weighted average basis" described in the second sentence of Article 2.4.2. 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.

166. We also observe that both of the references to weighted average normal value in Article 2.4.2, in the first sentence as well as in the second sentence, are singular. That is, the first sentence refers to "a weighted average normal value" and the second sentence likewise refers to "a normal value established on a weighted average basis." This is further contextual support for understanding that these terms share a common meaning.

167. Of course, the Appellate Body has recognized that "multiple averaging" is possible under the weighted average-to-weighted average comparison methodology, in which case transactions may be divided into groups, for instance, according to model or product type.[209] There is no textual basis to indicate that this is not equally true under the average-to-transaction comparison methodology. In the washers antidumping investigation, the USDOC, in fact, did calculate multiple weighted average normal values for different averaging groups to ensure price comparability.[210] The USDOC used the same "multiple averaging" methodology[211] to calculate normal value in its application of both the average-to-average comparison methodology and the average-to-transaction comparison methodology in the washers antidumping investigation.

168. The term "prices of individual export transactions" in the second sentence of Article 2.4.2 of the AD Agreement appears to be synonymous with the term "export prices" in the first sentence of Article 2.4.2. Article 2.1 of the AD Agreement indicates that the term "export price" means the "price of the product exported from one country to another," and the "price of individual export transactions" appears simply to be another way of conveying the same meaning, but in a situation wherein there is more than one export transaction. Put another way, "prices of individual export transactions" and "export prices" both mean the prices of the sales transactions when the product is sold in the export market (here, the prices of large residential washers from Korea that were sold in the United States).

169. The term "may be compared to" in the second sentence of Article 2.4.2 links the term "[a] normal value established on a weighted average basis" and the term "prices of individual export transactions" and indicates that it is permissible for an investigating authority to "compare[]", or "[c]onsider or estimate the similarity or dissimilarity of" those two things.[212]

---

[208] AD Agreement, Art. 2.4.2, first sentence.
[209] *See US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.
[210] *See* Final Samsung AD Calculation Memo, at Attachment 1, p. 27 (p. 92 of the PDF version of Exhibit KOR-41); Final LG AD Calculation Memo, at Attachment 1, p. 36 (p. 89 of the PDF version of Exhibit KOR-42).
[211] *See US – Softwood Lumber V (Article 21.5 – Canada)*, para. 91.
[212] Definition of "compare" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 457 (Exhibit USA-11).

The reference in the second sentence of Article 2.4.2 to "prices of individual export transactions" in the plural suggests that the comparison exercise undertaken pursuant to that provision "will generally involve multiple transactions."[213]

170. At this point in the textual and contextual analysis, it appears that, when certain conditions are met, the second sentence of Article 2.4.2 permits an investigating authority to examine multiple export sale transactions in order to estimate, measure, or note the similarity or dissimilarity between the prices of those export sale transactions and the price of the like product, on average, when it is sold in the home market.

171. The textual and contextual analysis thus far does not yet suggest an answer to the question of whether zeroing is or is not permissible when the methodology provided in the second sentence of Article 2.4.2 is applied. Additional contextual analysis, however, will demonstrate that zeroing is permissible – and indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology provided for in the second sentence of Article 2.4.2 of the AD Agreement.

c. The Average-to-Transaction Comparison Methodology in the Second Sentence of Article 2.4.2 Is an Exception to the Comparison Methodologies in the First Sentence of Article 2.4.2 and Should Be Interpreted So that It May Yield Results that Are "Systematically Different" from the Comparison Methodologies "Normally" Applied

172. As noted above, the Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."[214] The Appellate Body has reasoned that it would be illogical if these two comparison methodologies were to yield "results that are systematically different."[215]

173. The Appellate Body has further observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[216] As an exception to the two comparison methodologies that an investigating authority must use "normally," each of which logically should *not* "lead to results that are systematically different,"[217] the third comparison methodology, by logical extension, *should* "lead to results that are systematically different" from the "normal[]" comparison methodologies when the conditions for its use have been met. The Appellate Body has also found that this

[213] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.
[214] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[215] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[216] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.
[217] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

exceptional methodology provides a means by which Members can "unmask targeted dumping."[218]

174. That the average-to-transaction comparison methodology is an exception to the comparison methodologies that "shall normally" be applied, and that it can be used to "unmask targeted dumping,"[219] 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.

175. The Appellate Body has observed previously that "a fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 [of the Vienna Convention] is the principle of effectiveness."[220] As the Appellate Body has explained:

> One of the corollaries of "the general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[221]

176. The Appellate Body has referenced this "fundamental tenet of treaty interpretation" previously when considering the meaning of Article 2.4.2 of the AD Agreement. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body posited that "[i]t could be argued . . . that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology *inutile*."[222] We note that an implication of the Appellate Body's observation in this regard is that it is *possible* to use zeroing "to capture pricing patterns constituting 'targeted dumping.'"[223]

177. Of course, in the same dispute, the Appellate Body found "the concerns of the Panel and the United States over the third comparison methodology (weighted average-to-transaction)

---

[218] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[219] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[220] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[221] *See US – Gasoline (AB)*, p. 23.
[222] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.
[223] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100. Of course, the Appellate Body has never found that it is permissible to use zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in Article 2.4.2, just as it has never found that it is impermissible to do so, because it has never had occasion to examine that issue. *See US – Stainless Steel (Mexico) (AB)*, para. 127.

being rendered *inutile* by a prohibition of zeroing under the transaction-to-transaction methodology to be overstated."[224] The Appellate Body reasoned that:

> One part of a provision setting forth a methodology is not rendered *inutile* simply because, *in a specific set of circumstances*, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision. In other words, the fact that, *under the specific assumptions of the hypothetical scenario provided by the United States*, the weighted average-to-transaction comparison methodology could produce results that are equivalent to those obtained from the application of the weighted average-to-weighted average methodology is insufficient to conclude that the second sentence of Article 2.4.2 is thereby rendered ineffective. It has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results. Even if that were the case, it would not be sufficient to compel a finding that zeroing is permissible under the transaction-to-transaction comparison methodology, because this methodology is not involved in the "mathematical equivalence" argument.[225]

178. The final sentence of this passage is key to distinguishing the situation in *US – Softwood Lumber V (Article 21.5 – Canada)* from the situation in this dispute. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body was rejecting the panel's concern about effectiveness in connection with a review of the panel's contextual analysis of the first sentence of Article 2.4.2 when it was examining whether zeroing is prohibited under the transaction-to-transaction comparison methodology. Earlier in the same report, the Appellate Body confirmed that "[t]he 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."[226] Since there had been no finding that zeroing was prohibited under the alternative, average-to-transaction comparison methodology, the Appellate Body considered that the "hypothetical" possibility of "mathematical equivalence" did not support a finding that zeroing is permissible *under the transaction-to-transaction methodology*.

179. The reverse, however, would not be true. That is, in a situation, such as in this dispute, where the permissibility of zeroing in the alternative, average-to-transaction comparison methodology is at issue, if it is proven that "in all cases, or at least in most of them,"[227] prohibiting zeroing under the average-to-transaction comparison methodology would lead to that methodology yielding results that are mathematically identical to the results of the average-to-average comparison methodology (and, by logical extension, they also would be systematically similar to the results of the transaction-to-transaction comparison methodology), then the concern about effectiveness would be well founded. An interpretation that led to such a result would not be consistent with the principle of effectiveness.

---

[224] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 100.
[225] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99 (emphasis added).
[226] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.
[227] *US – Softwood Lumber (Canada) (21.5) (AB)*, para. 99.

180. In the next subsection, the United States demonstrates that, if the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is prohibited, then that comparison methodology will, as a mathematical certainty, in every case, yield an aggregate weighted average dumping margin that is identical to the aggregate weighted average dumping margin calculated using the average-to-average comparison methodology (also without zeroing). This has been referred to in previous disputes as the "mathematical equivalence" argument.[228]

d. "Mathematical Equivalence" Demonstrated

181. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results, with respect to the total amount of all comparison results, the total amount of dumping, and the weighted average dumping margin for an exporter for the product under investigation. 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. As shown below, though, those mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical.

182. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. The associative principle states that you can combine addition or multiplication operations in different groupings and get the same results.[229] The commutative principle states that you can perform addition or multiplication operations in different orders and get the same results.[230] The distributive principle states that you can extend, or distribute, addition and multiplication operations into different groups and get the same results.[231]

183. Below, we will present a simple hypothetical scenario to demonstrate how these properties are at work in the average-to-average and average-to-transaction comparison methodologies when zeroing is prohibited in connection with both. For simplicity, the following

---

[228] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 97-100; *US – Zeroing (Japan) (AB)*, paras. 133-135; *US – Stainless Steel (Mexico) (AB)*, paras. 124-126.

[229] *See, e.g.*, Definition of "associative" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 133 (Exhibit USA-12) ("*Math.* Governed by or stating the condition that where three or more quantities in a given order are connected together by operators, the result is independent of any grouping of the quantities, e.g. that (a X b) X c = a X (b X c).").

[230] *See, e.g.*, Definition of "commutative" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 456 (Exhibit USA-13) ("*Math.* governed by or stating the condition that the result of a binary operation is unchanged by interchange of the order of quantities, e.g. that a X b = b X a."). Subtraction, on the other hand, is not commutative: 2 - 1 is not equal to 1 - 2.

[231] *See, e.g.*, Definition of "distributive" from the New Shorter Oxford English Dictionary, 4th ed., L. Brown (ed.) (Clarendon Press, Oxford, 1993), Vol. 1, p. 709 (Exhibit USA-14) ("*Math.* Governed by or stating the condition that when an operation is performed on two or more quantities already combined by a second operation, the result is the same as when it is performed on each quantity individually and products then combined, e.g. that a X (b + c) = (a X b) + (a X c).").

scenario involves 5 export sales transactions of 1 unit each of 1 model of a product to 5 different purchasers.

184. By having each sale in our hypothetical involve only 1 unit, we are stripping away the complexity of weight averaging. We are also stripping away the complexity of adjustments, which are made to ensure price comparability. When these complexities are incorporated, however, for example, in an actual application such as in the washers antidumping investigation, they have no effect on "mathematical equivalence" because of the mathematical principles identified above and the fact that the same basis for weight averaging and the same adjustments are made in both the average-to-average and average-to-transaction methodologies. Nothing in Article 2.4.2 of the AD Agreement suggests that weight averaging and adjustments for price comparability should be any different in the application of the two methodologies.

185. By having our hypothetical at this point involve only 1 model, we also are stripping away the complexity of "multiple averaging" to account for different models. Again, though, when this complexity is incorporated, as in the washers antidumping investigation, it has no effect on "mathematical equivalence" because the different "model averaging" groups, when combined, still yield the same mathematical result in both comparison methodologies.

186. For our hypothetical scenario, our export price data are as follows:

Export Price to Purchaser 1	13
Export Price to Purchaser 2	13
Export Price to Purchaser 3	11
Export Price to Purchaser 4	10
Export Price to Purchaser 5	4

In this hypothetical, we will not apply the kind of analysis that the USDOC has applied to identify a "pattern of export prices which differ significantly," but it should be readily apparent that the export price to Purchaser 5 is significantly lower than the export prices to any of the other purchasers. So, we will assume for the purpose of this demonstration that the "pattern clause" condition set forth in Article 2.4.2 has been met.

187. In our hypothetical, we will posit that the weighted average normal value is 10. As explained above, nothing in the text or context of Article 2.4.2 of the AD Agreement suggests that the "weighted average normal value" used in the average-to-average comparison methodology should be any different from the "normal value established on a weighted average basis" used in the average-to-transaction methodology. Thus, in our hypothetical, normal value for the purpose of both comparison methodologies will be 10.

188. For the average-to-average comparison methodology, we will first calculate the weighted average export price. Again, as this hypothetical involves 5 sales transactions of 1 unit each, a weighted average is the same as a simple average. To calculate this average, we add the export prices and divide by 5 (the total quantity of the export transactions). That calculation looks like this:

$$\frac{13 + 13 + 11 + 10 + 4}{5} = 10.2$$

189. Thus, the weighted average export price is 10.2. To determine the average comparison result for this model, this weighted average export price is "compared to," or subtracted from our weighted average normal value, which, again, is 10:

$$10 - 10.2 = -0.2$$

Then the difference calculated, -0.2, is multiplied by the total quantity, 5 units, to determine the total amount of the comparison results for all units of the model:

$$-0.2 \times 5 = -1$$

190. Thus, the total amount of the comparison results calculated using the average-to-average comparison methodology in our hypothetical example is -1. The total amount of dumping (and the weighted average dumping margin) when using the average-to-average comparison methodology would be zero in this scenario. The dumping that would be evidenced by the export sale to Purchaser 5, at a price of 4, which is 6 below the normal value of 10, has been masked by higher priced sales to other purchasers.

191. The complete calculation under the average-to-average methodology can be expressed as an algebraic equation as follows:

$$\left(10 - \left(\frac{13 + 13 + 11 + 10 + 4}{5}\right)\right)5 = -1$$

As can be seen, this equation simply combines the preceding steps in a format that is modestly different, visually. All of the operations, however, remain the same. We will return to this algebraic representation of the average-to-average methodology shortly.

192. Now, we will demonstrate the calculation of the total amount of the comparison results and the total amount of dumping using the average-to-transaction comparison methodology. In the average-to-transaction comparison methodology, each individual export price is "compared to" the weighted average normal value, which is to say that each individual export price is subtracted from the weighted average normal value. Comparing each of our export prices above with our weighted average normal value on an individual, transaction-specific basis, we get the following comparison results:

$$10 - 13 = -3$$

$$10 - 13 = -3$$

$$10 - 11 = -1$$

$$10 - 10 = 0$$

$$10 - 4 = 6$$

The amount of comparisons yielding negative results is -7 (*i.e.*, (-3) + (-3) + (-1)). The amount of comparisons yielding positive results, which is evidence of dumping, is 6. If zeroing is prohibited, then the amount of comparisons yielding negative results is combined with the amount of comparisons yielding positive results to calculate the total amount of the comparison results, as follows:

$$(-3) + (-3) + (-1) + (0) + (6) = -1$$

In this scenario, the total amount of dumping (and the weighted average dumping margin) when using the average-to-transaction comparison methodology would be zero.

193. As can be seen from the above, the total amount of the comparison results, the total amount of dumping, and the weighted average dumping margin calculated using the average-to-average comparison methodology (without zeroing) are identical the calculations that result from the application of the average-to-transaction comparison methodology (without zeroing).

194. The complete calculation under the average-to-transaction methodology can be expressed as an algebraic equation as follows:

$$(10 - 13) + (10 - 13) + (10 - 11) + (10 - 10) + (10 - 4) = -1$$

195. Applying the mathematical principles referenced above, this equation can be rearranged, separating out each 10, as follows, with the same mathematical result:

$$(10 + 10 + 10 + 10 + 10) - (13 + 13 + 11 + 10 + 4) = -1$$

This equation can again be rearranged as follows, so that instead of adding the 10s, we multiply 10 by 5, once again with the same mathematical result:

$$(5 \times 10) - (13 + 13 + 11 + 10 + 4) = -1$$

Finally, the same equation can be rearranged one more time as follows, again with the same mathematical result:

$$\left(10 - \left(\frac{13 + 13 + 11 + 10 + 4}{5}\right)\right)5 = -1$$

This equation is the equivalent of the three equations that immediately precede it and, of course, it is the very same algebraic equation presented earlier for the average-to-average comparison methodology.

196. If zeroing is prohibited for both the average-to-average and average-to-transaction comparison methodologies, then those two methodologies will always be identical, or "mathematically equivalent," in every case, because, ultimately, the mathematical operations in each are identical and are only structured in different orders.

197. As a consequence, if zeroing is prohibited in the application of the average-to-transaction comparison methodology, the dumping that would be evidenced by the export sale to Purchaser 5, or the amount of the positive comparison result, is masked by higher priced sales to other purchasers, even though there is a "pattern" of significantly differing export prices among the different purchasers. That evidence of dumping can be "unmasked" using zeroing, in which case the negative comparison results are set to zero, and the total amount of the comparison results would be 6.

198. It is equally true that the average-to-average and average-to-transaction comparison methodologies (both without zeroing) yield identical results even when there are multiple models that are segregated into "averaging groups." For another, only slightly more complicated hypothetical example, we will posit that the data from the hypothetical example above represents Model A in a scenario where there are two models, Model A and Model B. The only difference is that the total amount of the comparison results, and the total amount of dumping (and the weighted average dumping margin) result from an aggregation of the sales of two models. We will return to this after setting out the hypothetical data and calculations for Model B.

199. For Model B, we will posit that the weighted average normal value is 15, and our export price data is as follows:

Export Price to Purchaser 1	17
Export Price to Purchaser 2	17
Export Price to Purchaser 3	14
Export Price to Purchaser 4	13
Export Price to Purchaser 5	7

200. Using the same steps laid out above for the application of the average-to-average methodology, and relying on the same premise that each sale involves only one unit, we first calculate the weighted average export price:

$$\frac{17 + 17 + 14 + 13 + 7}{5} = 13.6$$

This weighted average export price of 13.6 is then subtracted from our weighted average normal value of 15 to determine the average comparison result for this model:

$$15 - 13.6 = 1.4$$

Then the difference calculated, 1.4, is multiplied by the total quantity, 5 units, to determine the amount of the comparison result for this model:

$$1.4 \times 5 = 7$$

Thus, the application of the average-to-average comparison methodology for Model B yields a comparison result of 7.

201. For the average-to-transaction comparison methodology, again, each individual export price is subtracted from the weighted average normal value:

$$15 - 17 = -2$$

$$15 - 17 = -2$$

$$15 - 14 = 1$$

$$15 - 13 = 2$$

$$15 - 7 = 8$$

If zeroing is prohibited, then the amount of comparisons yielding negative results is -4 (*i.e.*, (-2) + (-2)), and the amount of comparisons yielding positive results is 11 (*i.e.*, 1+2+8).

202. To recall, the comparison results yielded are as follows for each model and comparison methodology:

	Average-to-Average Comparison Methodology		Average-to-Transaction Comparison Methodology	
	Negative Comparison Results	Positive Comparison Results	Negative Comparison Results	Positive Comparison Results
Model A	-1	n/a	-7	6
Model B	n/a	7	-4	11
Total	-1	7	-11	17

203. The average-to-average comparison methodology yields just one comparison result for each model group, while the average-to-transaction comparison methodology may yield both negative and positive comparison results for a given model group, especially in a situation where targeting is occurring.

204. Based on the data above, for the average-to-average comparison methodology, the total amount yielded by positive comparison results for both models is 7, the total amount yielded by negative comparison results for both models is -1, and thus the total amount of the aggregated comparison results, and the total amount of dumping for the product under investigation, is 6 (*i.e.*, 7 + (-1)).

205. Also based on the data above, for the average-to-transaction comparison methodology, the total amount yielded by positive comparison results for both models is 17 (*i.e.*, 6 + 11), the total amount yielded by negative comparison results for both models is -11 (*i.e.*, (-7) + (-4)), and thus the total amount of the aggregated comparison results, and the total amount of dumping for the product under investigation is, once again, 6 (*i.e.*, 17 + (-11)).

206. The Panel will note that, in the hypothetical example with two model groups, the total amounts yielded by positive and negative comparison results are different for each of the comparison methodologies, due to the way that the positive and negative results are grouped in the different methodologies. As shown, though, even with multiple models, if zeroing is prohibited for both the average-to-average and average-to-transaction comparison methodologies, then the total amounts of the comparison results calculated using those two methodologies will always be mathematically equivalent.

207. Like the total amount of the comparison results, the weighted average margin of dumping will also be equivalent under both methodologies because the total amount of the comparison results for each comparison methodology is divided by the same denominator (total export price multiplied by quantity) to calculate the weighted average dumping margin.[232] Nothing in Article2.4.2 of the AD Agreement suggests that the denominator used in the average-to-average and average-to-transaction comparison methodologies should be different. In fact, the calculation of a weighted average margin of dumping, "expressed as a percentage of the export price," is described elsewhere in the AD Agreement, in Article 5.8.

208. The United States hopes that the above discussion is helpful in illustrating the problem that necessarily would result from finding that zeroing is prohibited for both the average-to-average and average-to-transaction comparison methodologies. That is, the second sentence of Article 2.4.2 of the AD Agreement would be deprived of any meaning, contrary to the principle of effectiveness, because the "exceptional"[233] comparison methodology set forth therein would always yield results that are identical, or "mathematically equivalent," to one of the two comparison methodologies that must be used "normally" (average-to-average), and would thus also, as a matter of logic, always yield results that are not "systematically different"[234] from the other normal methodology (transaction-to-transaction). It is important to note that this problem will result no matter what values or numbers are used in the hypothetical example above.

209. However, we must emphasize that this 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.

210. This can be seen by looking at the output of the USDOC's margin programs for both LG and Samsung, as presented in the final determination margin calculation memoranda for the two

[232] The AD Agreement does not recognize the concept of "negative dumping." Accordingly, where the total, aggregated amount of comparison results is less than zero, *i.e.*, when it is a negative number, then the total, aggregated amount of comparison results is set to zero, the total amount of dumping is zero, and the weighted-average dumping margin is zero. This should not be confused with "zeroing," which Korea challenges in this dispute. Rather, this is just reflects that an aggregated amount of comparison results that is negative leads to a conclusion that there is no dumping, and the margin of dumping is zero.

[233] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.

[234] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.

companies.[235] Those memoranda show that, without zeroing, the total amount of dumping would be the same under both the average-to-average comparison methodology and the average-to-transaction comparison methodology.

211. For LG, the total amount of dumping using the average-to-average comparison methodology is [[***]].[236] This is calculated by combining the total amount yielded by positive comparison results, [[***]], and the total amount of negative comparison results, [[***]].[237]

212. Under the average-to-transaction comparison methodology, for LG, the USDOC calculated total positive comparison results of [[***]] and total negative comparison results of [[***]].[238] As in the hypotheticals above, the Panel will note that the total amounts yielded by positive and negative comparison results are different for each of the comparison methodologies, due to the way that the positive and negative results are grouped in the different methodologies. However, when the total positive comparison results are combined with, or, in other words, are offset by, the total negative comparison results, the total amount of dumping would be [[***]], which is the same total amount of dumping calculated under the average-to-average comparison methodology.

213. The same holds true for Samsung. Under the average-to-average comparison methodology, Samsung's total amount of comparison results is a negative number, [[***]], which is derived by combining the negative comparison results, [[***]], with the positive comparison results, [[***]].[239]

214. Application of the average-to-transaction comparison methodology, without zeroing, would yield the same total amount of comparison results for Samsung. If the positive comparison results under the average-to-transaction comparison methodology, [[***]], are offset by the negative comparison results, [[***]], the resulting total amount of comparison results would be [[***]], which, again, is the same total amount of comparison results calculated under the average-to-average comparison methodology.[240]

215. In light of the above, the United States respectfully requests that the Panel make a factual finding that, if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, then those two methodologies will yield mathematically equivalent results in all cases, as well as in the washers antidumping investigation.

e. The Appellate Body's Consideration of "Mathematical Equivalence" in Previous Disputes Can Be Distinguished and

[235] *See* Final LG AD Calculation Memo, at Attachment 2, pg. 125-126 (p. 323-324 of the PDF version of Exhibit KOR-42); Final Samsung AD Calculation Memo, at Attachment 2, pg. 123-124 (p. 279-280 of the PDF version of Exhibit KOR-41).
[236] *See* Final LG AD Calculation Memo, at Attachment 2, pg. 126 (p. 324 of the PDF version of Exhibit KOR-42).
[237] *See* Final LG AD Calculation Memo, at Attachment 2, pg. 126 (p. 324 of the PDF version of Exhibit KOR-42).
[238] *See* Final LG AD Calculation Memo, at Attachment 2, pg. 125 (p. 323 of the PDF version of Exhibit KOR-42).
[239] *See* Final Samsung AD Calculation Memo, at Attachment 2, pg. 124 (p. 280 of the PDF version of Exhibit KOR-41).
[240] *See* Final Samsung AD Calculation Memo, at Attachment 2, pg. 123 (p. 279 of the PDF version of Exhibit KOR-41).

Does Not Compel Rejection of the "Mathematical Equivalence" Argument in this Dispute

216. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes,[241] though never in the context of an actual application of the alternative, average-to-transaction comparison methodology in which a finding that the use of zeroing is prohibited in connection with that methodology would, in fact, result in "mathematical equivalence." The factual situations of those previous disputes can be distinguished from the factual situation here, and the Appellate Body's consideration of the "mathematical equivalence" argument in those previous disputes neither supports nor compels rejection of the "mathematical equivalence" argument in this dispute.

217. The Appellate Body first addressed the "mathematical equivalence" argument in *US – Softwood Lumber V (Article 21.5 – Canada)*.[242] In that dispute, the Appellate Body "disagree[d] with the Panel's analysis of the 'mathematical equivalence argument for several reasons."[243] Some of the reasons the Appellate Body gave are distinguishable from the current situation, while others are instructive.

218. The first reason offered by the Appellate Body was that the United States had "never applied the methodology provided in the second sentence of Article 2.4.2, nor has it provided examples of how other WTO Members have applied this methodology. Thus, the United States' argument on 'mathematical equivalence' rests on an untested hypothesis."[244] As explained above, that is no longer the case. The United States applied the average-to-transaction methodology in the washers antidumping investigation and has demonstrated above that, for the final determination in that investigation, the "mathematical equivalence" argument holds true, if the use of zeroing in connection with the average-to-transaction methodology is prohibited.

219. The Appellate Body's second reason for disagreeing with the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* was that, "[b]eing an exception, the comparison methodology in the second sentence of Article 2.4.2 (weighted average-to-transaction) alone cannot determine the interpretation of the two methodologies provided in the first sentence, that is, transaction-to-transaction and weighted average-to-weighted average."[245] In this dispute, the United States does not offer the "mathematical equivalence" argument to support a proposed interpretation of the transaction-to-transaction and average-to-average comparison methodologies in the first sentence of Article 2.4.2 of the AD Agreement. The Appellate Body has found that the use of zeroing is not permitted in connection with those comparison methodologies, and the United States has brought itself into compliance with the Appellate Body's findings. The "mathematical equivalence" argument is offered here to support the contextual argument that, as an exception, the alternative, average-to-transaction comparison methodology should not be interpreted in a

[241] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 97-100; *US – Zeroing (Japan) (AB)*, paras. 133-135; *US – Stainless Steel (Mexico) (AB)*, paras. 124-126.
[242] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 97-100.
[243] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.
[244] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.
[245] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 97.

way that would lead, invariably, to that comparison methodology yielding results that are identical or systematically similar to the normal comparison methodologies.

220. For its third reason, the Appellate Body observed in *US – Softwood Lumber V (Article 21.5 – Canada)* 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."[246] The Appellate Body is correct, of course, that the "mathematical equivalence" argument is premised on the assumption that zeroing is prohibited under the average-to-transaction methodology. We offer the "mathematical equivalence" argument here as an argument *against* finding that that is the case. That the Appellate Body suggested that the U.S. assumption in *US – Softwood Lumber V (Article 21.5 – Canada)* was a reason for its disagreement with the panel's analysis of the "mathematical equivalence" argument hints that the Appellate Body might agree that the use of zeroing is *not* prohibited in connection with the average-to-transaction methodology in the second sentence of Article 2.4.2 of the AD Agreement.

221. The Appellate Body also noted in *US – Softwood Lumber V (Article 21.5 – Canada)* that "there is considerable uncertainty regarding how precisely the third methodology should be applied."[247] In that dispute:

> Canada and several third participants argued before the Panel that, even assuming that zeroing were prohibited also under the weighted average-to-transaction comparison methodology, mathematical equivalence would be limited to a specific set of circumstances. Canada and these third participants offered their own hypothetical scenarios showing that the weighted average-to-transaction comparison methodology would not yield necessarily the same results as the weighted average-to-weighted average methodology, even if the prohibition to use zeroing were to extend to the former. Thailand also explains that the mathematical equivalence argument works only under very specific assumptions, one of them being that the weighted-average normal value used in both the weighted average-to-weighted average and weighted average-to-transaction comparison methodologies be the same.[248]

222. Similarly, in *US – Stainless Steel (Mexico)*, Mexico and the third participants argued that "the 'mathematical equivalence' argument works only under the assumption that the weighted average normal value used in the weighted average-to-transaction ('W-T') comparison methodology is identical to that used in the [average-to-average] comparison methodology," and Mexico pointed out that that was "not the case under the United States' system."[249]

---

[246] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.
[247] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.
[248] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99.
[249] *US – Stainless Steel (Mexico) (AB)*, paras. 124-125.

223. In both *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the Appellate Body signaled that it saw merit in the arguments of the participants and third participants described above.[250] In *US – Stainless Steel (Mexico)*, the Appellate Body expressed the view that "the 'mathematical equivalence' argument works only under a specific set of assumptions, and . . . there is uncertainty as to how the [average-to-transaction] comparison methodology would be applied in practice."[251]

224. Those disputes, however, did not involve an actual application of the average-to-transaction comparison methodology. In the washers antidumping investigation, and generally, the weighted average normal value used in the application of the average-to-average comparison methodology is no different from the weighted average normal value used in the application of the average-to-transaction comparison methodology. As explained above, nothing in Article 2.4.2 of the AD Agreement suggests that "a weighted average normal value" under the first sentence should be calculated any differently than "a normal value established on a weighted average basis" in the second sentence.

225. Because of the substantially different underlying factual situations in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, as contrasted with the factual situation in this dispute, this aspect of the Appellate Body's consideration of the "mathematical equivalence" argument in those disputes is not germane to the Panel's consideration of this argument here.

226. Finally, the Appellate Body also considered the "mathematical equivalence" argument in *US – Zeroing (Japan)*.[252] There, after noting the reasons it gave in *US – Softwood Lumber V (Article 21.5 – Canada)* for rejecting the argument, the Appellate Body disagreed with an underlying assumption of the panel in that dispute.[253] The Appellate Body explained that:

> [T]he Panel's reasoning appears to assume that the universe of export transactions to which these two comparison methodologies apply is the same, and that these two methodologies differ only in that, under the [average-to-transaction] comparison methodology, a normal value is established on a weighted average basis, while it is established on a transaction-specific basis under the [transaction-to-transaction] comparison methodology.[254]

The Appellate Body indicated that, in its view:

> The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs [sic] significantly among different purchasers, regions or time periods." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We

[250] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 99; *US – Stainless Steel (Mexico) (AB)*, para. 126.
[251] *US – Stainless Steel (Mexico) (AB)*, para. 126.
[252] *See US – Zeroing (Japan) (AB)*, paras. 133-135.
[253] *US – Zeroing (Japan) (AB)*, para. 135.
[254] *US – Zeroing (Japan) (AB)*, para. 134.

> therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern.[255]

227. The United States suggests that, to the extent that the Panel takes into account this discussion by the Appellate Body, it should exercise caution in doing so. As was the case in *US – Softwood Lumber V (Article 21.5 – Canada)* and *US – Stainless Steel (Mexico)*, the *US – Zeroing (Japan)* dispute did not involve an actual application of the average-to-transaction comparison methodology.

228. Furthermore, the Appellate Body "emphasize[d] … that our analysis of the second sentence of Article 2.4.2 is confined to addressing the contextual arguments drawn by the Panel from that provision."[256] Thus, in reading the text of Article 2.4.2, the Appellate Body expressly was not making findings of legal interpretation that resulted from a complete analysis pursuant to the customary rules of interpretation of public international law.

229. Additionally, it is unclear what precisely the Appellate Body meant when it suggested that, "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[257] As we explained above in section IV.B.4, 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 transactions found to have been priced significantly lower than other transaction, *i.e.*, those found to be "targeted." To do so would have been illogical because a "pattern" within the meaning of the "pattern clause" necessarily includes both lower and higher export prices that "differ significantly" from each other.

230. Moreover, nothing in the second sentence of Article 2.4.2 or any other provision of the AD Agreement suggests that, in "limiting" application of the average-to-transaction methodology, an investigating authority could exclude from consideration entirely certain export transactions. Doing so would, ironically, result in what could be called "double zeroing," in which negative comparison results are zeroed, or removed, from the numerator of the weighted average dumping margin, and the export value of the transactions yielding those negative comparison results also would be zeroed, or removed, from the denominator in the calculation of a weighted average dumping margin. This would have the effect of increasing the weighted average dumping margin even more than zeroing does, but would not, in the view of the United States, be an appropriate means of "unmasking targeted dumping."

[255] *US – Zeroing (Japan) (AB)*, para. 135.
[256] *US – Zeroing (Japan) (AB)*, para. 136.
[257] *US – Zeroing (Japan) (AB)*, para. 135.

231. If, on the other hand, zeroing is prohibited and application of the average-to-transaction comparison methodology is "limit[ed]" to "targeted" sales while other sales are examined using the average-to-average comparison methodology, then "mathematical equivalence" would still result. We can demonstrate this by returning to the first hypothetical scenario we presented in the preceding subsection.

232. Recall that, in that hypothetical scenario, weighted average normal value is 15 and the export price data are as follows:

Export Price to Purchaser 1	13
Export Price to Purchaser 2	13
Export Price to Purchaser 3	11
Export Price to Purchaser 4	10
Export Price to Purchaser 5	4

233. Also recall that the total amount of the comparison results calculated using the average-to-average and average-to-transaction methodology was -1.

234. Finally, recall that, above, in the application of the average-to-transaction methodology, that methodology was not limited to the targeted sales and then combined with the results of an application of the average-to-average methodology to the remaining sales, as Korea suggests is required.[258] That type of application is what we will now discuss, and we will show that the total amount of the comparison results calculated using such an application also would be -1.

235. First, under this mixed approach to the application of the alternative, average-to-transaction comparison methodology provided for in the second sentence of Article 2.4.2, the average-to-transaction comparison methodology would be applied to the one low-priced sale found to "differ significantly" from the others. In this hypothetical example, that is the sale to Purchaser 5. Thus, the comparison result for this particular transaction is as follows:

$$10 - 4 = 6$$

236. The result of the application of the average-to-transaction comparison methodology is a positive comparison result of 6. This, of course, is an intermediate calculation and not, by definition, a dumping margin for the exporter and for the product under investigation.

237. Next, the remaining export sale transactions would be examined using the average-to-average methodology. We will first calculate the weighted average export price for this group. Note that, since only 4 sales of 1 unit each are included in this group now, the quantity here is 4, not 5, as before. Thus, the weighted average export price is calculated as follows:

$$\frac{13 + 13 + 11 + 14}{4} = 11.75$$

[258] *See* Korea First Written Submission, paras. 168-179.

238. To determine the average comparison result for this average-to-average comparison, this weighted average export price is "compared to," or subtracted from our weighted average normal value, which, again, is 10:

$$10 - 11.75 = -1.75$$

Then the difference calculated, -1.75, is multiplied by the total quantity for the group, 4 units, to calculate the total amount of the comparison results:

$$-1.75 \times 4 = -7$$

Thus, the result of the application of the average-to-average methodology for this group of transactions is a negative comparison result of -7.

239. When the total amounts of the comparison results for each comparison methodology are aggregated, the aggregate total amount of the comparison results is -1 (*i.e.*, 6 + (-7)). This result, of course, is identical to the result of the application of the average-to-average comparison methodology and the average-to-transaction comparison methodology in the original hypothetical example above.

240. Without zeroing, a mixed application – combining the average-to-transaction comparison methodology and the average-to-average comparison methodology – will always yield a result that is mathematically equivalent to the average-to-average comparison methodology, as well as the average-to-transaction comparison methodology, when each of those methodologies is applied to all export sales.

241. For these reasons, the Appellate Body's consideration of the "mathematical equivalence" argument in previous disputes neither supports nor compels rejection of the "mathematical equivalence" argument in this dispute.

f. The Negotiating History of the AD Agreement Confirms that Zeroing is Permissible when Applying the Asymmetrical Comparison Methodology Set Forth in the Second Sentence of Article 2.4.2 of the AD Agreement

242. We recall that the first sentence of Article 2.4.2 of the AD Agreement provides that the comparison methodology used to establish margins of dumping "shall normally" be symmetrical, *i.e.*, either the average-to-average or transaction-to-transaction comparison methodology, while the second sentence of Article 2.4.2, by its terms, permits the application of an asymmetrical comparison methodology, the average-to-transaction comparison methodology. The Appellate Body has observed that the "third methodology (weighted average-to-transaction) . . . involves an asymmetrical comparison and may be used only in exceptional circumstances."[259]

[259] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.

243. The "asymmetrical" nature of the "third methodology," and the fact that it may be used "only in exceptional circumstances," when considered together with the negotiating history of the AD Agreement, confirms that zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.

244. Article 32 of the Vienna Convention has been recognized by the Appellate Body as reflecting a customary rule of interpretation of public international law.[260] Article 32 provides that "[r]ecourse may be had to supplementary means of interpretation," including the "preparatory work of the treaty," or its negotiating history, to confirm the meaning of the text or to determine the meaning when the interpretation according to the general rule of interpretation "(a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable."

245. Consistent with the interpretive arguments set forth above, the United States certainly does not consider that an interpretation according to the general rule of interpretation "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable." We do, however, believe that the meaning of the second sentence of Article 2.4.2, specifically that zeroing is permissible when applying the comparison methodology set forth in that provision, can be confirmed through recourse to documents from the negotiating history of the AD Agreement.

246. Of particular relevance are proposals from Contracting Parties that sought changes to the Tokyo Round Antidumping Code to address concerns about certain investigating authorities that used an asymmetrical comparison methodology, in which "the 'negative' dumping margin by which the normal value falls below the export price in the value term will be treated as zero instead of being added to the other transactions to offset the dumping margin."[261] It is clear from these proposals that the *demandeurs* viewed asymmetry and zeroing as one and the same problem.

247. Hong Kong explained one of its proposals in the following terms:

> Negative dumping margin (Article 2.6)
>
> In calculating the overall dumping margin of the producer under investigation, *certain investigating authorities compare the normal value (calculated on a weighted average basis) with the export price on a transaction by transaction basis*. For transactions where normal value is higher than the export price (*i*.e., dumping occurs), the dumping margin by which the normal value exceeds the export price of each transaction in value terms will be added up. The grand total will then be expressed as a percentage of the total value of the transactions under investigation. This will then represent the overall dumping margin in percentage terms. *For transaction where normal value is lower than the export price (i.e., no*

[260] *See Japan – Alcoholic Beverages II (AB)*, p. 10.
[261] *Communication from the Delegation of Hong Kong,* GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, para. 14 (December 22, 1989) (Exhibit USA-15).

> *dumping occurs), the "negative" dumping margin by which the normal value falls below the export price in value terms will be treated as zero instead of being added to the other transactions to offset the dumping margin*. As a result, it would be technically easy to find dumping with an inflated overall dumping margin in percentage terms.
>
> We propose that such practices should be discontinued and that the Code be amended to require comparison to be made between the weighted average normal value and the weighted average export price.[262]

248. Japan similarly linked its concerns about asymmetry and zeroing, in particular in situations where "export prices vary over time":

> Price comparison in cases where sales prices vary
>
> In cases where sales prices vary among many transactions, certain signatories, using the weighted-average of domestic sales price as the normal value with which each export price is compared, calculate the average dumping margin in such a way that the sum of the dumping margins of transactions export prices of which are lower than normal value is divided by total amount of export prices. In this method, however, negative dumping margins, i.e., the amount by which export price exceeds normal value, are ignored.
>
> Consequently, dumping margins occur in cases where export prices vary over time (Figure 2) or where export prices vary due to different routes of sale (Figure 3), even if the average level of export prices is equal to that of domestic sales prices.[263]

Japan proposed that its concern be addressed as follows:

> (b) The Code should set out clear guidelines that ensure symmetrical comparison of "normal value" and "export price" at the same level of trade, and eliminate the possibility of asymmetrical comparison, in disregard of certain costs actually incurred, and thereby artificially creating "dumping" when none actually exist. *The Code should also be clarified, as another aspect of "symmetrical comparison", to disallow the practice of calculating "normal value" on an average basis and then to compare it to "export price" on an individual basis.*[264]

---

[262] *Communication from the Delegation of Hong Kong,* GATT Doc. No. MTN.GNG/NG8/W/51 Add. 1, paras. 14-15 (December 22, 1989) (Exhibit USA-15) (italics added; underlining in original).
[263] *Communication from Japan,* GATT Doc. No. MTN.GNG/NG8/W/30, p. 3 (June 20, 1988) (Exhibit USA-16) (underlining in original).
[264] *Communication from Japan,* GATT Doc. No. MTN.GNG/NG8/W/81, p. 2 (July 9, 1990) (Exhibit USA-17) (italics added; underlining in original).

249. The minutes of a meeting of the Negotiating Group on MTN Agreements and Arrangements reflects that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked:

> Use of weighted averages in the comparison of export price and normal value
>
> The following were among comments made:
>
> - *the problem arose from practices where the normal value, established on a weighted-average basis, was compared to the export price on a transaction-by-transaction basis*. Thereby, dumping might be found merely because a company's export price varied in the same way as its own domestic price. Even when domestic profit margin was the same as in the export market, *any variations in the export price would, due to the disregard of negative dumping margins, cause dumping to be found, or a dumping margin to be increased*;
>
> - *if negative margins were included in the calculation, one would not deal with instances in which dumping was targeted* to a particular portion of a product line or to a particular region; *sales at fair value in one region or in one portion of a product line did not offset injury caused in the other*;
>
> - given the definition of like products in Article 2:2, it was difficult to see the relevance of the product line argument. Injury to producers in certain areas presupposed market segmentation which was dealt with in Article 4:1(ii);
>
> - *the issue at stake was masked, selective dumping, the effects of which could be considerable*;
>
> - an important question was whether non-dumped imports should also have to be included in the examination of injury.[265]

250. The ultimate compromise agreed by the WTO Members is, of course, reflected in the text of Article 2.4.2 of the AD Agreement, which provides that "normally" a symmetrical comparison methodology must be used, but when certain conditions are met, an investigating authority "may" use an asymmetrical comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping."[266] The negotiating history documents referenced above confirm that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

g. Article 2.4 of the AD Agreement Should Not Be Read as Prohibiting the Use of Zeroing in Connection with the

[265] *Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989*, MTN.GNG/NG8/13, p. 10 (November 15, 1989) (Exhibit USA-18) (emphasis added).
[266] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

Application of the Alternative, Average-to-Transaction Comparison Methodology

251. In addition to its claims under Article 2.4.2 of the AD Agreement, Korea claims that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology in the washers antidumping investigation is inconsistent with Article 2.4 of the AD Agreement.[267] Korea's claim is without merit.

252. Korea argues that:

> The Appellate Body has found, based on the ordinary meaning of the term "fair", that Article 2.4 requires investigating authorities to be "impartial, even-handed, or unbiased" when comparing the export price and normal value, and this obligation applies with equal force to all three comparison methodologies provided in Article 2.4.2. According to the Appellate Body, the use of zeroing cannot be considered impartial, even-handed or unbiased, because it distorts the prices of non-dumped export transactions, which are either not considered at their real value or artificially reduced.[268]

Korea overstates the Appellate Body's findings in previous disputes related to zeroing and Article 2.4 of the AD Agreement. A review of those findings demonstrates that they are not nearly as broad as Korea suggests.

253. The Appellate Body first examined a claim that zeroing is inconsistent with Article 2.4 of the AD Agreement in the *EC – Bed Linen* dispute. The Appellate Body found there that:

> [W]e are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[269]

As a general matter, of course, the Appellate Body's findings in *EC – Bed Linen* are limited in their application to the measures in that dispute, namely the challenged EC antidumping measures on bed linen from India. However, the emphasis the Appellate Body places on the word "all" in "all comparable export transactions" is significant and may be instructive for the Panel. Earlier in the same paragraph, the Appellate Body had reasoned that:

> . . . Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value

[267] *See* Korea First Written Submission, paras. 99-101.
[268] Korea First Written Submission, para. 75.
[269] *EC – Bed Linen (AB)*, para. 55 (emphasis in original).

> … despite the fact that it was, in reality, higher than the weighted average normal value." By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation.[270]

254. Again, the emphasis, indicated by italics, is that of the Appellate Body. The emphasis that the Appellate Body placed on the word "all" and the fact that the European Communities had acted inconsistently with the first sentence of Article 2.4.2 of the AD Agreement by not including "*all* comparable export transactions" suggests that, when it found that the European Communities also had breached the "fair comparison" requirement of Article 2.4 of the AD Agreement, that finding was closely related to, and perhaps even dependent upon the earlier finding that the European Communities had breached Article 2.4.2.

255. Certain statements the Appellate Body made in *US – Softwood Lumber V (Article 21.5 – Canada)* lend support for this understanding of the Appellate Body's findings under Article 2.4 related to zeroing. In that dispute, the United States argued that "even if a comparison methodology that uses zeroing results in higher margins of dumping, it does not become 'unfair' by this mere fact alone, provided that it is WTO-consistent."[271] The Appellate Body did not reject this argument out of hand. Rather, the Appellate Body responded that, "[t]his proviso . . . has not been met because, as we have found, the use of zeroing under the transaction-to-transaction comparison methodology is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*."[272] This is another indication that, when the Appellate Body has found a breach of Article 2.4 of the AD Agreement, that breach has been closely related to, and perhaps even dependent upon the separate finding of a breach of the first sentence of Article 2.4.2 of the AD Agreement.

256. Furthermore, of course, the Appellate Body's finding of a breach of Article 2.4 in *US – Softwood Lumber V (Article 21.5 – Canada)* expressly was limited to "the use of zeroing under the transaction-to-transaction comparison methodology" under the first sentence of Article 2.4.2, which the Appellate Body found was "difficult to reconcile with the notions of impartiality, even-handedness, and lack of bias reflected in the 'fair comparison' requirement in Article 2.4."[273] There is no support for reading the Appellate Body's finding as applying more broadly than that.

---

[270] *EC – Bed Linen (AB)*, para. 55 (emphasis in original).
[271] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 143.
[272] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 143.
[273] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 138.

257. In *US – Zeroing (EC)*, the Appellate Body "declined to rule" on a claim under Article 2.4 of the AD Agreement. The Appellate Body explained that:

> We have already found that zeroing, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Therefore, an additional finding that the use of the same methodology in the administrative reviews at issue is inconsistent with the "fair comparison" requirement contained in the first sentence of Article 2.4 of the *Anti-Dumping Agreement* does not appear to us necessary for solving this dispute. Accepting the European Communities' claim with respect to Article 2.4, first sentence, would lead to the same result that we have reached after examining zeroing, as applied by the USDOC in the administrative reviews at issue, in the light of Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[274]

The Appellate Body's decision not to make a finding under Article 2.4 is a further indication that the Appellate Body has not taken the position that Article 2.4 of the AD Agreement provides a basis for finding a prohibition of zeroing that is independent of finding a breach of another provision of the AD Agreement. Without a doubt, it remains true that the Appellate Body has not found that zeroing breaches Article 2.4 without having first found a breach of another provision.

258. The Appellate Body's most explicit indication that a breach of Article 2.4 of the AD Agreement is closely related to, and perhaps even dependent upon, the separate finding of a breach of another provision of a covered agreement can be found in the Appellate Body report in *US – Zeroing (Japan)*. There, the Appellate Body explained that:

> If anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a "fair comparison" within the meaning of the first sentence of Article 2.4. *This is so because such an assessment would result in duty collection from importers in excess of the margin of dumping established in accordance with Article 2, as we have explained previously*.[275]

Here, we have provided the emphasis using italics. The Appellate Body states clearly in the final sentence of the quoted passage that the basis for finding a breach of Article 2.4 is that a breach of Article 9.3 of the AD Agreement already has been established.

[274] *US – Zeroing (EC) (AB)*, para. 147.
[275] *US – Zeroing (Japan) (AB)*, para. 168 (emphasis added).

259. For these reasons, the Panel should recognize the limited nature and application of the Appellate Body's previous findings relating to zeroing and the "fair comparison" language in Article 2.4 of the AD Agreement.

260. Furthermore, there is no basis for finding here that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is in any way not "fair," or that it is inconsistent with any "fair comparison" obligation in Article 2.4 of the AD Agreement. Korea notes that "[t]he Appellate Body has found, based on the ordinary meaning of the term 'fair', that Article 2.4 requires investigating authorities to be 'impartial, even-handed, or unbiased' when comparing the export price and normal value."[276] The United States agrees with Korea that the Appellate Body's reasoning "applies with equal force to all three comparison methodologies provided in Article 2.4.2."[277] It does not follow from this, however, that the Appellate Body would find that Article 2.4 of AD Agreement prohibits the use of zeroing in connection with the alternative, "exceptional" average-to-transaction comparison methodology when the "pattern clause" and "explanation clause" conditions set forth in the second sentence of Article 2.4.2 have been met.

261. As explained above, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[278] in "exceptional"[279] situations. 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.[280]

262. For these reasons, the Panel should find that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology in the washers antidumping investigation is not inconsistent with Article 2.4 of the AD Agreement.

h. Korea's Consequential "As Applied" Claims Relating to the Washers Antidumping Investigation Are without Merit

263. Korea claims that, "[a]s a consequence" of the USDOC's final determination in the washers antidumping investigation being inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement, "the application of the zeroing methodology in *Washers* is also inconsistent 'as applied' with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994."[281]

264. For the reasons given above, the USDOC's final determination in the washers antidumping investigation is not inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement, and, hence, also is not inconsistent with Article 2.1 of the AD Agreement and Article VI:1 of the

[276] Korea First Written Submission, para. 75.
[277] Korea First Written Submission, para. 75.
[278] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[279] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.
[280] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 138.
[281] Korea First Written Submission, para. 100.

GATT 1994. Accordingly, the Panel should reject Korea's consequential "as applied" claims related to the washers antidumping investigation.

C. Korea's "As Such" Claims Related to the Use of Zeroing in Connection with the Application of the Alternative, Average-to-Transaction Comparison Methodology Are without Merit

265. In addition to its "as applied" claims relating to zeroing, Korea claims that the use of zeroing in connection with the average-to-transaction comparison methodology is inconsistent, "as such," with Articles 2.4.2 and 2.4 of the AD Agreement.[282] Korea relies for support of its "as such" claims on the same arguments it advances in support of its "as applied" claims with respect to the washers antidumping investigation.[283] For the reasons given above in section IV.B.5, those arguments are without merit, and the Panel should find that the use of zeroing in connection with the average-to-transaction comparison methodology is not inconsistent, "as such," with Articles 2.4.2 and 2.4 of the AD Agreement.

266. Korea also claims that, "as a consequence," the use of zeroing in connection with the average-to-transaction comparison methodology is inconsistent, "as such," with Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994.[284] Since Korea's underlying claims are without merit, these consequential claims also are without merit, and the Panel should find that the use of zeroing in connection with the average-to-transaction comparison methodology is not inconsistent, "as such," with Article 2.1 of the AD Agreement and Article VI:1 of the GATT 1994.

267. Additionally, Korea claims that "the use of zeroing in administrative reviews is 'as such' inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994."[285] Korea argues that the reason for this is that the USDOC "systematically levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement."[286] For the reasons given above in section IV.B.5, the USDOC's use of zeroing, or its approach to determining dumping under the average-to-transaction comparison methodology, is not inconsistent with Article 2 of the AD Agreement. Korea thus has no basis to support its claims of inconsistency with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. Accordingly, the Panel should reject Korea's claims under these provisions.

268. For these reasons, the Panel should find that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement is not inconsistent, "as such," with Articles 1, 2.1, 2.4, 2.4.2, and 9.3 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994.

---

[282] *See* Korea First Written Submission, paras. 93-98.
[283] *See* Korea First Written Submission, para. 96-97.
[284] *See* Korea First Written Submission, paras. 96.
[285] Korea First Written Submission, para. 98.
[286] Korea First Written Submission, para. 98.

D. Korea's Claims Regarding the "Differential Pricing Methodology" Are without Merit

269. Korea claims the existence of a measure that it describes as the "differential pricing methodology," and further claims that this measure is inconsistent with Article 2.4.2 of the AD Agreement "as such."[287] As explained below, Korea's claims are without merit.

1. The "Differential Pricing Methodology" Is Not a Measure that Can Be Challenged "As Such"

270. In its first written submission, Korea seeks to "establish that the differential pricing methodology is a measure challengeable in WTO dispute settlement, 'as such'."[288] Korea's effort fails. The sum total of the evidence Korea adduces to support its claim that there exists a measure that can be called the "differential pricing methodology" consists of a handful of determinations by the USDOC,[289] a notice seeking comments from the public "on the possible further development of its approach,"[290] and generic SAS programming code that the USDOC has made available on its web site.[291] Such evidence is insufficient.

271. The Appellate Body explained in *US – Zeroing (EC)* that "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document."[292] The Appellate Body further explained that:

> When an "as such" challenge is brought against a "rule or norm" that is expressed in the form of a written document – such as a law or regulation – there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. The situation is different, however, when a challenge is brought against a "rule or norm" that is not expressed in the form of a written document. In such cases, the very existence of the challenged "rule or norm" may be uncertain.
>
> In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this *high threshold*, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or norm" may be challenged, as such. This

[287] *See* Korea First Written Submission, paras. 182-241.
[288] Korea First Written Submission, para. 182; *see also id.*, paras. 182-189.
[289] *See* Korea First Written Submission, paras 184, 187-188.
[290] *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26,720 (May 9, 2014) ("Differential Pricing Analysis Request for Comments") (Exhibit KOR-25).
[291] *See* Korea First Written Submission, para. 184 and Exhibit KOR-24.
[292] *US – Zeroing (EC) (AB)*, para. 196.

> evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is not expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.[293]

In *US – Zeroing (Japan)*, the Appellate Body applied the same reasoning, warning that "panels must not 'make affirmative findings that lack a basis in the evidence contained in the panel record.'"[294]

272. In *US – Zeroing (EC)*, the Appellate Body observed that:

> [T]he evidence before the Panel consisted of the USDOC determinations in the "as applied" cases challenged by the European Communities, as well as the standard programs used by the USDOC to calculate margins of dumping. Furthermore, the Panel had before it expert opinions regarding the use and the content of the zeroing methodology. In addition, we note that the Panel had before it the United States' recognition that it had been "unable to identify any instance where [the] USDOC had given a credit for non-dumped sales".[295]

The Appellate Body found that this evidence was, "in the specific circumstances of this case, … sufficient to identify the precise content of the zeroing methodology; that the zeroing methodology is attributable to the United States, and that it does have general and prospective application."[296] The Appellate Body noted that "[t]his evidence consisted of considerably more than a string of cases, or repeat action, based on which the Panel would simply have divined the existence of a measure in the abstract."[297]

273. The evidence Korea has presented in this dispute contrasts sharply with the evidence put before the panel in *US – Zeroing (EC)*. As noted above, Korea presents little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be challenged "as such." For example, there are before the Panel no expert opinions describing the alleged "differential pricing methodology" measure. There are only Korea's characterizations and arguments.

274. Furthermore, unlike the situation in *US – Zeroing (EC)*, there are instances wherein the USDOC has not applied the "differential pricing methodology." In the very investigation about which Korea advances its "as applied" claims in this dispute, the USDOC applied a substantially different analysis, the *Nails* test. And, as explained below, the USDOC has varied in its approaches to the use of the alternative, average-to-transaction comparison methodology.

---

[293] *US – Zeroing (EC) (AB)*, paras. 197-198 (emphasis added, citations omitted).
[294] *US – Zeroing (Japan) (AB)*, para. 82 (*citing US – Wheat Gluten (AB)*, paras. 160-162).
[295] *US – Zeroing (EC) (AB)*, para. 201 (citations omitted).
[296] *US – Zeroing (EC) (AB)*, para. 204.
[297] *US – Zeroing (EC) (AB)*, para. 204.

275. In addition to the string of cases, Korea has put before the Panel a notice that the USDOC published in the U.S. Federal Register requesting public comment on the differential pricing analysis.[298] Korea also points to certain SAS programs, which Commerce made available in connection with that request for public comment.[299] These pieces of evidence do not support Korea's contention that there exists something called the "differential pricing methodology" that is a measure of general and prospective application, which can be challenged in WTO dispute settlement "as such." Indeed, these pieces of evidence support the opposite conclusion.

276. In 2006, when the Appellate Body found in *US – Zeroing (EC)* that zeroing was a measure that could be challenged "as such," the USDOC had been applying zeroing in its determinations for more than a decade, unchanged, and the United States was unable to identify any instance in which the USDOC had given a credit for non-dumped sales, *i.e.*, when the USDOC had decided not to use zeroing in a situation wherein not doing so would have had an impact on the dumping margin.[300]

277. In contrast, the USDOC's request for public comment on the differential pricing analysis explains that the USDOC has used three different approaches to determining whether it is appropriate to apply the alternative, average-to-transaction comparison methodology since 2008.[301] In December 2008, the USDOC withdrew a regulation that, prior to that time, had addressed the application of the alternative, average-to-transaction comparison methodology. By that time, the USDOC had developed a "targeted dumping" analysis, referred to as the *Nails* test, and applied that in a number of antidumping proceedings. Since that time, the USDOC has been developing a "differential pricing analysis," as evidenced in a number of antidumping proceedings. This history is explained in the USDOC's request for public comment.[302]

278. Also explained in the USDOC's request for public comment is the USDOC's desire in the future to "continue[] to seek to refine its approach with respect to the use of an alternative comparison method."[303] The USDOC states in the request that it "is seeking comments to further develop and/or refine its differential pricing analysis."[304] The USDOC continues:

> As the Department gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the average-to-average comparison method, the Department expects to continue to develop its approach with respect to the use of an alternative comparison method. The Department is requesting comments on this analysis to facilitate that development as the Department expects to take account of all comments received, as appropriate. Further, in the context of

[298] *See* Korea First Written Submission, para. 184; *see also* Differential Pricing Analysis Request for Comments (Exhibit KOR-25).
[299] *See* Korea First Written Submission, para. 184; *see also* Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,723 (Exhibit KOR-25); Exhibit KOR-24.
[300] *See US – Zeroing (EC) (AB)*, para. 201.
[301] *See* Differential Pricing Analysis Request for Comments (Exhibit KOR-25).
[302] *See* Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,720-26,723 (Exhibit KOR-25).
[303] Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,722 (Exhibit KOR-25).
[304] Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,722 (Exhibit KOR-25).

> ongoing and future proceedings, parties to the particular proceeding will have an opportunity to provide comments that are relevant to the possible use of an alternative comparison method in that proceeding.[305]

These statements by the USDOC are further evidence that its approach is not fixed and that no measure of general and prospective application exists.

279. The SAS code to which Korea points likewise does not support Korea's argument. We offer two observations about that SAS code, which Korea puts before the Panel as Exhibit KOR-24. First, page 4 of the electronic/PDF version of Exhibit KOR-24 presents a screen shot of a page on the USDOC's web site, which is entitled "Antidumping Margin Calculation Programs." That web page explains that:

> On this page you will find the *generic* antidumping (AD) margin calculation programs. These programs are the starting point of our AD calculations. For a particular company in a proceeding, a case analyst will fill in the company's case-specific information in the required sections *and make any changes to the boilerplate code required for the situation*.[306]

As indicated, these "generic" programs provide "boilerplate code" that may be changed depending on the particular situation in a given antidumping proceeding.

280. Second, we note that each of the "generic," "boilerplate" programs that Korea has provided to the Panel contains a date indicating the "LAST PROGRAM UPDATE" or the "LATEST PROGRAM UPDATE."[307] This is further support for the conclusion that the nature of such programming code is not permanent or fixed, and that the analysis the USDOC applies in any given proceeding will depend on the given situation.

281. In light of the above, it is evident that 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.[308] The Panel should decline Korea's invitation, and should find that there exists no "differential pricing methodology" measure that may be challenged "as such."

2. The "Differential Pricing Methodology" Cannot Be Found Inconsistent with Article 2.4.2 "As Such" because It Does Not Necessarily Result in a Breach of Article 2.4.2 of the AD Agreement

282. 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,

---

[305] Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,722 (Exhibit KOR-25).
[306] Exhibit KOR-24, p. 4 of the electronic/PDF version (emphasis added).
[307] Exhibit KOR-24, pp. 6 and 44 of the electronic/PDF version.
[308] *See US – Zeroing (EC) (AB)*, para. 204.

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.

283. As the Appellate Body explained in *US – Oil Country Tubular Goods Sunset Reviews*, "an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations."[309] The panel in *EC – IT Products* observed that, "[i]t flows from this that, in general, measures challenged 'as such' should have general and prospective application, and 'necessarily' result in a breach of WTO obligations."[310] In other words, the complainant must demonstrate that the challenged measure always will result in an inconsistency with a covered agreement, and not merely that the measure might result in an inconsistency in certain circumstances.

284. In this dispute, for its "as such" challenge to succeed, Korea must demonstrate that the "differential pricing methodology" necessarily will result in a breach of Article 2.4.2 of the AD Agreement. To make such a demonstration, Korea must present to the Panel evidence and legal argument sufficient to show that every application of the "differential pricing methodology" necessarily results in an inconsistency with Article 2.4.2 of the AD Agreement. Korea has not done so, and it cannot do so.

285. First, as explained further below, Korea's argument that the "differential pricing methodology enshrines the same unlawful interpretations of Article 2.4.2 as the USDOC applied in the *Washers* investigation"[311] lacks merit for the same reasons that Korea's arguments relating to the washers antidumping investigation lack merit.

286. Second, as explained further below, Korea presents no evidence whatsoever to support its additional criticisms of the "differential pricing methodology." Instead, Korea relies on conjecture and speculation, utilizing self-serving hypothetical scenarios rather than pointing to any actual applications of the "differential pricing methodology" by the USDOC.[312] Korea has failed to make a *prima facie* case in respect of these aspects of its "as such" claim.

287. Finally, Korea simply cannot prove that the "differential pricing methodology" necessarily results in a breach of Article 2.4.2 of the AD Agreement. The general premise of Korea's argument appears to be that "the USDOC has turned what was meant to be a carefully circumscribed exception into the rule."[313] Korea alleges "systematic abuse of a very limited exception to the general rule that margins of dumping are to be calculated using either of the

[309] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.
[310] *EC – IT Products*, para. 7.154.
[311] *See* Korea First Written Submission, paras. 190-200.
[312] *See* Korea First Written Submission, paras. 201-241.
[313] Korea First Written Submission, para. 4.

symmetrical methods of comparison,"[314] and that, with the use of the "differential pricing methodology," "what had been the rarely used exception has become the rule."[315]

288. 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 also belied by the facts. As a matter of fact, at the time Korea requested the establishment of a panel in this dispute, the USDOC's application of a differential pricing analysis had resulted in the use of the exceptional, asymmetrical, average-to-transaction comparison methodology in only two instances when the USDOC had applied a differential pricing analysis to determine the proper comparison methodology to use.[316] Thus, 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.[317]

289. Further review indicates that, when determinations made subsequent to Korea's panel request are examined, it appears that the USDOC's use of a differential pricing analysis results in the application of the average-to-transaction comparison methodology, at most, in approximately 20-30 percent of instances.[318] In the remaining instances, the USDOC, when it has applied a differential pricing analysis, has determined that one or more of the conditions for using the alternative methodology was not met, and, accordingly, Commerce used the "normal[]," symmetrical, average-to-average comparison methodology. Commerce's application of a differential pricing analysis thus has not "necessarily" resulted in any breach of Article 2.4.2 at all.

290. For these reasons, the Panel should find that the "differential pricing methodology" does not necessarily result in a breach of Article 2.4.2 of the AD Agreement, and thus is not inconsistent with that provision, "as such."

---

[314] Korea First Written Submission, para. 5.
[315] Korea First Written Submission, para. 27.
[316] Exhibit USA-21. In this exhibit, we identify the comparison methodology used by the USDOC when it applied the differential pricing analysis in investigations and administrative reviews through the date of Korea's request for the establishment of a panel, December 5, 2013. This exhibit demonstrates that the exceptional, asymmetrical, average-to-transaction comparison methodology was applied just twice in 18 instances, or about 11 percent of the time, when Commerce used a differential pricing analysis to determine the appropriate comparison methodology for determining the existence of the margin of dumping. While 28 instances are included in the list, we have excluded from our calculation of the percentage those instances in which the dumping margin was determined on the basis of facts available, or in which the use of a differential pricing analysis was not relevant or possible, in light of the facts.
[317] *See* Exhibit USA-21.
[318] We present this range because, inevitably, as more instances are analyzed, more unique situations arise that complicate the analysis. Some of these complications include, for example, the fact that in some instances, there may have been insufficient sales data to conduct a differential pricing analysis, or the situation may have involved the resumption of a discontinued review, or an antidumping duty order may have been revoked for a particular company between the publication of the preliminary and final determinations in an administrative review. Additionally, a number of instances involved the application of facts available or a dumping rate determined using a non-market economy methodology. In any event, there is no factual basis for Korea's contention that the USDOC's application of a differential pricing analysis has turned the "exception" in the second sentence of Article 2.4.2 into a "rule."

3. Korea's Complaints about the "Differential Pricing Methodology" Are Unfounded

291. In its first written submission, 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. Second, Korea sets forth a number of criticisms that it argues are specific to the "differential pricing methodology."

292. As explained above, the "differential pricing methodology" has not been shown to be a measure, much less one with general and prospective application. Moreover, it cannot be found "as such" inconsistent with Article 2.4.2 because it does not necessarily result in a breach of that provision. In this section, the United States further explains that Korea has established no breach of Article 2.4.2 and its complaints about the "differential pricing methodology" are without foundation.

a. The "Pattern Clause" of the Second Sentence of Article 2.4.2 Does Not Require that the "Differential Pricing Methodology" Be Used to Examine Why there Are Significant Differences in Export Prices

293. Similar to its "as applied" claim relating to the washers antidumping investigation, Korea argues that the "differential pricing methodology" is, "as such," inconsistent with what we call the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, because:

> it remains the unequivocal position of the USDOC under the differential pricing methodology, based on its interpretation of the U.S. statutory provision implementing Article 2.4.2, that evidence and argument seeking to demonstrate that observed differences in export prices by time period, customer or region were caused by normal commercial conditions and practices unrelated to potential "targeting" are categorically irrelevant to invoking the exception in Article 2.4.2.[319]

294. As explained above in section IV.B.2, Korea's proposed interpretation of the "pattern clause," and specifically the terms "pattern" and "significantly," is not supported by the text of the second sentence of Article 2.4.2, read in its context. Investigating authorities are under no obligation to examine *why* there are significant differences in export prices. Rather, the "pattern clause," properly interpreted pursuant to the customary rules of interpretation of public international law, requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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. The USDOC did this when it applied the differential

[319] Korea First Written Submission, para. 192.

pricing analysis in the four antidumping proceedings to which Korea refers in its first written submission.[320]

295. Korea refers to four antidumping proceedings in which the USDOC issued final determinations over a four-month period from December 2013 to April 2014, and puts before the Panel excerpts from the final issues and decision memoranda in those proceedings.[321] Even with such a limited sample, the excerpts Korea offers are sufficient to show that, in applying the differential pricing analysis, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information.

296. Specifically, the USDOC used the "Cohen's *d* test," which "is a generally recognized statistical measure of the extent of the difference in the means between a test group and a comparison group," to "evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise."[322] The USDOC also used the "ratio test" "to assess the extent of the significant price differences for all sales as measured by the Cohen's *d* test."[323] The final issues and decision memoranda for the antidumping proceedings to which Korea refers note that these tests, and the USDOC's application of the differential pricing analysis, are described in full in the preliminary determinations. The tests and the USDOC's analysis are also described in the USDOC's request for public comment.[324]

297. As reflected in the discussion in the final issues and decision memoranda of the antidumping proceedings to which Korea refers, 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 in the final issues and decision memoranda, 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 which differed significantly among different purchasers, regions, or time periods.

298. Each of the issues and decision memoranda to which Korea refers demonstrates that the USDOC's application of the differential pricing analysis constituted a reasoned and adequate

---

[320] *See* Korea First Written Submission, para. 191.
[321] *See* Korea First Written Submission, para. 191; *see also Stainless Steel Plate in Coils from Belgium*, Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 Fed. Reg. 79,662 (December 31, 2013), Issues and Decision Memorandum (excerpted), pp. 15-16 (Exhibit KOR-60); *Welded Carbon Steel Standard Pipe and Tube Products from Turkey*: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 Fed. Reg. 79,665 (December 31, 2013), Issues and Decision Memorandum (excerpted), pp. 39-40 (Exhibit KOR-61); *Polyethylene Terephthalate Film from India*, Final Results of Antidumping Duty Administrative Review; 2011-2012, 79 Fed. Reg. 11,406 (February 28, 2014), Issues and Decision Memorandum (excerpted), p. 5 (Exhibit KOR-62); *Certain Steel Nails from the People's Republic of China*: Final Results of the Fourth Antidumping Duty Administrative Review, 79 Fed. Reg. 19,316 (April 8, 2014), Issues and Decision Memorandum (excerpted), p. 31 (Exhibit KOR-63).
[322] Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,722 (Exhibit KOR-25).
[323] Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,722 (Exhibit KOR-25).
[324] *See* Differential Pricing Analysis Request for Comments, 79 Fed. Reg. at 26,722-26,723 (Exhibit KOR-25).

application of the "pattern clause" of Article 2.4.2 of the AD Agreement, and none supports Korea's claim that the "differential pricing methodology" is inconsistent with that provision, "as such."

299. For these reasons, the Panel should find that the fact that the "differential pricing methodology" does not include an examination of *why* export prices differ significantly does not establish that the "differential pricing methodology" is inconsistent with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, "as such."

b. The "Differential Pricing Methodology" Is Not Inconsistent with the "Explanation Clause" of the Second Sentence of Article 2.4.2, "As Such"

300. Korea claims that "the 'explanation' that the USDOC provides under the differential pricing methodology as to why the pattern of significant price differences 'cannot be taken into account appropriately' by the use of either the [average-to-average] or [transaction-to-transaction] comparison methodologies is facially inadequate."[325] Korea argues that "all of the reasons" it gave in support of its claim against the USDOC's "explanation" in the washers antidumping investigation support its "as such" claim against the "differential pricing methodology."[326] Korea's arguments are without merit.

301. As demonstrated above in section IV.B.3, a proper application of the customary rules of interpretation of public international law reveals that the "explanation clause" in the second sentence of Article 2.4.2 of the AD Agreement 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 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.

302. Like Korea, the United States relies on the arguments made above in relation to the washers antidumping investigation, and we will not repeat them here.[327] It suffices to say that the excerpts of the final issues and decision memoranda to which Korea refers in its first written submission[328] demonstrate that, when the USDOC applied the differential pricing analysis in the referenced proceedings, it provided a reasoned and adequate statement that made clear or intelligible or gave details of the reason that it was not possible to deal or reckon with export prices which differed significantly in a manner that was proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2.

303. Specifically, in the proceedings to which Korea refers, the evidence that supported the USDOC's conclusion – *i.e.*, that the pattern of export prices that differed significantly cannot be taken into account by the use of the average-to-average comparison methodology – was the "meaningful difference" in the weighted average dumping margin as calculated under that

[325] Korea First Written Submission, para. 194.
[326] Korea First Written Submission, para. 197.
[327] *See supra*, section IV.B.3.
[328] *See* Korea First Written Submission, para. 196.

methodology when compared to the weighted average dumping margin as calculated under the average-to-transaction comparison methodology. The USDOC explained that "a difference in the weighted average dumping margins is considered meaningful if there is a 25 percent relative change in the weighted average dumping margin between the [average-to-average comparison] method and the appropriate alternative method where both rates are above the *de minimis* threshold, or the resulting weighted average dumping margin moves across the *de minimis* threshold."[329] The "explanation clause" in the second sentence of Article 2.4.2 of the AD Agreement does not require more than what the USDOC did in the referenced proceedings.

304. Korea also argues that the "differential pricing methodology" is inconsistent with the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement because it does not "address at all why the [transaction-to-transaction] comparison methodology cannot take into account appropriately the pattern of significantly differing prices found to exist."[330] As explained above in section IV.B.3.c, when the "explanation clause" is read in the context of Article 2.4.2 as a whole, it is clear that an investigating authority is not obligated to include a discussion of both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" provided pursuant to the second sentence of Article 2.4.2.

305. For these reasons, the Panel should find that the "differential pricing methodology" is not inconsistent with the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement, "as such."

c. The Application of the Alternative, Average-to-Transaction Comparison Methodology to All Sales under the "Differential Pricing Methodology" Is Not Inconsistent with Article 2.4.2 of the AD Agreement, "As Such"

306. As it did with respect to the washers antidumping investigation, Korea claims that the "differential pricing methodology" is inconsistent with Article 2.4.2 of the AD Agreement, "as such," because it "leads the USDOC to apply the exceptional W-T comparison methodology to sales that do not meet the criteria for invoking the exception."[331] Korea seeks to establish its claim by referencing excerpts from the final issues and decision memoranda in two recent antidumping proceedings.[332] Korea's claim is without foundation.

307. As explained above in section IV.B.4 with respect to Korea's claim concerning the washers antidumping investigation, Korea's proposed interpretation of Article 2.4.2 is not supported by the "structure and language"[333] of that provision, as Korea contends. When the conditions for the use of the exceptional comparison methodology are met, nothing in the second

[329] *See e.g.*, Korea First Written Submission, para. 196 (*quoting Stainless Steel Plate in Coils from Belgium*, Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 Fed. Reg. 79,662 (Dec. 31, 2013), Issues and Decision Memorandum (excerpted), p. 17 (Exhibit KOR-60)).
[330] Korea First Written Submission, para. 197 (underlining in original).
[331] Korea First Written Submission, para. 198.
[332] *See* Korea First Written Submission, para. 199.
[333] Korea First Written Submission, para. 170.

sentence of Article 2.4.2 suggests that the alternative methodology must be applied only to some subset of transactions, as Korea proposes.

308. Korea appears to harbor a fundamental misconception about the meaning of the phrase "pattern of export prices which differ significantly among different purchasers, regions or time periods" in the second sentence of Article 2.4.2. Such a "pattern" necessarily includes both lower and higher export prices that "differ significantly" from each other.

309. 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."[334] "Targeted dumping" that is "masked" necessarily involves both lower-priced sales, below normal value, which constitute evidence of dumping, and higher-priced sales, above normal value, which mask such dumping. Both lower-priced sales and higher-priced sales are part of a pattern of export prices which differ significantly, which may result in masked dumping.

310. It is possible to unmask "targeted dumping," which would be evidenced by lower-priced sales that "differ significantly" from higher-priced sales, 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 the amount of 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.

311. For these reasons, the application of the alternative, average-to-transaction comparison methodology to all sales in certain circumstances does not render the "differential pricing methodology" inconsistent with Article 2.4.2 of the AD Agreement, "as such."

d. Korea Has Failed To Make a *Prima Facie* Case with Respect to Its Remaining Specific Complaints against the "Differential Pricing Methodology"

312. In addition to contending that the arguments it presented in connection with the washers antidumping investigation support the conclusion that the "differential pricing methodology" is inconsistent with Article 2.4.2 of the AD Agreement, "as such," Korea attempts to present numerous additional arguments that purportedly are specific to the "differential pricing methodology." With respect to these latter arguments, 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.

313. A party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim. With respect to the allocation of the burden of proof, the Appellate Body has explained:

> We first recall that, in WTO dispute settlement, as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the

[334] *See US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.

> affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence. . . . Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it.[335]

314. A "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[336] With regard to the additional arguments that purportedly are specific to the "differential pricing methodology," the case presented by Korea fails to meet this standard. In order to meet its burden, Korea must make an adequate legal argument for each of its claims[337] and "adduce[] evidence sufficient to raise a presumption that what it claim[s] is true."[338] The Panel may not make the case for Korea,[339] and should keep in mind the admonition of the Appellate Body that "when a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU."[340]

315. Sections V.E.3 and V.E.4 of Korea's first written submission are notable for their dearth of citations to record evidence.[341] Korea premises its arguments related to what it calls the "'vertical' variation problem,"[342] the "'horizontal' variation problem,"[343] and "'cross-category' price variation"[344] exclusively on hypothetical scenarios that are entirely the invention of Korea. Korea makes no reference whatsoever to any actual evidence that any of its concerns have actually manifested themselves in any actual application of the "differential pricing methodology."

316. Korea asserts that:

> The three flaws in the differential pricing methodology that Korea has identified are not merely artefacts of the hypothetical examples that Korea has provided. Rather, these flaws are inherent in the differential pricing methodology and prevent it, in all cases, from operating in a manner that is consistent with the second sentence of Article 2.4.2.[345]

Once again, however, there is no evidence before the Panel that supports Korea's assertion.

317. Korea's final argument relating to what it calls "systemic disregarding" is similarly without support. In its discussion of this argument, Korea references a short section of SAS

---

[335] *Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134 (internal footnotes omitted).
[336] *EC – Hormones (AB)*, para. 104.
[337] *See Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134.
[338] *US – Wool Shirts and Blouses (AB)* at 14.
[339] *See Japan – Agricultural Products II (AB)*, para. 129.
[340] *US – Gambling (AB)*, para. 281.
[341] *See* Korea First Written Submission, paras. 201-241.
[342] *See* Korea First Written Submission, paras. 217-221.
[343] *See* Korea First Written Submission, paras. 222-226.
[344] *See* Korea First Written Submission, paras. 227-233.
[345] *See* Korea First Written Submission, para. 234.

programming code, though it does not indicate the source of this code. Upon review of Exhibit KOR-24, the programming code and accompanying explanation appear to come from pages 70 and 71 of the electronic/PDF version of that exhibit. We recall that this SAS code is that which is posted on the USDOC's web site, and which is described there as "generic," "boilerplate" programming code.[346] Korea does not present any evidence to establish that this generic programming code has been used in any application of the "differential pricing methodology." Korea does not even assert that it has. Instead, Korea again premises its argument on a hypothetical scenario of its own invention.

318. For these reasons, with regard to its arguments that are specific to the "differential pricing methodology," 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."

319. Accordingly, the United States will not respond to the substance of Korea's arguments that are specific to the "differential pricing methodology." It would be imprudent and inappropriate for the United States to engage with Korea on the basis of Korea's hypothetical scenarios, which are not evidence of the application of the "differential pricing methodology." In doing so, the United States does not intend to suggest that it accepts Korea's arguments or that Korea's arguments have any merit whatsoever.

E. Korea's "Ongoing Conduct" Claims Are without Merit

320. In addition to its "as applied" and "as such" claims, Korea claims that the alleged "repetition" of errors related to the USDOC's determination to use the alternative, average-to-transaction methodology,[347] as well as the USDOC's use of zeroing, "in subsequent connected stages of the *Washers* investigation,"[348] is inconsistent with certain provisions of the covered agreements as "ongoing conduct." Korea's "ongoing conduct" claims are without merit.

1. "Ongoing Conduct" Is Not within the Panel's Terms of Reference Because It Purports to Include Future Measures

321. As an initial matter, 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.[349] Article 3.3 of the DSU provides that:

> [t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being impaired* by *measures taken* by another Member is essential to the effective

[346] Exhibit KOR-24, p. 4.
[347] *See* Korea First Written Submission, paras. 180-181.
[348] Korea First Written Submission, para. 103; *see also id.*, note 88.
[349] *See, e.g., US – Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); *Indonesia – Autos*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of a panel was not within the panel's terms of reference).

> functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. (emphasis added).

Not only would it be impossible to consult on a measure that does not exist, because it is not a measure "taken by another Member," a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement. As the *Upland Cotton* panel found, the legislation challenged in that dispute could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel.[350] Similarly, in this dispute, indeterminate future measures that did not exist at the time of Korea's panel request (and may never exist) could not be impairing any benefits accruing to Korea.

322. Furthermore, Article 17.4 of the AD Agreement provides that a Member may refer "the matter" to dispute settlement only if consultations have failed to resolve the dispute and "final action" has been taken by the administering authorities of the importing Member to levy definitive antidumping duties or to accept price undertakings.[351] Korea suggests that the "ongoing conduct" measure relates to "subsequent connected stages of the *Washers* investigation."[352] However, at the time of Korea's panel request, neither any "subsequent" proceeding "connected" to the washers antidumping investigation nor the "ongoing conduct" measure itself involved a final action to levy definitive antidumping duties or accept price undertakings. That remains true even as of the writing of this U.S. first written submission. On April 1, 2014, the USDOC published a notice of initiation of the first administrative review of the washers antidumping order for the period August 3, 2012, through January 31, 2014.[353] That administrative review currently is ongoing.

323. Because the purported "ongoing conduct" "measure" consists of an indeterminate number of future antidumping measures for which no final action had been taken at the time of Korea's panel request, the United States respectfully requests that the Panel find that any alleged "ongoing conduct" is not a measure that is within the Panel's terms of reference, and Korea's claims against such alleged "ongoing conduct," accordingly, must fail.

2. Korea Cannot Establish "Ongoing Conduct" as that Concept Has Been Understood by the Appellate Body

324. Should the Panel conclude that "ongoing conduct" is a "measure" within its terms of reference, the Panel nevertheless should reject Korea's claims relating to such a "measure,"

[350] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.
[351] While provisional measures may also be challenged in certain circumstances, *see* AD Agreement, Art. 17.4, Korea has made no allegations in this regard.
[352] Korea First Written Submission, para. 103.
[353] *See* AD and CVD Review Initiation Notice, 79 Fed. Reg. at 18,264 (Exhibit KOR-43).

because the facts belie a conclusion that any such "ongoing conduct" exists or is likely to continue under the washers antidumping duty order that is at issue in this dispute.[354]

325. The United States has serious concerns about the rationale articulated by the Appellate Body in *US – Continued Zeroing* for finding an entirely new type of "measure" to be subject to WTO dispute settlement. That dispute concerned "the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained."[355] But the facts in this dispute are markedly different from the facts in *US – Continued Zeroing* and therefore, even on the Appellate Body's approach in that dispute, Korea's claim fails.

326. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged, *i.e.*, where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time."[356] Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings"[357] included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

327. Where there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" or "the sunset review determination was excluded from the Panel's terms of reference," the Appellate Body found that "the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained."[358] Consequently, the Appellate Body was "unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings . . . ."[359]

328. The facts in this dispute do not support the conclusion that the challenged practices "would likely continue to be applied in successive proceedings."[360] As explained above, 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"[361] that would be required to support its claims related to alleged "ongoing conduct."

---

[354] When bringing a challenge against an unwritten measure, a complaining party must clearly establish, through arguments and supporting evidence, both the existence of the alleged measure, and its precise content. *US – Zeroing (EC) (AB)*, paras. 196-98.
[355] *US – Continued Zeroing (AB)*, para. 180.
[356] *US – Continued Zeroing (AB)*, para. 191.
[357] *US – Continued Zeroing (AB)*, para. 191.
[358] *US – Continued Zeroing (AB)*, para. 194.
[359] *US – Continued Zeroing (AB)*, para. 194.
[360] *US – Continued Zeroing (AB)*, para. 191.
[361] *US – Continued Zeroing (AB)*, para. 191.

329. For the reasons given above, the United States respectfully requests that the Panel reject Korea's claims that the USDOC's alleged "ongoing conduct" is inconsistent with the covered agreements.

F. The Antidumping Measures Challenged by Korea Are Not Inconsistent with Article 1 of the AD Agreement

330. In its request for findings and recommendations at the end of its first written submission, Korea requests that the Panel find that "[t]he United States' measures discussed above are also inconsistent with Article 1 of the Anti-Dumping Agreement."[362] There is no basis for the Panel to grant Korea's request for such a finding.

331. Article 1 of the AD Agreement provides that "an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." As demonstrated above, 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.

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

332. In its final countervailing duty determination, the USDOC found that two subsidy programs used by Samsung were countervailable: (1) RSTA Article 10(1)(3), which provides tax credits to companies for investments in "research and human resources development"; and (2) RSTA Article 26 (entitled "Tax Deduction for Facilities Investment"), which provides tax credits for eligible investments in facilities.[363]

333. Samsung received massive amounts of subsidy under these programs in 2011 – a total of approximately KRW[[***]], equivalent to USD[[***]].[364] Korea does not dispute that these funds were subsidies for purposes of Article 1.1 of the SCM Agreement. Samsung received a

---

[362] Korea First Written Submission, para. 352.

[363] Washers Final CVD I&D Memo, p. 11-15 (Exhibit KOR-77). The Department calculated a 1.85 percent *ad valorem* duty rate for Samsung, which included a 0.72 percent rate for RSTA Article 10(1)(3) and a 1.05 percent rate for RSTA Article 26. *Id.* at 13, 15; Washers CVD Final Determination, 77 Fed. Reg. at 75,977 (Exhibit KOR-2). The 1.85 percent Samsung rate also reflected (1) a government grant provided for a project at a Samsung facility, which the USDOC calculated as 0.02 percent *ad valorem*, and (2) KDB and IBK short-term discounted loans to Samsung for export receivables, at a 0.06 percent *ad valorem* rate. Washers Final CVD I&D Memo, pp. 8-9, 22-23 (Exhibit KOR-77). Korea does not challenge either the USDOC's determination with respect to the grant or the USDOC's determination concerning the KDB and IBK loans. Korea sought consultations with respect to the latter, but did not include this matter in its panel request. *Compare* Consultations Request at 6 *with* Panel Request at 5-6.

[364] In 2011, Samsung received KRW[[***]] through the RSTA Article 10(1)(3) program, equivalent to USD[[***]]. In the same year, Samsung received KRW[[***]] in subsidies through the RSTA Article 26 program, equivalent to USD[[***]]. Final Samsung CVD Calculation Memo, Attachments 6, 9 (Exhibit USA-26).

financial contribution within the meaning of Article 1.1(a)(1). Here, "government revenue that is otherwise due is foregone or not collected (e.g., fiscal incentives such as tax credits)."[365] Nor does Korea contest that a benefit was thereby conferred.

334. Korea challenges only the Department's finding that these subsidies were specific. Korea asserts that the USDOC incorrectly found that the subsidies under RSTA Article 10(1)(3) were *de facto* specific – despite overwhelming evidence that Samsung received disproportionately large amounts of these subsidies. Subsidies under this program are available to any company in Korea that undertakes research or human resources investments. Yet despite this broad *de jure* availability, a single company (Samsung) received [[***]] percent of all subsidies disbursed under the program, which had nearly 12,000 participants.[366] Samsung received nearly [[***]] times more subsidy than the average recipient.[367] As discussed below, the USDOC's determination that these subsidies were *de facto* specific was consistent with Article 2.1(c) of the SCM Agreement and supported by positive evidence.

335. Korea's second specificity 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, which provides that a subsidy that is "limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific." The RSTA Article 26 program is expressly limited to a designated geographical region – i.e., the area outside the overcrowding region of Seoul. Korea's efforts to overcome the plain language of Article 2.2 are unavailing.

336. In addition to its specificity claims, Korea challenges the method by which Samsung's subsidy rate was calculated. Korea asserts that the research, human resources development, and facilities subsidies that Samsung received should have been calculated in a way that attributed them on a product-by-product basis, depending on how these subsidies were allegedly "used" and benefitted particular products.[368] Korea also complains that the subsidy rate for subsidies received under RSTA Article 10(1)(3) should have been calculated by dividing the amount of subsidy over Samsung's worldwide sales of large residential washers, including sales of washers produced outside Korea[369] – 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.

337. Here, Korea attempts to introduce obligations into the SCM Agreement and GATT 1994 that are not set out in the text of those agreements. A subsidy may, for example, be linked to a particular product based on the design and structure of the measure, and the investigating authority may attribute the subsidy to that product. But there is nothing in these agreements that logically or legally requires an investigating authority to treat subsidies as "tied" to a particular product, based on how a subsidy recipient chooses to "use" the benefit that it ultimately receives

[365] SCM Agreement, Article 1.1(a)(1)(ii).
[366] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[367] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[368] Korea First Written Submission, paras. 277-303.
[369] Korea First Written Submission, paras. 304-315.

and any alleged effects of that use on a particular product. Indeed, Korea's approach would tend to conflate the determination of the amount of a subsidy for subsidized imports with the separate inquiry into the effects of the subsidies through the subsidized imports. Equally, the agreements do not require authorities to apply this erroneous use and effects inquiry to include offshore manufacturing operations, particularly as this subsidy was granted in connection with activities carried out within Korea. Nor is there a factual basis for the calculation methods sought by Korea in this case.

338. As we demonstrate below, Korea's claims should be rejected. In section V.A we address Korea's claims concerning the USDOC's finding that subsidies conferred under RSTA 10(1)(3) were specific. In section V.B we discuss Korea's arguments concerning the USDOC's determination that subsidies conferred under RSTA Article 26 were regionally specific. Finally, in section V.C, we address Korea's arguments concerning the USDOC's calculation of the subsidy ratio for Samsung, and the attribution methodology that it employed.

A. Subsidies Conferred Under RSTA Article 10(1)(3) Are Specific Under Article 2.1 Of The SCM Agreement

339. In its submission, Korea criticizes the USDOC's determination that the subsidies distributed to Samsung under RSTA Article 10(1)(3) were disproportionately large and thus *de facto* specific. Korea's arguments do not withstand scrutiny. First, Korea errs in asserting that USDOC did not follow the Appellate Body's guidance with respect to the relevant legal standard.[370] The USDOC found that there was a significant disparity between the expected distribution of these subsidies based on the program's eligibility criteria – which are open to any company investing in research or human resources development – and their actual distribution.[371] This approach is fully consistent with text of Article 2 and the Appellate Body's guidance.

340. Second, the USDOC's conclusion that Samsung received subsidies in disproportionately large amounts is amply supported by the facts. Samsung received:

- [[***]] percent of all subsidies distributed in 2010 (the most recent year in which complete data was available), out of nearly 12,000 participants;[372]
- Nearly [[***]] times more subsidy than the average recipient;[373]
- [[***]] 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;[374] and a [[***]] percent reduction in its tax liability to Korea – more than

[370] Korea First Written Submission, paras. 268-271.
[371] Washers Final CVD I&D Memo, pp. 35-36 (Exhibit KOR-77).
[372] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[373] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[374] Washers CVD Redetermination, pp. 10-11 (Exhibit KOR-44) (BCI).

> [[***]] times greater than the average tax reduction received by the other 99 largest companies.[375]

341. Contrary to Korea's assertion,[376] these findings cannot be dismissed on the grounds that Samsung received funds according to the formulas set by RSTA, and is a large company. The fact that a subsidy program operates through common formulas does not mean that the resulting distribution of a subsidy is necessarily "proportionate." Disproportionality is a "relational concept" that requires consideration of subsidy distribution relative to other recipients.[377] Equally, the fact that a recipient is large does not mean that when it receives a subsidy that is larger, in relative and absolute terms, than that received by other recipients, such a subsidy is inherently non-specific under Article 2.1(c). Korea's "size defense" would undermine the purpose of the disproportionality inquiry, and is not factually supported here.

342. Below, we describe the RSTA Article 10(1)(3) subsidy program, applicable legal standard, and the USDOC's application of that standard in this case. As this discussion reveals, the USDOC's specificity determination was fully consistent with Article 2 of the SCM Agreement. The USDOC provided a reasoned and adequate explanation of its findings, which were supported by positive evidence.[378]

1. Description of the RSTA Article 10(1)(3) Subsidy Program

343. RSTA Article 10(1)(3) establishes a program that confers tax credits on companies based on their investment in "research and human resources development."[379] As Korea stated in its questionnaire responses, this subsidy program is intended to "boost the general national economic activities."[380] The program is available to all Korean companies, regardless of industry or product.[381] Qualifying investments must relate to research and human resources development activities that take place in Korea.[382]

344. Under this program, a company is eligible to receive a credit against its corporate income tax liability, according to formulas that vary depending on company size. Small-to-medium enterprises (SMEs) may claim up to 50 percent of the difference between the research and human development expenditures incurred in a given tax year and the annual average of such expenses over the preceding four years. Large companies can claim only 40 percent of this

---

[375] Washers CVD Redetermination, pp. 11-12, 14 (Exhibit KOR-44) (BCI).
[376] Korea First Written Submission, paras. 267-268.
[377] *US – Large Civil Aircraft (AB)*, para. 879.
[378] Korea did not include in its Panel Request a claim under Article 2.4 of the SCM Agreement, which provides that specificity determinations must be based on "positive evidence." Panel Request at 5-6. Any such claim would thus fall outside the Panel's terms of reference.
[379] Washers Final CVD I&D Memo, p. 11 (Exhibit KOR-77); GOK April 9, 2012 QR at App. Vol. at 108 (Exhibit KOR-75) (BCI). Investment expenditures qualifying for tax credits under RSTA Articles 10(1)(1) and 10(1)(2) are claimed under those provisions, rather than RSTA Article 10(1)(3). GOK April 9, 2012 at App. Vol. at 108 and 113 (Exhibit KOR-75) (BCI).
[380] GOK April 9, 2012 QR at II-75 (Exhibit KOR-75) (BCI).
[381] GOK April 9, 2012 QR at II-75 (Exhibit KOR-75) (BCI).
[382] *See, e.g.*, Washers Final CVD I&D Memo, p. 52 (Exhibit KOR-77).

amount.[383] Alternatively, SMEs may elect to receive a credit equal to 25 percent of expenses incurred in the tax year, whereas large companies can receive 6 percent.[384]

345. A tax credit for research and human resources development has existed since 1982, under the Tax Exemption and Reduction Control Law.[385] The tax credit was subsequently codified in RSTA Article 10. In 2010 two additional subsidy programs were added to Article 10 of the RSTA: Article 10(1)(1), which provides a 20 percent tax credit for new R&D expenses incurred with respect to "new growth engine" industries, and Article 10(1)(2), under which companies may receive a 20 percent tax credit for "core technology" R&D expenses.[386]

346. In contrast with the tax credit available under Article 10(1)(3) of the RSTA, eligibility for subsidies under Articles 10(1)(1) and 10(1)(2) is limited to R&D in a closed list of technologies.[387] Due to these restrictions, recipients of subsidies under Articles 10(1)(1) and 10(1)(2) must submit a form with their tax return setting out detailed information about R&D activities, to allow tax authorities to evaluate eligibility.[388]

347. As Korea states, a company that claims credits under RSTA Article 10(1)(3) need only submit a form with its return that "list[s] the total amount of its eligible R&D investments and calculate[s] the amount of the resulting tax credit."[389] The company is not required to identify whether or which R&D expenses are related to particular merchandise.

348. The credits claimed by a company under the RSTA are limited by Korea's Minimum Tax Scheme, which set a minimum corporate income tax rate of 7-14 percent in 2010-2011. To comply with Minimum Tax requirements, a company may defer RSTA tax credits to a subsequent tax year.[390]

2. The USDOC's Specificity Findings

349. The USDOC concluded that subsidies conferred under Article 10(1)(3) of the RSTA were not *de jure* specific.[391]

350. To determine whether RSTA Article 10(1)(3) subsidies were *de facto* specific, the USDOC asked for detailed information on the distribution of subsidies under the program. The Period of Investigation (POI) was the most recent fiscal year, January 1, 2011 through December

[383] GOK April 9, 2012 QR at App. Vol. at 108 and 110-111 (Exhibit KOR-75) (BCI).
[384] GOK April 9, 2012 QR at App. Vol. at 108 and 110-111 (Exhibit KOR-75) (BCI).
[385] GOK April 9, 2012 QR at II-75 (Exhibit KOR-75) (BCI).
[386] Washers Final CVD I&D Memo, pp. 9-11 (Exhibit KOR-77); GOK April 9, 2012 QR at II-73 to II-74 (Exhibit KOR-75) (BCI); RSTA Article 10 and Enforcement Decree Article 9, at 96 (Exhibit KOR-76).
[387] Washers Final CVD I&D Memo, pp. 9-11 (Exhibit KOR-77); GOK April 9, 2012 QR at App. Vol. at 82-86, 96-100 (Exhibit KOR-75) (BCI).
[388] GOK April 9, 2012 QR at App. Vol. at 87, 101 (Exhibit KOR-75) (BCI).
[389] Korea First Written Submission, para. 250; *see also* Samsung Washers Verification Report, Ex. 10 (Exhibit KOR-79) (BCI).
[390] Samsung April 9, 2012 QR at Ex. 22, pp. 3-4 (Exhibit KOR-72) (BCI); *see also* Washers CVD Redetermination at 8-9 (Exhibit KOR-44) (BCI).
[391] Washers Final CVD I&D Memo, pp. 12, 34 (Exhibit KOR-77).

31, 2011, consistent with 19 CFR § 351.204(b)(2) .[392] Korea stated that complete information was unavailable for 2011, but was able to provide information on the aggregate amount of subsidies distributed through 2010, as well as the total number of participants.[393]

351. Korea was unable to provide information in response to the USDOC's request for an industry-by-industry breakdown of how subsidies were distributed. Korea stated that its authorities "do[ ] not compile the data of recipients in terms of business sectors or industries."[394] As a result, the USDOC was prevented from determining whether the subsidies were *de facto* specific on an industry basis.[395] As the USDOC observed, "the information on the record is not sufficient to evaluate predominance or disproportionality on an industry basis."[396]

352. Despite these limitations, the results of the USDOC's investigation were striking. The USDOC found that Samsung received approximately KRW[[***]] in 2010, equivalent to [[***]] percent of all subsidies disbursed under the program that year.[397] By comparison, the average recipient that year obtained only KRW[[***]], or [[***]] percent of the total.[398] Samsung received nearly [[***]] times more subsidy than the average recipient – a distribution that was remarkable given that the program had 11,764 recipients.[399]

353. Together, Samsung and LG accounted for [[***]] percent of all subsidies distributed in 2010.[400] The USDOC found that:

> It is a significant indicator of disproportionality use that Samsung and LG together accounted for a very large percentage of all tax credits provided under this program, when this program had more than 11,000 beneficiaries. Even though we would not expect each beneficiary to receive an equal percentage of the total benefits, in the case of Samsung and LG, the percentage of total benefits received is significant.[401]

354. The USDOC considered and discussed at length the parties' arguments concerning this distribution of benefits.[402] The USDOC concluded that Samsung and LG received

---

[392] Washers Final CVD I&D Memo, p. 2 (Exhibit KOR-77); *see also* 19 CFR § 351.204 ("In a countervailing duty investigation, the Secretary normally will rely on information pertaining to the most recently completed fiscal year for the government and exporters or producers in question.") (Exhibit USA-22).
[393] GOK April 9, 2012 QR at App. Vol. at 116 (Exhibit KOR-75) (BCI).
[394] GOK April 9, 2012 QR at App. Vol. at 116 (Exhibit KOR-75) (BCI).
[395] Washers Final CVD I&D Memo, p. 12 (Exhibit KOR-77) ("Because the GOK did not compile the data on the basis of business sectors or industries, the Department cannot determine whether this program provides benefits to a limited number of recipients on an industry-specific basis.").
[396] Washers Final CVD I&D Memo, p. 12 (Exhibit KOR-77).
[397] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[398] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[399] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[400] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI). LG received approximately KRW[[***]] in 2010, or [[***]] percent of the KRW[[***]] in total subsidies distributed under the program. *Id.*
[401] Washers Final CVD I&D Memo, pp. 35-36 (Exhibit KOR-77).
[402] Washers Final CVD I&D Memo, Comment 7, at 37-42 (Exhibit KOR-77).

disproportionally large amounts of subsidy and, as a result, the subsidies received under Article 10(1)(3) were *de facto* specific.[403]

3. Legal Framework

355. Before addressing Korea's criticisms of the USDOC's determination, we consider the text and structure of Article 2.1 of the SCM Agreement.

356. Article 2.1 provides:

> In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[404] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

---

[403] Washers Final CVD I&D Memo, pp. 12-13, 35-36 (Exhibit KOR-77). As noted above, the USDOC found that LG had received countervailable subsidies under, *inter alia*, RSTA Article 10(1)(3) and RSTA Article 26. But the USDOC ultimately found a *de minimis* (0.01 percent) net subsidy rate for LG, and no duties were imposed with respect to LG. Washers CVD Final Determination at 75,977 (Exhibit KOR-2); Washers Final CVD I&D Memo, p. 13, 15 (Exhibit KOR-77).

[404] Footnote 2 of the SCM Agreement explains that "[o]bjective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise."

357. The "central inquiry" under Article 2.1 is to determine "whether a subsidy is specific to 'certain enterprises' within the jurisdiction of the granting authority."[405] As the Appellate Body observed in *US – Anti-Dumping and Countervailing Duties (China)*, the term "certain enterprises" – which appears in the *chapeau* and throughout Article 2.1 – refers to "a single enterprise or industry or a class of enterprises or industries that are known and particularized."[406] This term involves "a certain amount of indeterminacy at the edges," and a determination of whether a group of enterprises or industries constitute "certain enterprises" can only be made on a case-by-case basis.[407]

358. Subparagraphs (a) through (c) of Article 2.1 articulate principles that inform this analysis. The Appellate Body has emphasized that these are "principles," and not rules.[408] In some cases, application of one subparagraph may unequivocally indicate specificity or non-specificity, and further considerations under other subparagraphs may be unnecessary.[409]

359. Subparagraph (a) identifies circumstances in which a subsidy is *de jure* specific – i.e., where limitations on eligibility favor certain enterprises.[410] By contrast, subparagraph (b) sets out circumstances in which a subsidy shall be regarded as non-specific, i.e., where "objective criteria or conditions" exist that "guard against selective eligibility."[411] Both subparagraphs "direct scrutiny to the eligibility requirements imposed by the granting authority or the legislation pursuant to which the granting authority operates."[412]

360. Article 2.1(c) establishes that, "notwithstanding any appearance of non-specificity" resulting from application of subparagraphs (a) and (b), a subsidy may nevertheless be "in fact" specific. Application of Article 2.1(c) is a fact-driven, context-dependent exercise. As the panel observed in *US – Countervailing Measures on Certain Products from China*, Article 2.1(c) "reflects the diversity of facts and circumstances that investigating authorities may be confronted with when analysing subsidies covered by the SCM Agreement."[413] Article 2.1(c) "concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise."[414]

361. In conducting its analysis under Article 2.1(c), an investigating authority "may" consider "other factors" – i.e., the four factors set out in the second sentence of Article 2.1(c): use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises,

---

[405] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.
[406] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.
[407] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.
[408] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366; *see also US – Carbon Steel (India) (Panel)*, para. 7.118.
[409] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371; *US – Carbon Steel (India) (Panel)*, para. 7.119.
[410] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.
[411] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.
[412] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.
[413] *US – Countervailing Measures (China) (Panel)*, para. 7.240.
[414] *US – Countervailing Measures (China) (Panel)*, para. 7.252.

and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. An authority need not examine all four factors when conducting its analysis.[415]

362. The third sentence of Article 2.1(c) sets out two additional considerations to be taken into account when conducting a *de facto* specificity analysis: the "extent of diversification of economic activities within the jurisdiction of the granting authority" and the "length of time during which the subsidy programme has been in operation."[416]

4. The USDOC's Disproportionality Findings Are Fully Consistent with the Text of Article 2 and the Appellate Body's Guidance

363. Korea fails to articulate its claim based on the text of Article 2, or show how the USDOC's specificity determination was inconsistent with that text. Instead, Korea relies largely on the assertion that the USDOC's specificity determination was inconsistent with the Appellate Body's guidance in *US – Large Civil Aircraft*.[417] This argument is flawed. The USDOC's specificity findings comport fully with the text of Article 2. Not surprisingly, these findings fit well with the guidance provided by the Appellate Body.

364. First, the USDOC's findings are fully consistent with the text of Article 2. The USDOC considered whether the GOK had granted "disproportionately large amounts of subsidy to certain enterprises," within the meaning of Article 2.1(c). The term "disproportionate" means "[l]acking in proportion; poorly proportioned; out of proportion (*to*); relatively too large or too small"; whereas the term "proportion" refers to "[a] portion, a part, a share, esp. in relation to a whole; a relative amount or number."[418] The ordinary meaning of the phrase indicates that the inquiry is whether subsidies were granted to "certain enterprises" (as defined in the *chapeau* of Article 2.1) in amounts that are relatively too large.

365. Here, the USDOC found that a single company, Samsung, received amounts of subsidy that were relatively too large – in comparison with both the total amount distributed under the program and amounts received by other recipients. Samsung received [[***]] percent of all benefits distributed under the program in 2010, out of nearly 12,000 participants.[419] Subsidies disbursed to Samsung were nearly [[***]] times greater than those conferred on the average recipient.[420] The evidence overwhelmingly demonstrated that Samsung received subsidies that were "disproportionately large," and the USDOC's findings are entirely consistent with the text of Article 2.

---

[415] *US – Softwood Lumber IV (Panel)*, para. 7.123; *see also id.*, para. 7.124.
[416] Article 1.2 of the SCM Agreement provides that "[a] subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2." As discussed below, Korea has failed to establish that the USDOC's specificity findings were inconsistent with Article 2. Korea's claim under Article 1.2 fails as a consequence.
[417] Korea First Written Submission, paras. 269-271.
[418] *US – Large Civil Aircraft (Second Complaint) (AB)*, n.1769 (citing 1 *New Shorter Oxford English Dictionary* 713 (6th ed. 2007), and 2 *New Shorter Oxford English Dictionary* 2372 (6th ed. 2007)).
[419] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[420] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).

366. Second, Korea errs in asserting that the specificity determination is somehow at odds with the Appellate Body's approach in *US – Large Civil Aircraft*. In that dispute, which was brought under Part III of the SCM Agreement, the Appellate Body upheld the panel's finding – albeit for different reasoning – that two companies, Boeing and Spirit, received disproportionately large amounts of tax benefits provided under an Industrial Revenue Bond ("IRB") program.[421]

367. By way of background, the City of Wichita, Kansas, issued IRBs to applicants "for the purpose of paying all or part of the cost of purchasing, acquiring, constructing, reconstructing, improving, equipping, furnishing, repairing, enlarging or remodeling facilities."[422] Certain IRBs could provide for tax abatement in the form of reduced property taxes for the project properties and exemption from sales tax for property and services acquired by project properties.[423] As the Appellate Body noted, the relevant statute "expresses eligibility for IRB benefits in very broad terms," without limitation to a particular enterprise or industry.[424] Thus, the program was not *de jure* specific.[425]

368. In reviewing the panel's *de facto* specificity findings, the Appellate Body interpreted the third factor in the second sentence of Article 2.1(c) of the SCM Agreement – i.e., "the granting of disproportionately large amounts of subsidy to certain enterprises." The Appellate Body observed that the text of this provision "does not offer clear guidance."[426] Nonetheless, the Appellate Body interpreted this factor as calling for an essentially two-step inquiry – i.e., to (1) identify the "amounts of subsidy" granted, and (2) determine whether the amounts of subsidy are "disproportionately large."[427]

369. According to the Appellate Body, the term "disproportionately large" suggests that "disproportionality is a relational concept that requires an assessment as to whether the amounts of subsidy are out of proportion, or relatively too large."[428] This assessment requires analysis of

> whether the actual allocation of the "amounts of subsidy" to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions of eligibility for that subsidy as assessed under Article 2.1(a) and (b). In our view, where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, a panel will

[421] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 889.
[422] *US – Large Civil Aircraft (Second Complaint) (AB)*, n. 1028 (quoting *Kansas Statutes Annotated*, sections 12-1740ff (2001)).
[423] *US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 472-474, 860.
[424] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 875.
[425] *US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 875-76; *see also id.*, para. 876 ("Having found that the IRB subsidies are not specific within the meaning of Article 2.1(a), analysis by the Panel under Article 2.1(b) was not necessary.").
[426] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 879.
[427] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 879.
[428] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 879.

> be required to examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to certain enterprises.[429]

370. Turning to the IRB program at issue, the Appellate Body stated that "even if the benefits of IRBs are limited to those enterprises actually in a position to seek them, we would expect, on the basis of the conditions established for eligibility for IRBs, a wide distribution of those benefits across various sectors of the Wichita economy."[430] In fact, two companies – Boeing and Spirit – received 69 percent of all IRB tax abatements disbursed under the program.[431] The Appellate Body stated that it would have expected "a wider distribution of those benefits across different sectors of the Wichita economy," and that this "provides a reason to believe that the IRB subsidies were granted in disproportionately large amounts to certain enterprises."[432]

371. The Appellate Body then considered the reasons advanced by the respondent to explain the disparity between the expected and actual distributions of IRB subsidies.[433] The Appellate Body did not accept either explanation proffered by the respondent – i.e., that the universe of "qualifying investments" was limited and the economy in Wichita was undiversified.[434] The Appellate Body did not view the respondent as having presented sufficient evidence in support of these proffered explanations.[435] The Appellate Body thus upheld the panel's finding that the subsidies were granted in disproportionately large amounts.[436]

372. Here, the USDOC's findings were fully consistent with the Appellate Body's approach in *US – Large Civil Aircraft*. The USDOC found that, despite the absence of any *de jure* restrictions on eligibility, the distribution of benefits was disproportionate. As in *US – Large Civil Aircraft*, two companies received a substantial share of all benefits disbursed under a subsidy program. Together, Samsung and LG accounted for [[***]] percent of all subsidies distributed in 2010.[437] By contrast, the average recipient in the program obtained only [[***]] percent of the total.[438] Indeed, the USDOC found that Samsung received nearly [[***]] times more subsidy than the average recipient – a remarkable statistic, given that the program had 11,764 recipients.[439]

---

[429] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 879.
[430] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 883.
[431] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 884.
[432] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 884.
[433] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 883 ("Where the actual distribution of a subsidy deviates materially from the expected distribution of that subsidy, a panel would need to examine the reasons provided by the parties to explain that outcome.").
[434] *US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 886-888.
[435] *US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 887-888.
[436] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 889.
[437] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI); *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.226-7.230 (finding that investigating authority's *de facto* specificity determination was consistent with Article 2.1 of the SCM Agreement, given *inter alia* the authority's determination that "a disproportionate 41 per cent of the total subsidy amount of KRW 2.9 trillion was granted to Hynix").
[438] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[439] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).

373. In its submission, Korea asserts that the USDOC "made no inquiry" into whether the distribution of subsidy benefits differed from what would be expected based on the eligibility criteria of RSTA Article 10(1)(3).[440] This is simply untrue. In its I&D Memorandum, the USDOC found that the actual distribution differed markedly from what would be expected:

> It is a significant indicator of disproportionate use that Samsung and LG together accounted for a very large percentage of all tax credits provided under this program, when this program had more than 11,000 beneficiaries. Even though we would not expect each beneficiary to receive an equal percentage of the total benefits, in the case of Samsung and LG, the percentage of total benefits received is significant.[441]

374. This statement should be read in context with the USDOC's finding that RSTA Article 10(1)(3) is not *de jure* specific. The USDOC found that the implementing statute for RSTA Article 10(1)(3) "do[es] not limit eligibility to a specific enterprise or industry or group thereof."[442] As in *US – Large Civil Aircraft*, 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.[443] The RSTA Article 10(1)(3) program's eligibility criteria made any firm investing in "research and human resources development" eligible for the tax credits (criteria that resulted in 11,764 actual recipients). Thus, there was a significant disparity between the expected distribution of subsidy based on those conditions of eligibility and the actual distribution in which two recipients received such a large percentage of credits and so much more than the average recipient.

375. To the extent that Korea is suggesting that the USDOC should have framed its expectations in precise, quantitative terms, this argument is groundless. The text of Article 2.1(c) imposes no such obligation. In *US – Large Civil Aircraft*, the Appellate Body did not express in quantitative terms the allocation of benefits it would have expected given the eligibility criteria. This is consistent with the panel's observation in *US – Upland Cotton* that "specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition."[444]

5. Subsidies Are Not "Proportionate" By Virtue of a Common Formula or the Size of the Recipient

376. Equally groundless is Korea's assertion that the subsidies were "proportionate" because they were calculated using the same formula available to all Korean companies, based on

---

[440] Korea First Written Submission, para. 269.
[441] Washers Final CVD I&D Memo, pp. 35-36 (Exhibit KOR-77).
[442] Washers Final CVD I&D Memo, p. 12 (Exhibit KOR-77).
[443] This wider expected distribution is further supported by the fact that the formulas for tax credits under RSTA Article 10(1)(3) allow greater percentage reductions for small to medium enterprises, which one would expect to even out the distribution of tax credits across companies of different size and R&D orientation. *See* GOK April 9, 2012 QR at App. Vol. at 108 and 110-111 (Exhibit KOR-75) (BCI).
[444] *US – Upland Cotton (Panel)*, para. 7.1142; *see also id.* ("At some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy . . . .").

amounts invested.[445] The USDOC appropriately considered and rejected this argument. As the USDOC found, the fact that common formulas are used to calculate subsidy amounts has no bearing on the disproportionality inquiry. These formulas relate to different aspects of a specificity analysis under Article 2.1.

377. As a threshold matter, Korea's argument appears to be based on a misreading of Article 2.1. Use of a common formula to calculate benefits could indicate the existence of "objective criteria or conditions" under Article 2.1(b), and thereby suggest non-specificity. But an investigating authority may conduct its analysis under Article 2.1(c) "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" (emphasis supplied). An indication of non-specificity under Article 2.1(b) does not preclude a finding of *de facto* specificity under Article 2.1(c). The USDOC explained that the nature of the disproportionality inquiry is different, as the "common formula" argument "fails to recognize that the Department's analysis of disproportionality examines a respondent's use of the program in comparison to the universe of companies who use the program."[446]

378. Nor is the exercise of discretion (or lack thereof) relevant here. As the USDOC found, the fact that subsidies credited to Samsung were the product of a common formula – and allegedly not the exercise of discretion by Korean authorities – has no bearing on the disproportionality inquiry.[447] At most, the exercise of discretion would be relevant to a different analysis under Article 2.1(c) – i.e., "the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy."[448] The absence of discretion would merely indicate that *de facto* specificity could not be demonstrated through that analysis. It would not mean that specificity could not be demonstrated through another analysis under Article 2.1(c), such as disproportionality.[449]

379. Korea's argument is also factually inaccurate. As discussed above, benefits under RSTA Article 10(1)(3) are calculated according to formulas that vary depending on company size, and recipients may elect not to take tax credits or defer them given Minimum Tax requirements. Benefits do not simply reflect amounts invested or a common formula.[450]

380. 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.[451] The USDOC rejected the same argument in its determination, observing that "Samsung's argument that large companies, by

[445] Korea First Written Submission, paras. 269-270.
[446] Washers Final CVD I&D Memo, p. 36 (Exhibit KOR-77).
[447] Washers Final CVD I&D Memo, pp. 36-37 (Exhibit KOR-77).
[448] SCM Agreement, Article 2.1(c); *see* Washers Final CVD I&D Memo, pp. 36-37 (Exhibit KOR-77).
[449] If the presence of a common formula was dispositive, and automatically precluded a finding of disproportionality, this would allow Members to circumvent the specificity provisions of Article 2.1(c). It would allow Members to ensure that, while eligibility criteria appear to be general in scope, the benefit will mainly flow to the largest recipients.
[450] For further discussion, see Washers CVD Redetermination, pp. 8-9 (Exhibit KOR-44) (BCI).
[451] Korea First Written Submission, para. 271.

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."[452] Like the explanations offered in *US – Large Civil Aircraft*, Korea's hypothesis is "made only at a relatively high level of generality," unsupported by evidence.[453]

381. Korea's "size defense" is also misdirected. 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). As the Appellate Body explained, "disproportionality is a relational concept,"[454] which requires consideration of subsidy distribution relative to other recipients. The amounts of subsidy received by Samsung were massive, both in absolute terms and relative to the recipient pool.

382. The fact that Samsung is a large company is not determinative for a specificity finding. Indeed, the USDOC found that to accept such an argument would "undermine the purpose" of the disproportionality inquiry.[455] Korea's argument proves too much. It would suggest that a subsidy program that results in most benefits being enjoyed by the largest recipients because of their unique size would be no more likely to be specific than a program resulting in an even distribution of subsidies across recipients.

6. Korea Has Failed To Make a Prima Facie Case With Respect To the Final Sentence of Article 2.1(c)

383. Almost as an afterthought, Korea asserts in its submission that the USDOC did not take into account the factors listed in the final sentence of Article 2.1(c) – i.e., the "extent of diversification of economic activities within the jurisdiction of the granting authority" and "the length of time during which the subsidy programme has been in operation."[456]

384. Korea has failed to make a *prima facie* case of inconsistency. In order to meet its burden, Korea must make an adequate legal argument for each of its claims[457] and "adduce[] evidence sufficient to raise a presumption that what is claimed is true."[458] Here, Korea fails to identify how the USDOC allegedly neglected the factors set out in the third sentence of Article 2.1(c).

---

[452] Washers Final CVD I&D Memo, p. 37 (Exhibit KOR-77). Korea asserts that Samsung, as a "large company," has R&D investments that are "much larger" than other companies. Korea First Written Submission, para. 270. But LG is another "large company," yet received [[***]] of the R&D subsidies that Samsung did. See Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI). More generally, Korea has failed to adduce evidence concerning the alleged explanatory link between company size and R&D spending, whether in the abstract or with respect to the recipients of RSTA Article 10(1)(3) funding. In its redetermination, the USDOC explored this issue in detail, and confirmed that subsidies received by Samsung were disproportionate, even among the top 100 largest companies receiving subsidies. Washers CVD Redetermination, pp. 9-14 (Exhibit KOR-44) (BCI).

[453] *US – Large Civil Aircraft (Second Complaint) (AB)*, paras. 887-888.

[454] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 879.

[455] Washers Final CVD I&D Memo, p. 37 (Exhibit KOR-77).

[456] Korea First Written Submission, paras. 272-273.

[457] *See Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134.

[458] *US – Wool Shirts and Blouses (AB)* at 14.

Nor does Korea explain how proper consideration of these factors would have affected the overall specificity determination.

385. In any event, the USDOC did take into account these considerations in its determination. Article 2.1(c) states that "account shall be taken" of these factors. As discussed above, an authority takes a factor into account when it "deals" or "reckons" with it.[459] The term "shall" indicates that it is mandatory for investigating authorities to deal or reckon with the two factors noted in the third sentence.[460] We note that the third sentence of Article 2.1(c) is incorporated into U.S. law through the Uruguay Round Agreements Act ("URAA").[461]

386. The third sentence of Article 2.1(c) does not impose a purely formalistic requirement. An authority need only "deal" or "reckon" with these factors to the extent that they inform an authority's task of "determin[ing] whether a subsidy . . . is specific."[462] Where these factors are plainly irrelevant to that determination, an authority satisfies its obligation by determining that they are, in fact, irrelevant. An authority need not conduct an empty analysis, merely to demonstrate compliance with a formalistic checklist.

387. Accordingly, it is well-established that "taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly."[463] Indeed, panels have upheld determinations by investigating authorities where these factors were taken into account implicitly.[464]

388. Such implicit findings are all the more understandable where, as here, none of the parties to the countervailing duty proceedings ever argued or suggested that these factors had any bearing on the facts at issue.[465] The GOK was an active participant in the countervailing duty proceedings, and never once raised these factors as considerations in the Department's specificity analysis with respect to RSTA Article 10(1)(3). It is remarkable that Korea should now, in this WTO dispute, criticize the USDOC for allegedly failing to consider these factors by not discussing an issue that no interested party had raised. The Panel should not condone these tactics.

389. Here, neither of the two factors identified in the third sentence of Article 2.1(c) has any bearing on the specificity inquiry. With respect to the "length of time during which the subsidy programme has been in operation," the USDOC made express findings. The USDOC observed

---

[459] *See* discussion at Section IV.B.3.a, *supra*.
[460] *US – Countervailing Measures (China) (Panel)*, para. 7.251.
[461] URAA, H.R. 5110, 103rd Cong., 2d sess., § 251(a) (1994) (codified as amended at 19 U.S.C. § 1677(5A)(D)) (Exhibit USA-28).
[462] SCM Agreement, Article 2.1 (*chapeau*).
[463] *US – Countervailing Measures (China) (Panel)*, para. 7.253.
[464] *US – Softwood Lumber IV (Panel)*, para. 7.124; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.229.
[465] *See EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.229 ("[T]he record does not indicate that the parties ever raised the issue that the disproportionate use of the Programme's funds for Hynix was somehow to be explained by the lack of diversification of the Korean economy or the length of time the programme had been in operation. We therefore do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters.").

that the RSTA Article 10(1)(3) program began in 1982.[466] The thirty-year duration of this subsidy program was repeatedly noted in the record.[467]

390. The considerable age of this subsidy program eliminates certain complications that can arise with new programs. As the panel in *US – Large Civil Aircraft* observed, if a "subsidy programme is relatively new, the fact that 'certain enterprises' have been the main or most frequent beneficiaries under the programme may be a reflection of the fact that the programme has not been in operation long enough to have a wide range of users, rather than an indication that the programme is de facto specific."[468] In that dispute, the subsidy program in question (the IRB program) had been in operation since at least 1979, prompting the panel to find that "[i]t is not the case that the IRB programme has been in operation for only a short period of time and therefore that it is too early to draw conclusions regarding specificity."[469]

391. The RSTA Article 10(1)(3) program had been in operation since 1982, and in 2010 had nearly 12,000 users.[470] It was clearly not "too early to draw conclusions regarding specificity."[471]

392. Equally, the USDOC took into account the "extent of diversification of economic activities" in Korea, albeit implicitly. Article 2.1(c) references this factor to ensure that subsidy data is viewed in proper context. For instance, if an economy is dominated by one sector, the fact that this sector receives a large proportion of subsidies may not necessarily indicate that the amounts are "disproportionately large."[472]

393. Like the duration factor, the extent of diversification of Korea's economy had no bearing on the specificity analysis. As discussed above, Korea was unable to provide data setting out the distribution of RSTA Article 10(1)(3) subsidies by industry and sector.[473] As a result, the USDOC found that "the information on the record is not sufficient to evaluate predominance or disproportionality on an industry basis."[474] The USDOC was not in a position to evaluate whether, for instance, certain sectors received more subsidies than others. And the USDOC could not interpret this sectoral and industry information in context – i.e., by evaluating it in light of the diversification of the Korean economy across sectors and industries.

394. In any event, 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

---

[466] Washers CVD Preliminary Determination, 77 Fed. Reg. at 33187 (Exhibit KOR-85),
[467] *See, e.g.*, GOK April 9, 2012 QR at App. Vol. at II-75, 108 (Exhibit KOR-75) (BCI).
[468] *US – Large Civil Aircraft (Second Complaint) (Panel)*, para. 7.747.
[469] *US – Large Civil Aircraft (Second Complaint) (Panel)*, para. 7.757.
[470] Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[471] *US – Large Civil Aircraft (Second Complaint) (Panel)*, para. 7.757.
[472] *See, e.g., EC – Large Civil Aircraft (Panel)*, para. 7.975 ("[F]or example, where a subsidy programme operates in an economy made up of only a few industries, the fact that those industries may have been the main beneficiaries of a subsidy programme may not necessarily demonstrate 'predominant use.'").
[473] Washers Final CVD I&D Memo, p. 12 (Exhibit KOR-77). Korea was unable to provide this information, on the grounds that it did not compile data for RSTA Article 10(1)(3) along industry and sector lines. *Id.*
[474] Washers Final CVD I&D Memo, p. 12 (Exhibit KOR-77).

contested.[475] The record indicates that Korea is a member of both the OECD and G20, and chaired a recent G20 summit.[476] Moreover, as the USDOC observed, the RSTA Article 10(1)(3) R&D tax credit program had nearly 12,000 participants,[477] reflecting Korea's status as an advanced, diversified economy.

7. The USDOC's Redetermination Confirms That Subsidies Conferred Under RSTA Article 10(1)(3) Are De Facto Specific

395. In a single paragraph of its submission, Korea criticizes the USDOC's redetermination with respect to RSTA Article 10(1)(3).[478] Korea dismisses the USDOC's findings on remand, asserting that they merely replicate alleged deficiencies in the original determination's specificity analysis.[479] Korea then asserts that if the Panel finds that the original determination was inconsistent with Articles 1.2 and 2.1(c) of the SCM Agreement, "such a finding in our view extends to the USDOC's remand redetermination as well."[480]

396. These criticisms are baseless. As discussed above, the USDOC's original specificity determination is fully consistent with Article 2.1(c) of the SCM Agreement. The USDOC's remand redetermination supplements and reaffirms these findings. The additional evidence and findings adduced in the redetermination put to rest any suggestion that these subsidies were "proportionate," and provide additional confirmation that they are, in fact, specific.

397. On remand, the USDOC issued three rounds of questions to the GOK, and solicited comments from the parties.[481] Based on this information, the USDOC issued a thirty-seven page redetermination, in which it reaffirmed its previous finding that the subsidies conferred under RSTA Article 10(1)(3) were *de facto* specific.

398. Contrary to Korea's assertion,[482] the USDOC's redetermination is consistent with the Appellate Body's guidance in *US – Large Civil Aircraft*. The USDOC considered the subsidies conferred on Samsung in light of the expected wider distribution that should result from the eligibility criteria. Indeed, the USDOC was explicit in setting out the expected distribution of the subsidy, and affirmed its original disproportionality finding:

> RSTA Article 10(1)(3) aims to facilitate Korean corporations' investment in their research and development activities, and thus boost the general economic activities in all sectors. The GOK also stated that all Korean corporations are eligible to utilize this program as long as they satisfy the requirements set forth in

[475] *See, e.g., US – Softwood Lumber IV (Panel)*, para. 7.124 (finding that the USDOC took into account the "publicly known fact" that Canada is a highly diversified economy when the USDOC noted that the vast majority of companies and industries in Canada do not receive benefits under the programs in question).
[476] GOK April 9, 2012 QR at Ex. Gen02 (PR-56) at "Minister's Forward" (Exhibit USA-27).
[477] Washers Final CVD I&D Memo, p. 12 (Exhibit KOR-77); Final Samsung CVD Calculation Memo, Attachment 7 (Exhibit USA-26) (BCI).
[478] Korea First Written Submission, para. 276; *see* Washers CVD Redetermination (Exhibit KOR-44) (BCI).
[479] Korea First Written Submission, para. 276.
[480] Korea First Written Submission, para. 276.
[481] Washers CVD Redetermination, p. 2 (Exhibit KOR-44) (BCI).
[482] Korea First Written Submission, para. 276.

> the statute. According to the GOK, over 11,000 Korean corporations received this tax credit in 2010. Furthermore, the record indicates that Korea, as a member of the G-20, is one of the twenty major economies in the world.
>
> With these facts in mind, i.e., that the tax credit is available to all Korean corporations in one of the world's largest economies, and that over 11,000 companies used the credit, the Department determined (and continues to find) that a single company receiving [[***]] percent of all the program's total credits, compared to the average of [[***]] percent, has received a disproportionately large amount of those credits . . . .[483]

399. The USDOC once again rejected Korea's "common formula" argument – i.e., the argument that RSTA Article 10(1)(3) subsidies are non-specific because they are calculated from a common formula, on the basis of amounts invested. The USDOC explained that companies making identical amounts of eligible investments would most likely receive different amounts of RSTA Article 10(1)(3) tax credits.[484] As the USDOC observed:

> It is not accurate to characterize companies' shares of the total credits granted under RSTA Article 10(1)(3) as proportionate to their investment spending, because each of those shares will vary depending on the formula used, average amount of prior years' eligible investments, and the applicability of the Minimum Tax Scheme.[485]

Tellingly, the amount of RSTA Article 10(1)(3) tax credits that Samsung claimed in its tax return filed in 2011 does not correspond directly to its share of all eligible spending on R&D in 2010.[486]

The USDOC also 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. On remand, the Department asked Korea for information on how RSTA Article 10(1)(3) subsidies were distributed given recipients' assets, revenues, taxable income, and calculated tax amounts.[487] Korea was only able to provide certain aggregated data for these recipients.[488]

---

[483] Washers CVD Redetermination, pp. 3-4 (Exhibit KOR-44) (BCI). The quoted language also confirms that, contrary to Korea's assertion (Korea First Written Submission, para. 276), the USDOC took into account the diversification of Korea's economy. This language should be read in context with the USDOC's original determination, where – as discussed above – the USDOC took into account both factors identified in the third sentence of Article 2.1(c) of the SCM Agreement.

[484] Washers CVD Redetermination, p. 8 (Exhibit KOR-44) (BCI).

[485] Washers CVD Redetermination, p. 9 (Exhibit KOR-44) (BCI).

[486] Washers CVD Redetermination, p. 9 (Exhibit KOR-44) (BCI).

[487] Washers CVD Redetermination, p. 16 (Exhibit KOR-44) (BCI).

[488] The USDOC asked Korea for the aggregated taxable income and calculated tax amount for every corporate tax return that used RSTA Article 10(1)(3) credits within established size of revenue and assets categories. For the largest 100 corporate tax returns (by taxable income) in which RSTA Article 10(1)(3) tax credits were claimed, the Department asked Korea for the taxable income, calculated tax amount listed in the return, and amount of tax credits claimed. Washers CVD Redetermination at 16 (Exhibit KOR-44) (BCI). In its initial response, Korea only provided the aggregate amount of all RSTA Article 10(1)(3) tax credits claimed by the 100 largest corporate tax returns (as defined by the amount of tax credit received). Korea claimed that it could not track this information, that

400. Despite these limitations, the evidence that the USDOC received conclusively refuted Korea's "size defense." The USDOC found that Samsung accounted for approximately [[***]] percent of the RSTA Article 10(1)(3) tax credits claimed by the largest 100 corporations that participated in the program, and that its credits were equal to [[***]] percent of the combined credits claimed by the other 99 largest recipients.[489] So even among other large companies, Samsung's use of the program was "*overwhelming[ly] disproportionate*."[490]

401. Samsung's actual tax savings from the program – as opposed to the credits claimed on its return – were even more remarkable. As the USDOC pointed out, the benefit that a recipient obtains from RSTA Article 10(1)(3) is the amount of taxes not paid through the use of a tax credit.[491] This may differ from the tax credits claimed on a return. For instance, if a company has a net loss for the tax year, it receives no benefit under the program.[492]

402. The USDOC calculated the amount of benefit as a percentage of the tax reduction received under the program, and found that RSTA Article 10(1)(3) tax credits reduced Samsung's taxes by [[***]] percent.[493] By contrast, the amount of taxes saved through use of this credit by the other 99 largest companies resulted in a tax reduction of [[***]] percent.[494] In other words, Samsung's tax benefit was <u>over [[***]] times greater</u> than the combined tax benefit received by the other 99 largest companies in this program.[495] These extraordinary findings,

---

companies do not report revenue and assets on tax forms, and that it was hindered by confidentiality laws. The USDOC pointed out that this rationale was unconvincing, as the GOK regularly uses size of revenue and size of assets categories in its *Statistical Yearbook of National Tax* and reports other data using these categories. At a minimum, Korea should have been able to provide the same aggregated data for the corporate tax returns based on these established revenue and asset categories. After the USDOC made a second request, Korea provided some additional information – i.e., aggregated taxable income and aggregated calculated tax amounts for the top 100 companies. This fell well short of full compliance with the USDOC's request. *Id.* at 16-17.

[489] Washers CVD Redetermination, pp. 10-11 (Exhibit KOR-44) (BCI). These percentages actually understate Samsung's disproportionate use of RSTA Article 10(1)(3), given that the data provided for the other 99 largest subsidy recipients includes the tax credits received by those companies for RSTA 10(1)(1), 10(1)(2), and 10(1)(3), combined. *Id.*, n.34.

[490] Washers CVD Redetermination, pp. 10-11 & n.34 (Exhibit KOR-44) (BCI) (emphasis supplied); *see also id.* at 10 ("This analysis eliminates potential distortions arising from including every recipient in the comparison, regardless of size, by removing the vast majority of program recipients from the analysis and focusing on recipients in an economic position more similar to Samsung.").

[491] Washers CVD Redetermination, pp. 11, 29-32 (Exhibit KOR-44) (BCI); *see* SCM Agreement, Article 1.1(a)(ii) (financial contribution in the form of "*government revenue that is otherwise due is foregone or not collected* (e.g. fiscal incentives such as tax credits) (emphasis supplied); *US – Carbon Steel (India) (Panel)*, para. 7.34 ("The title of Article 14 [of the SCM Agreement] explains that Article 14 is concerned with 'Calculation of the Amount of Subsidy in Terms of *Benefit to the Recipient*.'") (emphasis supplied).

[492] Washers CVD Redetermination, p. 11 (Exhibit KOR-44) (BCI).

[493] Washers CVD Redetermination, pp. 11-12, 14 (Exhibit KOR-44) (BCI).

[494] Washers CVD Redetermination, pp. 13-14 (Exhibit KOR-44) (BCI). This percentage understates Samsung's disproportionate use of the program. Samsung's data reflects only its use of RSTA Article 10(1)(3) tax credits, whereas data with respect to the other 99 largest subsidy recipients includes tax credits received under all three subsections of RSTA Article 10. *Id.*, n.43 (Exhibit KOR-44) (BCI).

[495] Washers CVD Redetermination, p. 14 (Exhibit KOR-44) (BCI). Korea dismisses these figures as "immaterial," on the grounds that the amount of tax credit claimed and resulting tax savings "ha[ve] nothing to do with the proportionality of the RSTA Article 10(1)(3) tax credit itself." Korea First Written Submission, para. 276. This statement is unsupported and explained. The disparity between the tax savings received by Samsung and the

which account for size of the recipient,[496] confirm that the subsidies granted to Samsung are disproportionate, and *de facto* specific.

B. Subsidies Conferred Under RSTA Article 26 Are Limited to a Designated Geographic Region and Specific Under Article 2.2 of the SCM Agreement

403. Korea's second specificity 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, which provides that a subsidy that is "limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

404. By way of background, RSTA Article 26 (entitled "Tax Deduction for Facilities Investment") confers tax credits for eligible investments in facilities.[497] Companies can elect to receive a reduction of corporate income tax liability in an amount equivalent to seven per cent of the value of all qualifying investments.[498] Companies claim credits by filing the same application documents required for the RSTA Article 10(1)(3) program, which do not require companies to identify the products that benefit from eligible expenditures.[499]

405. Eligibility does not depend on the manufacture of any particular merchandise. But Article 23(1) of the RSTA Enforcement Decree does limit eligibility to companies with "business assets out of overcrowding control region of the Seoul Metropolitan Area" [sic].[500]

406. The USDOC found that the subsidies conferred under RSTA Article 26 were "limited to a designated geographical region,"[501] and thus regionally specific. In its submission, Korea struggles to overcome the plain language of Article 2.2, and its strained, non-textual arguments only confirm that its claim has no basis in the SCM Agreement. Accordingly, Korea's arguments and claim should be rejected.

1. The USDOC's Specificity Determination Is a Straightforward Application of Article 2.2

407. The USDOC's determination is a straightforward application of Article 2.2 of the SCM Agreement. Article 2.2 provides, in relevant part that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific." This provision is framed in broad terms, to capture any form of

---

combined tax savings of the other 99 largest companies strongly supports a finding of disproportionality, and refutes Korea's argument that the distribution of subsidies to Samsung merely reflects its status as a large company.

[496] Washers CVD Redetermination, p. 12 (Exhibit KOR-44) (BCI) ("If, as Samsung argued, the amount of tax credits earned under RSTA Article 10(1)(3) is reflective of the size of a company, a smaller company would also have a relatively smaller amount of taxable income and calculated tax return.").

[497] Washers Final CVD I&D Memo, p. 14 (Exhibit KOR-77); RSTA Article 26 and Enforcement Decree Article 23 (Exhibit KOR-81).

[498] Washers Final CVD I&D Memo, p. 14 (Exhibit KOR-77).

[499] GOK April 9, 2012 QR at App. Vol. at 143 (Exhibit KOR-75); Korea First Written Submission, para. 250.

[500] Washers Final CVD I&D Memo, p. 14 (Exhibit KOR-77) (emphasis supplied); RSTA Article 26 and Enforcement Decree Article 23 (Exhibit KOR-81); Korea First Written Submission, para. 253.

[501] Washers Final CVD I&D Memo, p. 46 (Exhibit KOR-77).

geographically specific subsidy.[502] As the panel observed in *US – Anti-dumping and Countervailing Duties (China)*, the term "designated geographical region" can encompass "any identified tract of land within the jurisdiction of a granting authority," and need not have a formal administrative or economic identity.[503] The language of Article 2.2 is also mandatory – i.e., any subsidies that are limited to a designated geographical region "shall be specific."

408. Here, 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. As the USDOC observed, access to the program was limited by law to enterprises or industries within this region, which falls within the jurisdiction of the granting authority (here, the GOK).[504] The USDOC provided a reasoned and adequate explanation of its determination.

2. Korea Relies On Legal Theories That Have Been Repeatedly Rejected By WTO Panels

409. To evade these findings, Korea attempts to rely on legal theories that have been repeatedly rejected by WTO panels. This effort is unavailing. These arguments are no more persuasive than when originally presented, and the logic of past panels in rejecting them is sound.

410. First, Korea asserts that RSTA Article 26 subsidies are generally available to all enterprises located *within the designated region* – i.e., the area falling outside the Seoul overcrowding area.[505] As Korea puts it, "a determination under Article 2.2 requires not only a finding that the subsidy is limited to a designated geographical region, but also that the subsidy is 'limited to certain enterprises' within that geographical region. A subsidy available to all enterprises within that region does not qualify as a regional subsidy under Article 2.2."[506]

411. The panel in *EC – Large Civil Aircraft* refused to accept this argument, which would require specificity "on a double basis" within Article 2.2.[507] As the panel observed, this interpretation would render Article 2.2 redundant: "If a national authority grants a subsidy to a subset of enterprises within its territory, whether that subset of enterprises is located in a designated region or not, such a subsidy would, by definition, already be specific under Article

[502] The term "designate" means "[p]oint out, indicate, specify. . . [c]all by name or distinctive term; name, identify, describe, characterize." 1 *New Shorter Oxford English Dictionary* 645 (4th ed. 1993) (Exhibit USA-31). The term "region" refers to "[a]n area of more or less definite extent or character. . . the parts of a country outside the capital or chief seat of government," whereas the term "geography" refers to "[t]he branch of knowledge that deals with the earth's surface, its form and physical features, natural and political divisions, climate, products, population, etc." *New Shorter Oxford English Dictionary* vol.1, p. 1079, vol. 2, pp. 2527-28 (4th ed. 1993) (Exhibit USA-31).
[503] *US – Anti-dumping and Countervailing Duties (China)(Panel)*, paras. 9.140-9.144.
[504] Washers Final CVD I&D Memo, pp. 14-15, 44-45 (Exhibit KOR-77).
[505] Korea First Written Submission, paras. 331-334.
[506] Korea First Written Submission, para. 333.
[507] *EC – Large Civil Aircraft (Panel)*, para. 7.1223.

2.1."[508] This result would be at odds with the principle of effectiveness in treaty interpretation.[509]

412. Korea's interpretation would also make Article 8.2(b) redundant. Article 8.2(b) has now expired, but "provides important context for understanding the intended scope of other provisions."[510] Article 8.2(b) rendered assistance to disadvantaged regions within a Member's territory non-actionable, as long as those regions met certain criteria.[511] A key requirement was that the assistance be "non-specific (within the meaning of Article 2) *within eligible regions*."[512] Yet under Korea's reading, a regional subsidy that is not "limited to certain enterprises" within that region would not be specific in the first place. There would be no need for the carve-out provided in Article 8.2(b). As the panel in *EC – Large Civil Aircraft* stated:

> Article 8.2(b) carved out as non-actionable regional development subsidies which, presumably, would otherwise have been actionable, in part, because they were specific. Given that the establishment of particular types of subsidies as non-actionable under Article 8, including assistance to disadvantaged regions, was a significant achievement of the Uruguay Round negotiations, an interpretation of Article 2.2 which would have rendered one of the key provisions of Article 8 in this regard redundant and useless from the outset makes no sense to us, and we reject such an interpretation.[513]

413. More recently, the panel in *US – Anti-dumping and Countervailing Measures (China)* rejected the "double basis" interpretation of Article 2.2, for essentially the same reasons as the panel in *EC – Large Civil Aircraft*.[514]

414. Equally deficient is Korea's argument that the eligibility requirements for RSTA Article 26 are "objective criteria and conditions" within the meaning of Article 2.1(b), and thus non-specific.[515] The apparent suggestion here is that a finding of non-specificity under Article 2.1(b) trumps a finding of regional specificity under Article 2.2.

---

[508] *EC – Large Civil Aircraft (Panel)*, paras. 7.1224-7.1225.
[509] *EC – Large Civil Aircraft (Panel)*, para. 7.1224 (citing *US – Gasoline (AB)*, at 23).
[510] *EC – Large Civil Aircraft (Panel)*, para. 7.1226.
[511] *Cf. US – Anti-dumping and Countervailing Measures (China) (Panel)*, para. 9.130 ("Upon the lapsing of Article 8, the formerly non-actionable subsidies simply reverted to the same (actionable) status as all other specific subsidies.").
[512] SCM Agreement, Article 8.2(b) (emphasis supplied). Article 8.1(b) of the SCM Agreement also renders non-actionable subsidies that are specific within the meaning of Article 2, but which meet all the conditions of Article 8.2. *See EC – Large Civil Aircraft (Panel)*, para. 7.1226.
[513] *EC – Large Civil Aircraft (Panel)*, para. 7.1226. The panel viewed the ordinary meaning of Article 2.2, read in light of its object and purpose, as clear. According to the panel, recourse to the negotiating history of the SCM Agreement, as a supplementary means of interpretation, was unnecessary. *Id.*, para. 7.1227. Nonetheless, the panel reviewed this negotiating history, and found that it did not support a "double basis" theory of specificity under Article 2.2. *Id.*, paras. 7.1228-7.1231.
[514] *US – Anti-dumping and Countervailing Measures (China) (Panel)*, paras. 9.127-9.139.
[515] Korea First Written Submission, paras. 322-327.

415. Needless to say, this interpretation has no grounding in the text of Article 2. Indeed, Article 2.2 provides that subsidies limited to designated regions "*shall be specific*." As the panel in *EC – Large Civil Aircraft* stated:

> There is no indication in the text of the SCM Agreement that a finding of specificity under Article 2.2 is somehow subject to further examination under Article 2.1(b). There is thus no basis for the inference of a hierarchy . . . and a reading of the provisions of Article 2 as potentially conflicting in this manner is to be avoided.[516]

416. Once again, Korea's interpretation would make Article 8.2(b) redundant. Article 8.2(b)(ii) provided that assistance to a disadvantaged region would be non-actionable if, among other things, the region is "considered as disadvantaged on the basis of *neutral and objective criteria*" (emphasis supplied). Acceptance of Korea's "hierarchy" argument would render this provision unnecessary. As the panel in *EC – Large Civil Aircraft* observed, this position "effectively would re-introduce the expired provisions of Article 8.2(b), making regional assistance subsidies non-actionable on the basis of being non-specific under Article 2.1(b), which is not a justifiable outcome."[517]

3. Korea Mischaracterizes the RSTA Article 26 Program

417. Bereft of viable legal theories, Korea attempts to re-characterize the RSTA Article 26 subsidies. Korea asserts that these subsidies are "generally available to any enterprise that meets the qualifications of that Article, without regard to where the enterprise is located."[518] Korea cites as an example the fact that Samsung received RSTA Article 26 subsidies, but maintains its head office in the Seoul overcrowding area.[519] According to Korea, the geographic restrictions apply only to "certain uses – namely to investments made outside the overcrowding control of the Seoul Metropolitan Area."[520]

418. Korea's tortured reconstruction of RSTA Article 26 fails. This program does not address the "use" of a subsidy, but instead ties eligibility to the geographic location of the underlying facilities.[521] This is precisely the type of geographic limitation that Article 2.2 was intended to discipline.

419. The fact that the geographical restriction in RSTA Article 26 is addressed to the location of the facilities, as opposed to the head office of the subsidy recipient, is of no moment. Article 2.2 does not impose a "head office" test or similar restriction. Indeed, an enterprise or industry can be "located" in a variety of places – including where its investments and facilities are located. For instance, in *EC – Large Civil Aircraft*, Airbus received numerous subsidies in Spain

[516] *EC – Large Civil Aircraft (Panel)*, para. 7.1233.
[517] *EC – Large Civil Aircraft (Panel)*, para. 7.1234.
[518] Korea First Written Submission, para. 328.
[519] Korea First Written Submission, para. 329.
[520] Korea First Written Submission, para. 329.
[521] RSTA Article 26 and Enforcement Decree Article 23 (Exhibit KOR-81).

that were found to be regionally specific, based on the location of Airbus-owned facilities in various designated regions – and not the location of its headquarters.[522]

420. If a "head office test" were accepted, Members could readily circumvent the SCM Agreement by imposing geographic restrictions at the level of assets and investments, as opposed to the head office of recipients.[523] The Panel should decline Korea's apparent invitation to apply such a test, which would unduly narrow the scope of Article 2.2.

4. Korea's "Exception" Defense Is Without Merit

421. Likewise, there is no basis for Korea's attempt to re-characterize RSTA Article 26 as merely setting out an "exception." Korea asserts that because the RSTA Enforcement Decree speaks only of the region that is excluded (i.e., the Seoul overcrowding area), there is effectively no "designated geographical region" in which subsidies are available, as such designations must be explicit.[524] Korea also portrays such "exceptions" as benign and not trade-distorting, and that, as a result, they fall outside Article 2.2.[525] Finally, Korea emphasizes the relatively small percentage of Korea's land mass (2 percent) that is designated for exclusion.[526]

422. Korea's "exception" defense is predicated on a series of legal and factual errors, and should be rejected.

423. *First*, Article 2.2 does not require that any geographic region be designated "explicitly," as Korea suggests. Korea draws this alleged requirement from Article 2.1(a), which provides that a subsidy shall be specific where the granting authority or relevant legislation "explicitly limits access to a subsidy to certain enterprises." Critically, Article 2.2 does not contain the word "explicit." If the drafters of Article 2.2 had intended to impose such a requirement, they could have easily done so.

424. Nor is there any basis for Korea's apparent attempt to limit Article 2.2 to situations of *de jure* specificity. In *US – Anti-dumping and Countervailing Measures (China)*, the panel rejected a similar argument – i.e., that Article 2.2 is limited to situations of *de facto* specificity.[527] The panel observed that regional specificity is addressed in its own article (Article 2.2), separate from the general provisions containing the definitions of *de facto* and *de jure* specificity. Moreover, Article 2.2 does not refer to either *de facto* or *de jure* specificity. The panel rejected the attempt to limit Article 2.2 to situations of *de facto* specificity, and found that this interpretation "is

---

[522] *EC – Large Civil Aircraft (Panel)*, paras. 7.1207-7.1210, 7.1235-7.1236, 7.1243-7.1244; *see also id.*, paras. 7.1206, 1235, 1243 (finding that subsidies are regionally specific based on location of Airbus facility in Nordenham).

[523] *See US – Anti-dumping and Countervailing Duties (China)(Panel)*, para. 9.143 (finding that if narrow reading of "designated geographical region" were correct, "it would become a simple matter to circumvent the SCM Agreement by providing subsidies through industrial parks or similar geographical areas, without targeting particular enterprises within those areas").

[524] Korea First Written Submission, para. 339.

[525] Korea First Written Submission, paras. 335-339.

[526] Korea First Written Submission, paras. 340-342.

[527] *US – Anti-dumping and Countervailing Measures (China)(Panel)*, para. 9.134.

considerably less plausible than one that would read Article 2.2 as a particular case of specificity, on the basis of geographic limitations, which could arise in either the *de jure* or *de facto* sense."[528]

425. Here, the limitation of subsidies to a designated region (i.e., the territory outside the Seoul overcrowding area) is express and unambiguous, on the face of the RSTA enforcement decree. It is of no moment that the language of the relevant law designates a geographical region through language of inclusion or exclusion – the effect is the same. Korea's argument would privilege form over substance.

426. *Second*, there is 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. Once again, Korea attempts to impose restrictions on Article 2.2 that have no basis in the text. As the panel observed in *US – Anti-dumping and Countervailing Measures (China)*, the term "designated geographical region" can encompass "*any* identified tract of land within the jurisdiction of a granting authority," and need not have a formal administrative or economic identity.[529]

427. Large or small, once a region has been designated for purposes of limiting the scope of a subsidy program, that program "*shall be specific*." Article 2.2 does not function on a sliding scale, or depend on the relative proportion of land mass covered or excluded by designation of a region.[530] Instead, Article 2.2 is a "particular case of specificity" based on geographic limitations.[531]

428. Although Korea suggests that large regions with "sensible exclusions" do not distort trade,[532] this misconstrues the nature of the Article 2.2 specificity determination. Article 2.2 is not directed at trade distortions; it reflects the view of the Members that subsidies which are subject to geographic limitations are specific – that is, directed to certain enterprises. By imposing a geographic limitation, these subsidies are not generally available throughout the entire economy, and thus do not fall within the set of financial contributions conferring a benefit that the SCM Agreement excludes from subsidy disciplines. The inquiry under Article 2.2 is not one of trade distortion; that comes into play only in the context of a panel's adverse effects analysis or an investigating authority's injury analysis.[533]

---

[528] *US – Anti-dumping and Countervailing Measures (China)(Panel)*, para. 9.134.
[529] *US – Anti-dumping and Countervailing Measures (China)(Panel)*, paras. 9.140-9.144 (emphasis supplied).
[530] *See* Washers Final CVD I&D Memo, p. 46 (Exhibit KOR-77) ("This percentage of landmass bears on relationship to regional specificity.").
[531] *US – Anti-dumping and Countervailing Measures (China)(Panel)*, para. 9.134.
[532] Korea First Written Submission, para. 338. Korea offers hypothetical examples of "sensible exclusions," such as "subsidies to various types of industrial activity [that] may not apply in national parks." *Id.* But it is unclear whether these examples even involve the designation of geographical regions. In any event, Seoul – the capital of Korea – is not analogous to a national park, and Korea's argument has no bearing on the facts presented here.
[533] With respect to the facts of this case, we note that the USITC determined that the subsidies and anti-dumping measures at issue in this dispute caused injury to the U.S. domestic industry. The USITC's determination has not been challenged by Korea, and is not an issue in this dispute.

429. Under Korea's argument, there is also a significant risk that the exception will swallow the rule. By designating a geographic region, there will always be an "exception" to the subsidy program – i.e., an area that is excluded from the purview of a subsidy program. To provide an exemption for geographically limited subsidy programs, which will necessarily exclude other areas and therefore contain "exceptions," would invite abuse and easy circumvention of the subsidy disciplines of the SCM Agreement.

430. *Finally*, the alleged "exception" at issue here – the Seoul overcrowding region – is hardly a negligible exclusion that should be overlooked for specificity purposes. As the USDOC stated, "the designated region constitutes *a significant portion of the Korean capital region and the Korean population*."[534] Korea admits that this is "the most densely populated area of Korea."[535] Despite accounting for approximately 2 percent of the nation's territory, Seoul is the economic engine of Korea, and accounts for a substantial portion of Korea's population and industry.[536] By designating a region that did not include Seoul, Korea limited access to the RSTA Article 26 subsidy program in a fundamental way.

5. Korea's Policy Arguments Do Not Withstand Scrutiny

431. In a last-ditch attempt to justify these geographic restrictions, Korea falls back on "policy" arguments. Korea states that "[i]t is widely recognized that governmental assistance programs in various sectors are a legitimate policy tool and often constitute a first-best policy."[537] Korea portrays RSTA Article 26 as a "zoning measure" that was intended "to curb urban sprawl"[538] and thereby address the "geographical imbalances in the country's development."[539]

432. Korea essentially concedes that RSTA Article 26 is a regional assistance program. This program was intended to subsidize investment in other, less-developed areas of Korea. Article 8.2(b) of the SCM Agreement was drafted to render such regional assistance programs non-actionable, if certain criteria were met. This provision lapsed, however. As a consequence, the RSTA Article 26 program falls squarely within the regional specificity provisions of Article 2.2.[540]

---

[534] Washers Final CVD I&D Memo, p. 46 (Exhibit KOR-77) (emphasis supplied).
[535] Washers CVD GOK Case Brief, pp. 7-8 (Exhibit KOR-82) (BCI).
[536] *See, e.g.*, Korea First Written Submission, paras. 320-321 (noting the "overcrowding of population and industries in the overly concentrated Seoul Metropolitan area," and the "overconcentration of growth in the Seoul metropolitan area").
[537] Korea First Written Submission, para. 317.
[538] Korea First Written Submission, paras. 317, 321.
[539] Korea First Written Submission, para. 318.
[540] *US – Anti-dumping and Countervailing Measures (China)(Panel)*, para. 9.130 ("Upon the lapsing of Article 8, the formerly non-actionable subsidies simply reverted to the same (actionable) status as all other specific subsidies.").

C. USDOC's Calculation of Samsung's Subsidy Rate Was not Inconsistent With Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994

433. 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. Korea asserts that the R&D and facilities subsidies that Samsung received should have been calculated in a way that "tied" and attributed them to a single product (large residential washers).[541] Korea also complains that the denominator in the *ad valorem* subsidy rate for RSTA Article 10(1)(3) subsidies should include sales of products manufactured outside Korea[542] – even though the RSTA legislation declares that it is intended to benefit *national* economic activities.

434. Here, again, Korea attempts to import requirements into the SCM Agreement and GATT 1994 that do not exist in the text of those agreements. Nor has any previous panel or Appellate Body report endorsed the interpretations put forward by Korea, which would convert the inquiry into the amount of the subsidy benefitting the subsidized product into a speculative inquiry into "uses" and effects of a subsidy, rather than the means by and terms on which the Member bestows the subsidy.

435. For example, a subsidy may be linked to a particular product based on the design and structure of the measure, and the investigating authority may appropriately attribute the subsidy to that product. But there is nothing in the agreements that logically or legally requires an investigating authority to treat subsidies as "tied" to a particular product, based on how a subsidy recipient chooses to "use" the benefit that it ultimately receives and any alleged "effects" of that use on a particular product. Korea's approach would tend to conflate the determination of the amount of a subsidy for subsidized imports with the separate inquiry into the effects of a subsidy through the subsidized imports. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not remotely suggest the obligations Korea imagines, compelling investigating authorities to treat subsidies as "tied" based on their alleged use and effects and to base their calculations on sales of goods manufactured overseas. Nor is there a factual basis for the calculation methods sought by Korea in this case.

436. Below, we identify the relevant legal provisions of the GATT 1994 and the SCM Agreement, and explain that the provisions identified by Korea do not impose the obligations it asserts. Rather, the investigating authority will need to appropriately examine and calculate the amount of the subsidy benefitting the subsidized product, which forms the basis for the countervailing duties that can be applied. We then explain the USDOC's approach to attributing subsidies in this case and how the USDOC's methodology was fully consistent with the SCM Agreement and GATT 1994.

[541] Korea First Written Submission, paras. 207-303.
[542] Korea First Written Submission, paras. 304-315.

1. Legal Framework

437. Articles II:2 and VI:3 of the GATT 1994 affirm Members' authority to levy duties that "offset" subsidies, subject to the requirement that they not exceed the amount of subsidy found to exist.[543] Article VI:3 provides:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.

438. Article 10 of the SCM Agreement, in turn, requires that Members take all necessary steps to ensure that "imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture." Footnote 36 to Article 10 defines the term "countervailing duty" in essentially the same language as Article VI:3 of the GATT 1994:

> The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

439. These provisions recognize the diverse ways in which subsidies are conferred, and the authority of Members to offset them. Members may impose countervailing duties to offset subsidies that are "bestowed" or "granted" either "directly or indirectly." For instance, Members may counteract "indirect" subsidization by imposing duties on products that benefit from "upstream" subsidies conferred on other companies and products.[544] Likewise, Members may impose countervailing duties regardless of whether the subsidies are bestowed "upon the manufacture, production or export" of a product. And duties may be imposed to offset subsidies imposed on "any merchandise" – i.e., without restriction as to type of product.

---

[543] Article II:2(b) of the GATT 1994 provides that "[n]othing in this Article shall prevent any contracting party from imposing at any time on the importation of any product . . . any anti-dumping or countervailing duty applied consistently with the provisions of Article VI."

[544] *US – Softwood Lumber IV (AB)*, para. 140.

440. Article 19.4 of the SCM Agreement reaffirms the "quantitative ceiling" on the collection of duties set by Article VI:3 of the GATT 1994:[545]

> No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.[546]

441. The first clause of Article 19.4 makes clear that duties cannot be levied "in excess of" the "amount of the subsidy found to exist" by the investigating authority. The term "amount" is defined as "something quantitative, a number, 'a quantity or sum viewed as the total reached.'"[547] Thus, a Member cannot levy duties greater than the quantity of subsidy found to have been bestowed on the manufacture, production, or export of the product in question.[548] For instance, a Member cannot collect duties on subsidies alleged but not demonstrated, or levy punitive duties.

442. Likewise, the second clause of Article 19.4 calls for a calculation "in terms of subsidization per unit of the subsidized and exported product." Thus, the "subsidization" – in this context, the "amount of subsidy found to exist" by the investigating authority – would be expressed as a ratio, reflecting the amount of subsidy attributed to each "unit" of product.[549] This provision suggests that both the duty and the amount of subsidy should be calculated on a per unit basis, so that the duty levied on any unit of imported product does not exceed the amount of subsidization attributable to that unit of product. Thus, the second clause reinforces the quantitative ceiling articulated in the first clause.

443. As these provisions suggest, if a subsidy does not exist and the product is not "subsidized," a Member does not have the right to impose a countervailing duty. WTO panels and the Appellate Body have drawn certain implications from this principle. For instance, in *Japan – DRAMS*, the Appellate Body found that, where a non-recurring subsidy has been conferred, a Member may not impose a countervailing duty if the investigating authority has made a finding as to the duration of that subsidy, and according to that finding, the subsidy is *no longer in existence* at the time that the Member makes a final determination to impose a

---

[545] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 554 ("Article 19.4 thus places a quantitative ceiling on the amount of a countervailing duty, which may not exceed the amount of the subsidization.").
[546] Footnote 51 of the SCM Agreement provides that "'levy' shall mean the definitive or final legal assessment or collection of a duty or tax."
[547] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 552 (quoting 1 *Shorter Oxford English Dictionary* 71 (6th ed. 2007)).
[548] *See US – Upland Cotton (Panel)*, para. 7.1176 ("[T]he general rationale of a unilateral countervailing duty investigation is to determine whether or not a countervailable subsidy exists and, if so, to ensure that any countervailing duty levied on any import is not in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of subsidized and exported product. Logically, should a Member make an affirmative determination that a countervailable subsidy exists, these provisions in Part V necessitate calculation of the amount of the subsidy before a countervailing duty may be imposed.").
[549] *See US – Upland Cotton (Panel)*, para. 7.1176 (Article 19.4 "require[s] the calculation of [the amount of the subsidy] to be performed in a certain way: 'in terms of subsidization per unit of the subsidized and exported product.'").

countervailing duty.[550] As the Appellate Body explained, in such a situation, "the countervailing duty, if imposed, would be in excess of the amount of subsidy found to exist, contrary to the provisions of Article 19.4" of the SCM Agreement.[551]

444. Panels and the Appellate Body have applied this principle in the unique context of pass-through – i.e., where subsidies are alleged to have passed through from an upstream input to a processed product – to ensure that the subsidy benefits the allegedly subsidized and imported product.[552] And in the privatization context, the Appellate Body has emphasized the need to ensure that a benefit continues to exist following a change in ownership. While an authority may rebuttably presume that a benefit ceases to exist after a complete privatization, it would depend on the facts of a given case.[553]

2. Korea Seeks to Create Rules in Relation to Calculating and Attributing Subsidies That Are Not Set Out In the Agreements, Which Charge an Investigating Authority With Appropriately Determining the Amount of the Subsidy on the Imported Product

445. Within the parameters set out in the SCM Agreement, an investigating authority will need to examine and determine that an alleged subsidy exists and its amount. The SCM Agreement does not give significant guidance on what methodologies should be employed for calculating subsidy rates – an issue that an administering authority will therefore need to examine and determine. 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 those obligations are left to the Member to decide*."[554]

446. 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. Article 19.4 of the SCM Agreement provides that no duties shall be levied in excess of "the amount of the subsidy found to exist," calculated on a per

---

[550] *Japan – DRAMS (Korea) (AB)*, para. 210.
[551] *Japan – DRAMS (Korea) (AB)*, para. 210.
[552] For instance, in *US – Softwood Lumber IV*, the Appellate Body stated that a pass-through analysis must be conducted where the producer of the subsidized input and the producer of the processed product are unrelated. Absent such a pass-through analysis, "it cannot be shown that the essential elements of the subsidy definition in Article 1 are present," such that "the right to impose a countervailing duty on the processed product for the purpose of offsetting an input subsidy . . . would not have been established in accordance with Article VI:3 of the GATT 1994, and consequently, would also not have been in accordance with Articles 10 and 32.1 of the SCM Agreement." *US – Softwood Lumber IV (AB)*, paras. 141-143.
[553] *US – Countervailing Measures on Certain EC Products (AB)*, para. 127. In this case, the Appellate Body explained that "the focus of any analysis of whether a 'benefit' continues to exist should be on 'legal or natural persons' *instead of* on productive operations." *Id.*, para. 110 (emphasis in original). A financial contribution bestowed on shareholders investing in a firm could effect "indirect" subsidization, thereby conferring a benefit on the "manufacture, production or export of any merchandise," under Article VI:3 of the GATT 1994. *Id.*, paras. 113-115.
[554] *Mexico – Olive Oil*, para. 7.26 n.63 (emphasis supplied); *see also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 437 (Article 14 of the SCM Agreement contains "guidelines" that "should not be interpreted as rigid rules that purport to contemplate every conceivable factual circumstance") (quotations omitted).

unit basis. Article VI:3 of the GATT 1994 imposes the same quantitative ceiling on the magnitude of duties. But apart from confirming that the "amount of the subsidy" must have been bestowed, directly or indirectly, on the manufacture, production, or export of the particular imported product, these provisions do not provide guidance on how to find the amount of subsidy or rate of subsidization.

447. 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. For instance, a Member may examine a subsidy and determine that it is appropriate to treat that subsidy by a company as essentially "untied" – i.e., not tied to a particular product – for attribution purposes.[555] This may reflect that the subsidy is not bestowed for any particular activity but can be used for any number of purposes. The reference in Article VI:3 to a subsidy bestowed "indirectly" on the manufacture, production, or export of a product suggests that there are some subsidies that will potentially benefit more than one product or activity of a recipient. Thus, a Member may find that subsidies are essentially "untied" when calculating the rate of subsidization, and divide the benefit conferred by the subsidy by the company's combined sales of all products.

448. Alternatively, a Member may determine that it is appropriate to attribute a subsidy to a particular product. A Member may examine a subsidy and determine that there is a product-specific "tie," for example, where its nature and structure reveal bestowal upon a particular product. Based on such a determination, the Member may allocate the subsidy entirely to that product and, in calculating the rate of subsidization, divide the benefit by only the sales of the product that it views as "tied" to that subsidy.

449. The use of both approaches is reflected in Annex IV of the SCM Agreement, which informs a serious prejudice analysis under Article 6.1. Although this provision has now lapsed, it provides relevant contextual guidance.[556] Paragraphs 2 and 3 of Annex IV helped inform the calculation that would form the basis for the presumption in Article 6.1(a) that a 5 per cent subsidization rate causes serious prejudice.[557] Negotiators "indicated their awareness that the creation of such a presumption dependent upon the existence of a precise numerical benchmark would require guidance as to how the numerical benchmark would be established."[558]

450. Annex IV:2 provides the general rule that, for untied subsidies, the *ad valorem* subsidization rate is based on the total value of the recipient firm's sales. Paragraph 2 provides:

---

[555] *See, e.g.*, *US – Upland Cotton (Panel)*, para 7.644 (money is fungible); *US – Softwood Lumber IV (Panel)*, para. 7.116 (same).

[556] *See US – Upland Cotton (Panel)*, para. 7.1186; *see also EC – Large Civil Aircraft (Panel)*, para. 7.1226 (although expired, Article 8.2(b) provides important context for interpreting other provisions of the SCM Agreement).

[557] Article 6.1 of the SCM Agreement provides: "Serious prejudice in the sense of paragraph (c) of Article 5 shall be deemed to exist in the case of: (a) the total ad valorem subsidization of a product exceeding 5 per cent; . . . ." Footnote 14 to this provision confirms that "[t]he total ad valorem subsidization shall be calculated in accordance with the provisions of Annex IV."

[558] *See US – Upland Cotton (Panel)*, para. 7.1187.

> Except as provided in paragraphs 3 through 5, in determining whether the overall rate of subsidization exceeds 5 per cent of the value of the product, the value of *the product* shall be calculated as the *total value of the recipient firm's* sales in the most recent 12-month period for which sales data is available, preceding the period in which the subsidy is granted (emphasis supplied).

451. In contrast, paragraph 3 of Annex IV provides that "[w]here the subsidy is *tied to the production or sale* of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales *of that product* in the most recent 12-month period, for which sales data is available, preceding the period in which the subsidy is granted" (emphasis supplied). In other words, "where a 'subsidy [is] tied to the production or sale of a given product,' the amount of that subsidy would be compared only to the value of a firm's sales of that product."[559] (In fact, generally in cases where "a subsidy is tied to the production or sale of a particular product," the USDOC will "attribute the subsidy only to that product."[560])

452. Paragraph 3 of Annex IV sets out a methodology for calculating tied subsidies for purposes of the *ad valorem* serious prejudice analysis of Article 6.1, but provides limited guidance with respect to the determination of whether a subsidy can be deemed to be tied in the first place. Under this paragraph, the "tie" must be between the subsidy and the "production or sale" of the product in question. If a subsidy required or conditioned receipt to the "production or sale" of the product, it would appear to be "tied" to a particular product for purposes of paragraph 3, but if it only related to other aspects of a given product, it would not appear to be "tied" for purposes of that paragraph.

453. Of interest, the Informal Group of Experts ("IGE") established by the Committee on Subsidies and Countervailing Measures[561] developed recommendations to address when a subsidy is "tied" for purposes of paragraph 3. The IGE was composed of recognized experts nominated by Members, and included an expert from Korea.[562]

454. In its report, the IGE recognized that, although Annex IV, paragraph 3, of the SCM Agreement sets out a methodology for calculating the *ad valorem* subsidization rate for "tied" subsidies, this provision "*leav[es] open a number of questions, for example, how closely related to a product a subsidy must be to be 'tied' to that product . . . .*"[563] The IGE recommended the following test:

---

[559] *See US – Upland Cotton (Panel)*, para. 7.1187.
[560] 19 C.F.R. § 351.525(b)(5) (Exhibit USA-24) (emphasis supplied).
[561] The Committee on Subsidies and Countervailing Measures established the Informal Group of Experts with the following terms of reference: "To examine matters which are not specific in Annex IV to the [SCM] Agreement or which need further clarification for the purposes of paragraph 1(a) of Article 6, and to report to the Committee such recommendations as the Group considers could assist the Committee in the development of an understanding among Members, as necessary, regarding such matters." Decision of the WTO Committee on Subsidies and Countervailing Measures regarding Informal Group of Experts, G/SCM/5, June 22, 1995 (Exhibit USA-30).
[562] Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures, G/SCM/W/415/Rev.2, May 15, 1998, Note from the Informal Group of Experts, p. 1 (Exhibit USA-29) ("IGE Report").
[563] IGE Report, para. 62 (Exhibit USA-29) (emphasis supplied).

> To determine whether a subsidy is 'tied' to a particular product in the sense of paragraph 3 of Annex IV, and hence whether the sales denominator should be the recipient's sales of that product alone, instead of its total sales, it is recommended that a subsidy be deemed to be tied to a product if its intended use is known to the giver, and so acknowledged, prior to or concurrent with the subsidy's bestowal.[564]

The IGE also considered that other approaches were possible.[565]

455. With respect to research and development subsidies, the IGE recommended that such subsidies should be presumptively treated as "untied." The IGE explained that, "in view of the future orientation of research and development activities," it is recommend that "subsidies for these activities be presumptively allocated across the recipient firm's total sales, unless it is demonstrated that treating them as 'tied' to the product in question is appropriate."[566]

456. The absence of specific provisions setting forth rules on how to allocate a subsidy to a product necessitates that an investigating authority determine an appropriate approach. In addition to the material reviewed above, other relevant context suggests the appropriateness of an approach that looks to the conditions of the granting of the subsidy (as opposed to its use after receipt). Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement specify that countervailing duties are intended to offset subsidies that have been "bestowed," directly or indirectly, on the manufacture, production, or export of a product.[567] Thus, it would be appropriate for a Member to calculate and impose duties to take into account the nature of this bestowal. For example, in determining whether a subsidy should be attributed to a particular product, an investigating authority may appropriately focus on the point at which the subsidy is "bestowed," and whether the granting authority has linked that bestowal to a particular product.

457. Article 3.1 of the SCM Agreement provides additional context. Article 3.1 prohibits subsidies that are contingent, in law or fact, upon export performance.[568] Footnote 4 explains, in turn, that a subsidy is contingent "in fact" on export performance when "the facts demonstrate

---

[564] IGE Report, Recommendation 6, para. 10 (Exhibit USA-29) (emphasis supplied).

[565] IGE Report, para. 63 (Exhibit USA-29); *id.*, Recommendation 6, paras. 10-11. In fact, consistent with the IGE recommendations, the Department's long-standing approach is to treat a subsidy as tied to a particular product "when the intended use is known to the subsidy giver . . . and so acknowledged prior to or concurrent with the bestowal of the subsidy." Washers Final CVD I&D Memo, p. 41 & n.175 (Exhibit KOR-77). The Department focuses on "the purpose of the subsidy based on the information available at the time of bestowal." CVD Preamble, 63 Fed. Reg. at 65403 (Exhibit USA-25). For example, in determining if a loan or grant is tied to a product, the USDOC will examine the loan or grant approval documents. Washers Final CVD I&D Memo, p. 41 (Exhibit KOR-77).

[566] IGE Report, Recommendation 20, para. 2 (Exhibit USA-29).

[567] SCM Agreement, n.36 (countervailing duties are levied "for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of product of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994"); GATT 1994, Article VI:3 (countervailing duties are levied "for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, on the manufacture, production or export of such product . . . .").

[568] As the Appellate Body has observed, "a subsidy that is neutral on its face, or by necessary implication, and does not differentiate between a recipient's exports and domestic sales cannot be found to be contingent, in law, on export performance." *EC – Large Civil Aircraft (AB)*, para. 1056.

that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings" (emphasis supplied).

458. As the Appellate Body has observed, the phrase "granting of a subsidy" in footnote 4 focuses on "whether the *granting authority* imposed a condition based on export performance in providing the subsidy."[569] Likewise, the relevant meaning of the word "tie" is to "limit or restrict as to . . . conditions."[570] *De facto* export contingency thus requires the granting Member to impose a condition and must be assessed based on "an examination of the measure granting the subsidy and the facts surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure."[571]

459. Critically, the existence of a "tie" to anticipated exportation is not based on the actual effects of that subsidy:

> In setting out this test, we do *not* suggest that the issue as to whether the granting of a subsidy is in fact tied to anticipated exportation could be based on an assessment of the *actual effects* of that subsidy. Rather, we emphasize that it must be assessed on the basis of *information available to the granting authority at the time the subsidy is granted*.[572]

460. These provisions provide relevant context and, although not determinative, lend additional support for an approach that considers that a grant of subsidy is "tied" to a product "on the basis of information available to the granting authority at the time the subsidy is granted."[573] Likewise, an examination of whether the granting authority imposed a condition with respect to that grant so as to induce the production or sale of that product may be evident in the subsidy measure, including its design, structure, and modalities of operation.

461. In sum, the SCM Agreement does not impose specific obligations in relation to how a subsidy should be attributed to a product, but an investigating authority may derive some guidance from the provisions reviewed above. Annex IV, which relates to the expired *ad valorem* serious prejudice analysis under Article 6.1, is one source of relevant context. Annex IV indicates when a tied calculation approach may be appropriate, while recognizing that treating a subsidy as untied may also generally be appropriate. Under paragraph 3 of Annex IV, a subsidy would be deemed "tied" to a particular product when conditioned on the "production or sale" of the product. As the IGE report reflects, one acceptable method for determining the existence of such a tie 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.

---

[569] *Canada – Aircraft (AB)*, para. 171 (emphasis in original).
[570] *Canada – Aircraft (AB)*, para. 169.
[571] *EC – Large Civil Aircraft (AB)*, para. 1056.
[572] *EC – Large Civil Aircraft (AB)*, para. 1049.
[573] *EC – Large Civil Aircraft (AB)*, para. 1049.

462. Likewise, Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement provide context. These provisions suggest that it would be appropriate for a Member to calculate and impose duties taking into account the nature of the bestowal of a subsidy on the manufacture, production, or export of a product. Article 3.1 of the SCM Agreement provides additional contextual support for this approach. As demonstrated in the next section, the USDOC acted appropriately in attributing the subsidies in question, and in fact applied an approach consistent with those suggested by these provisions.

3. The USDOC Was Not Legally Compelled To Attribute Subsidies on a "Tied" Basis in This Case

463. Korea asserts only an "as applied" claim with respect to the USDOC's attribution of subsidies in this case – specifically, its decision to attribute subsidies on an untied basis in the Washers CVD investigation.[574] As explained below, the USDOC's approach is not inconsistent with any provision of the SCM Agreement or GATT 1994. In fact, this approach is consonant with the approaches described in, or that can be derived from relevant provisions of these agreements. Accordingly, Korea's claim fails.

a. The USDOC's Attribution of Subsidies in the Washers Final Determination

464. In its determination, the USDOC considered and rejected Samsung's argument that the rate of subsidization should be calculated in a way that treats a portion of the subsidies conferred under RSTA Articles 10(1)(3) and 26 as "tied" to large residential washers.[575] Samsung argued that the Department should trace which portions of the total subsidies were related to underlying expenditures in Samsung's Digital Appliance business unit.[576] Samsung urged the USDOC to carve up the numerator (i.e., the benefit) in the subsidy ratio, to include only subsidies linked to the Digital Appliance business unit, and divide that amount over sales from that business unit.[577] However, Samsung's preferred approach is not required by the SCM Agreement, and the USDOC did not act inconsistently with the Agreement in applying another appropriate approach.

465. The USDOC found that Samsung's suggested approach was not appropriate because the requisite analysis should focus on the "grant" or "bestowal" of the subsidies. As the USDOC explained, it "analyzes the purpose of the subsidy based on information available at the time of bestowal."[578] The Department further explained that a subsidy is tied "only when the intended use is known to the subsidy giver (in this case, GOK) and so acknowledged prior to or concurrent with the bestowal of the subsidy"[579] – in this case, when the tax return was filed. As noted above, this approach by USDOC is consonant with context provided by Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement, and is reflected in the IGE report.

---

[574] Panel Request at 2, 5-6.
[575] Washers Final CVD I&D Memo, p. 37-42 (Exhibit KOR-77).
[576] Washers Final CVD I&D Memo, p. 38 (Exhibit KOR-77).
[577] Washers Final CVD I&D Memo, p. 37-39 (Exhibit KOR-77).
[578] Washers Final CVD I&D Memo, p. 41 (Exhibit KOR-77).
[579] Washers Final CVD I&D Memo, p. 41 (Exhibit KOR-77).

466. Here, "the GOK had no way to know the intended use at the time the company was authorized to claim the tax credits, nor can the recipient company acknowledge receipt of the subsidy prior to or concurrent with its bestowal."[580] Samsung's tax return did not indicate that any tax credits were tied to any particular merchandise or facilities.[581] Samsung admitted this in its questionnaire responses, stating that "*the tax return did not specify the merchandise for which this reduction was to be provided*."[582] The fact that Samsung purported to have certain underlying documentation showing expenditures in connection with particular products is of no moment, as "these documents do not form the basis for bestowal and are not included in the annual tax returns that the company files with the Korean tax authorities."[583]

467. As the USDOC concluded, "the tax credit reduces Samsung's overall tax liability which benefits all of its domestic production and sales."[584] Accordingly, the USDOC treated the research, human resources development, and facilities subsidies as untied, and divided them over Samsung's adjusted sales of all goods manufactured domestically.[585] Because the granting of the credits was not conditioned on the production or sale of a particular product, this approach too finds support in the Article VI:3 of the GATT 1994 and Annex IV of the SCM Agreement, examined above.

b. Korea's Criticisms of the USDOC Determination Do Not Withstand Scrutiny

468. In this dispute, Korea repackages Samsung's arguments, framing them in the language of WTO obligations. According to Korea, in apparently every case,[586] a Member must analyze the actual use and effects of a subsidy in connection with a particular product, and apply a "tied" attribution methodology. Korea argues that, here, the USDOC should have traced which expenditures on research, human resources development, and facilities were spent in connection with which products, and then divided the associated pools of subsidy over the sales value of the corresponding product.[587] Korea argues that the USDOC's failure to do so means that some subsidies were attributed to large residential washers that did not "benefit" those products, such that Samsung's subsidy rate was calculated in a manner contrary to Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.[588] Korea's arguments have no basis in law or fact, and should be rejected.

469. *First*, 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

[580] Washers Final CVD I&D Memo, pp. 41-42 (Exhibit KOR-77).
[581] Washers Final CVD I&D Memo, p. 42 (Exhibit KOR-77).
[582] Samsung April 9, 2012 QR at Ex. 24, p. 2 (Exhibit KOR-72); *see also id.* at Ex. 22, p. 1.
[583] Washers Final CVD I&D Memo, p. 42 (Exhibit KOR-77).
[584] Washers Final CVD I&D Memo, p. 41 (Exhibit KOR-77).
[585] Washers Final CVD I&D Memo, pp. 41-42 (Exhibit KOR-77); Final Samsung CVD Calculation Memo at 2 (Exhibit KOR-80) (BCI).
[586] Korea asserts that, whether the subsidy is in the form of a loan, grant, or tax credit, the investigating authority "has the obligation to investigate the actual use of the subsidy." Korea First Written Submission, para. 300 & n.295.
[587] Korea First Written Submission, paras. 292-297.
[588] Korea First Written Submission, paras. 288-290, 303.

the approach employed by the USDOC or alternatives. Nonetheless, as discussed above, the USDOC's approach to tying is entirely consistent with the approaches reflected in context set out in the agreements.

470. The United States notes that it is not arguing that Korea's approach is necessarily inconsistent itself with the SCM Agreement or the GATT 1994. In certain circumstances, a Member might consider that it would need to take into account the use and effects of a subsidy for attribution purposes, and depending on the facts and circumstances, such an approach may be permissible. But this approach is not compelled by these agreements.

471. And Korea's approach could yield problematic outcomes in certain cases. On Korea's view, the way in which the recipient ultimately spends the funds, and the resulting benefit to a particular product, are determinative. Even if the mechanism or instrument by which the subsidy was granted has no connection to a particular product, such that the granting authority did not intend to benefit that product, any use by the recipient that benefitted that product would result in the conclusion that the grant of subsidy is "tied." This means that even quintessential examples of untied subsidies – such as equity infusions, which involve investments in the company as a whole[589] – would be treated as tied subsidies, based on the way in which the company ultimately makes use of the funds.

472. Far from being a more "precise" way of attributing subsidies,[590] Korea's approach may yield results that are speculative and arbitrary. Because money is fungible, tax credits earned based on expenses that, for accounting purposes, are incurred in one business unit will free up resources for use in connection with other business units.[591] Determining whether a subsidy has been "used" in connection with, or has affected a particular product may involve arbitrary line-drawing.

473. Adoption of Korea's use/effects approach could also impose significant administrative burdens, and may be difficult or impossible to implement in a meaningful way. The effects of R&D subsidies are particularly difficult to pinpoint, and may not materialize for many years – if ever. Basic research may not have a product-specific "use" or effect. And even more applied research activities may not have a clear product-specific effect, or may benefit multiple products. For instance, R&D conducted in connection with LCD screens may benefit a broad range of products – from washers to smartphones. Mere review of accounting records may not be sufficient to establish the extent of these effects on particular products.

474. Korea's approach calls for an analysis of potentially extraordinary complexity. In a given case, an authority would be called on to evaluate all of the various technologies that are under R&D development within a company, and determine which products incorporate them. The authority would then have to determine which portion of which subsidy had an impact on the development of a given technology, and to what extent. Such an analysis in fact would tend to

[589] *See, e.g.*, CVD Preamble, 63 Fed. Reg. at 65,352 & 65,400 (Exhibit USA-25) (equity infusions benefit the company as a whole and reduce its cost of capital; USDOC treats them as untied subsidies).
[590] Korea First Written Submission, paras. 295-296, 301.
[591] *See, e.g.*, CVD Preamble, 63 Fed. Reg. at 65,403 (Exhibit USA-25).

blur the distinction between determining the amount of the subsidy and determining its effect. Nothing in the SCM Agreement or GATT 1994 requires such a forensic exercise to calculate a subsidy rate.

475. *Third*, Korea relies on inapposite jurisprudence to support its position – i.e., disputes involving privatizations and the pass-through of subsidies.[592] As discussed above, these disputes center on whether the "benefit" of a subsidy continues to exist – either following a change in ownership or an alleged pass-through of subsidy from the producer of inputs to the producer of processed products. Absent the continued existence of this benefit, there is no right to impose a duty.[593] These cases do not establish that Members must attribute subsidies on a tied basis, or articulate a threshold for determining when a subsidy is tied to a particular product.

476. For instance, Korea relies on language in *US – Countervailing Measures on Certain EC Products*, where the Appellate Body noted the need to "ascertain the precise amount of a subsidy attributed to the imported products."[594] The Appellate Body made these comments in the context of a privatization case, to underscore the need for investigating authorities in an administrative review to ascertain the continued existence of subsidies after a full privatization and change in ownership. Although the Appellate Body cited Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement,[595] it relied primarily on Article 21.2 of the SCM Agreement.[596] Under that provision, because a privatization presumptively extinguishes a benefit, an investigating authority must determine whether that benefit continues to exist and whether the continued imposition of countervailing duties is warranted.[597]

477. Here, there are no allegations of pass-through or privatization, and it is undisputed that the RSTA subsidies at issue exist and benefit the subject products. Nor does Korea dispute the total amount of subsidy that Samsung received under the RSTA programs. The only dispute is over the appropriate way to attribute this amount mathematically. None of the privatization or pass-through cases cited by Korea addresses the broader question of whether and under what circumstance an investigating authority is required to adopt an untied or tied methodology.[598]

---

[592] Korea First Written Submission, paras. 284-287, 294-296 (citing *US – Countervailing Measures on Certain EC Products (AB)*, *US – Lead and Bismuth II (Panel)*, *China – Broiler Products*, and *US – Softwood Lumber IV (AB)*).

[593] *See, e.g.*, *US – Lead and Bismuth II (AB)*, para. 54 ("[W]e note that in order to establish the continuing need for countervailing duties, an investigating authority will have to make a finding on *subsidization*, i.e., whether or not the subsidy continues to exist. If there is no longer a subsidy, there would no longer be a need for a countervailing duty.") (emphasis in original).

[594] Korea First Written Submission, para. 295 (quoting *US – Countervailing Measures on Certain EC Products (AB)*, para. 139).

[595] *US – Countervailing Measures on Certain EC Products (AB)*, para. 139.

[596] Article 21.2 of the SCM Agreement provides that, in administrative reviews, "[i]nterested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately."

[597] *US – Countervailing Measures on Certain EC Products (AB)*, paras. 127, 144.

[598] Contrary to Korea's suggestion, applying an untied approach is not less accurate in this case than a tied approach. Under an untied attribution approach, the authority attributes the subsidy to all products – a methodology that is entirely consistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, the nature of the bestowal of subsidies that occurred here, and the principle that money is fungible.

478. Korea's citation to *China – Broiler Products* is particularly inapt.[599] This is yet another pass-through case, in which the investigating authority knowingly used erroneous data in its subsidy calculation.[600] The authority calculated the amount of benefit attributable to inputs used in the production of all merchandise, but then divided this by the sales volume of only a subset of that merchandise – i.e., the subject products.[601] As a result, the authority failed to "match" the elements in the numerator and denominator, yielding a mathematically incoherent result.[602] Like the other pass-through cases cited by Korea, *China – Broiler Products* did not address, and sheds no light on, the relative merits of a tied attribution model.

479. *Finally*, it was entirely appropriate for the USDOC to employ an untied approach on the facts of this case. The USDOC focused on the conditions under which a subsidy is "granted" or "bestowed,"[603] and nothing in the relevant legislation for RSTA Articles 10(1)(3) and 26 suggested any conditioning or tie between Korea's grant of these subsidies and a particular product.

480. The design, structure, and operation of these RSTA programs does not suggest a product-specific tie. Tax credits can be claimed in connection with any eligible research, human resources development or facilities investment, without regard for product type. Applicants are only required to submit with their tax returns the amount of eligible investments made, without breakdown by product.[604] They submit a pool of aggregate expenditures, and then receive a reduction in their tax liability on an aggregate basis. Any attempt to disaggregate the pool of subsidies that a company receives into particular product categories would be meaningless, and at odds with the nature of the subsidy.

481. Likewise, 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. Tax credits are available without regard for product type. So any inducement to invest would not favor any product, and would only apply at the aggregate level.

482. Indeed, companies only receive credits for a percentage of their aggregate investment costs. For instance, under RSTA Article 10(1)(3), large companies receive credits equal to only 6 percent of all eligible R&D expenses incurred in a single tax year.[605] So even if a category of R&D costs could be traced to a particular product, these amounts could well be deemed to fall

[599] Korea First Written Submission, paras. 286, 296.
[600] *China – Broiler Products*, paras. 7.237-7.242, 7.262, 7.266.
[601] *China – Broiler Products*, paras. 7.237-7.242, 7.262, 7.266.
[602] *China – Broiler Products*, paras. 7.257 ("[T]he correct calculation of the countervailing duty rate would depend on *matching* the elements taken into account in the numerator with the elements taken into account in the denominator.") (emphasis in original) (quoting *US – Softwood Lumber IV (AB)*, n.196).
[603] Washers Final CVD I&D Memo, p. 41 (Exhibit KOR-77).
[604] Korea First Written Submission, para. 250; *see also* Samsung Washers Verification Report, Ex. 10 (Exhibit KOR-79) (BCI).
[605] GOK April 9, 2012 QR at App. Vol. at 108, 110-111 (Exhibit KOR-75) (BCI).

within the 94 percent of all costs that are not offset by the tax credits.[606] This confirms the absence of any product-specific tie, and the futility of adopting a tied approach on these facts.[607] As the USDOC found, the aggregate tax credits received by the company are more appropriately viewed as fungible, benefitting the entire company.[608]

483. In theory, if Samsung submitted a tax return that indicated some tie between subsidies received and a particular product, the acceptance of that return by the Korean tax authorities might be construed as official acknowledgment of the product-specific "use" of those subsidies. But even on this theory, the evidence fails to support the existence of a product-specific tie. As the USDOC observed, "there is no evidence within Samsung's income tax return that the RSTA tax credits it claimed were tied to certain merchandise."[609]

484. And 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,[610] "these documents do not form the basis for bestowal and are not included in the annual tax returns that the company files with the Korean tax authorities."[611] 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. Nor was the USDOC itself required to review these underlying documents, for purposes of conducting an *ex post* tracing exercise.[612]

4. The USDOC Was Not Required To Attribute RSTA Article 10(1)(3) Subsidies To Sales of Products Manufactured Outside Korea

485. Equally, there is no basis for Korea's assertion that the USDOC was required to make a further adjustment to its calculation with respect to RSTA Article 10(1)(3) subsidies – i.e., to include in the denominator the sales value of products manufactured *outside Korea*. In a variation of its tracing argument, Korea asserts that the underlying, subsidized R&D and human

[606] As discussed above, a recipient may also defer eligible expenses until a subsequent tax year, to comply with Minimum Tax requirements. This further attenuates any potential tie to a specific product.
[607] Korea asserts that costs are "retroactively reduced by the tax credits." Korea First Written Submission, para. 297. But as the USDOC found, RSTA tax credits are bestowed on the date the tax return is filed and credits are earned. Washers Final CVD I&D Memo, pp. 41-42 (Exhibit KOR-77). To the extent that one could characterize the grant of credits as partially offsetting past expenditures, it would only do so at an aggregate level. The company receives an undifferentiated pool of tax credits, which is in turn derived from an aggregate pool of expenses.
[608] Washers Final CVD I&D Memo, p. 42 (Exhibit KOR-77).
[609] Washers Final CVD I&D Memo, p. 42 (Exhibit KOR-77).
[610] Korea First Written Submission, paras. 250, 292.
[611] Washers Final CVD I&D Memo, p. 42 (Exhibit KOR-77).
[612] Korea criticizes the USDOC for not reviewing "voluminous" supporting documents submitted by Samsung. Korea First Written Submission, paras. 292-293, 297. As discussed above, the USDOC was not required to conduct a tracing exercise, much less review documents adduced for this purpose. In any event, Korea submitted these documents late, after the record had closed, and the USDOC appropriately declined to accept them. *See* Samsung Verification Report, p. 16 (Exhibit KOR-79); 19 CFR § 351.301(b)(1) (Exhibit USA-23) (factual evidence in a countervailing duty investigation must be submitted no later than seven days prior to verification).

resources activities – all of which took place in Korea[613] – affected manufacturing facilities operated by Samsung affiliates in other parts of the world.[614]

486. This argument is not grounded in the SCM Agreement or GATT 1994.[615] The USDOC was not required to trace the possible indirect effects of subsidies overseas when calculating duties. The USDOC expressly considered and rejected Korea's "overseas effects" theory, which is without factual support, and provided a reasoned and adequate explanation for its decision to attribute subsidies over domestic sales.

487. *First*, 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. In fact, the language of these provisions suggests a focus on production activity occurring within the territory of the granting Member. Both provisions allow a Member to impose duties so as to offset subsidies that are "granted" or "bestowed" by another Member. Article VI:3 of the GATT 1994 clarifies 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*." Likewise, Article 19.4 of the SCM Agreement frames the subsidy calculation in terms of "subsidization per unit of the *subsidized and exported product*."

488. In other words, the textual focus is on the subsidization of products that are manufactured in and exported from the territory of the subsidizing Member. These provisions do not address possible overseas knock-on effects from these subsidies.

489. *Second*, Members generally grant subsidies to generate economic benefits within their borders.[616] They do not typically seek to incentivize outsourced or overseas manufacturing – and may actively oppose such activities. For a subsidy provided by a Member to a recipient within its territory to be deemed to be attributable to production occurring elsewhere would require specific facts supporting such a unique conclusion.

490. *Third*, on the facts of this case, the USDOC explained that it was not appropriate to attribute subsidies to overseas production. In its questionnaire responses, Korea affirmed that RSTA Article 10(1)(3) "aims to facilitate Korean corporations' investment in their respective research and development activities, and thus to *boost the general national economic activities* in

[613] Korea First Written Submission, para. 313.
[614] Korea First Written Submission, paras. 308, 313. Korea does not challenge the USDOC's attribution of RSTA Article 26 subsidies to domestic production.
[615] In its Panel Request, Korea asserted its claim (i.e., concerning sales of merchandise produced outside of Korea) exclusively under Articles 1 and 14 of the SCM Agreement. Panel Request at 5-6. But in its submission, Korea did not articulate any arguments under these provisions. Korea now asserts this claim exclusively under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Korea First Written Submission, paras. 304-315. In its "Request for Findings and Recommendations," at paragraph 353 of its submission, Korea cites Articles 1 and 14. We presume that this is an error. In any event, as Korea failed to adduce any argument or evidence in support of claims under these provisions, it has failed to establish a *prima facie* case.
[616] *See, e.g.*, CVD Preamble, at 65,403 (Exhibit USA-25) ("The government of a country normally provides subsidies for the general purpose of promoting the economic and social health of the country and its people, and for the specific purposes of supporting, assisting or encouraging domestic manufacturing or production and related activities (including, for example, social policy activities such as the employment of its people.").

all sectors."[617] Nothing in the legislation or enforcement decree suggests an intent to subsidize production outside Korea, and "there is no indication in the statutory provisions that a company could claim a tax credit on, for example, R&D conducted outside of Korea or a facility located outside of Korea."[618] Indeed, Korea concedes that Samsung only claimed tax credits for R&D work conducted in Korea.[619] The USDOC also considered Samsung's tax returns, and found that here, too, there was no evidence that Korea's design included the subsidization of foreign production.[620] Thus, 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.

491. Korea asserts that the USDOC failed to "match" the elements in the numerator and denominator. Korea asserts that, because the R&D activities benefitted overseas production, the subsidies reflected in the numerator are linked to that production. Korea argues that, to ensure that numerator and denominator reflect the "same universe," the USDOC should have included sales of goods manufactured outside Korea in the denominator.[621]

492. This "matching" argument rests on a flawed premise – namely, that the inquiry hinges on the possible indirect effects of subsidies overseas, rather than the structure and design of the subsidy program itself. As we have already shown, Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement do not require an effects-based tracing analysis. The USDOC's decision to focus on the structure and design of the subsidies was fully consistent with these provisions. The "universe" that a Member intends to benefit through subsidies are typically those products manufactured within its borders, and the facts showed that to be true here.[622]

493. 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. Korea merely cites to vague and conclusory statements in Samsung's case brief, unsupported by evidence.[623] This is plainly inadequate. The USDOC was not required to chase down the supposed overseas effects of R&D activities conducted in Korea, and Korea has made no showing that these effects existed.

---

[617] GOK April 9, 2012 QR at App. Vol. 108 (emphasis supplied) (Exhibit KOR-75).
[618] Washers Final CVD I&D Memo, p. 52 (Exhibit KOR-77).
[619] Korea First Written Submission, para. 313.
[620] Washers Final CVD I&D Memo, p. 52 (Exhibit KOR-77).
[621] Korea First Written Submission, paras. 304, 307-308.
[622] The apparent implications of Korea's "overseas matching" argument are troubling. Under Korea's logic, if the USDOC were to include sales of goods manufactured overseas in the denominator, then the USDOC would need to reflect in the numerator the overseas subsidies conferred on Samsung by *other Members*.
[623] Korea First Written Submission, paras. 308, 313. The sole "evidence" cited in Samsung's case brief are the Department's previous anti-dumping determinations in *Bottom Mount Refrigerators*. Washers Samsung CVD Case Brief at 50-51 (Exhibit KOR-90) (BCI); *see also* Korea First Written Submission, para. 309. Samsung appears to rely on the Department's calculation of a general and administrative expense ratio for purposes of determining cost of production. This calculation has no bearing on whether R&D and human resources subsidies should be divided by the sales value of domestic or worldwide production for purposes of calculating countervailing duties.

494. *Fourth*, Korea wrongly criticizes the USDOC for its alleged use of a presumption in favor of attributing subsidies to domestic sales.[624] 19 CFR § 351.525(b)(7) provides that the USDOC "will attribute the subsidy to products produced by the firm within the country of the government that granted the subsidy. However, if it is demonstrated that the subsidy was tied to more than domestic production, the [USDOC] will attribute the subsidy to multinational production."[625]

495. Korea asserts that without specific authorization in the text of the SCM Agreement, an investigating authority cannot apply presumptions, which in its view impede an authority's ability to assess the evidence in a given case.[626] This argument rests on several flawed premises, but the key point remains: absent evidence to the contrary, it is logical that a Member granting a subsidy to a recipient in its territory bestows that subsidy on the manufacture, sale, or export of the product from its territory.

496. As a threshold matter, an investigating authority is not barred from employing methodologies that are not expressly addressed in the text of the WTO Agreement. The Appellate Body made this clear in *US – Oil Country Tubular Goods Sunset Reviews (AB)*, where it was faced with a challenge to the USDOC's use of a cumulative analysis for likelihood-of-injury determinations in sunset reviews. The AD Agreement does not include language that specifically addresses or approves use of the technique in sunset reviews. Nonetheless, the Appellate Body noted that cumulation was a "useful tool for investigating authorities,"[627] and found that "*the silence of the text on this issue . . . cannot be understood to imply that cumulation is prohibited in sunset reviews*."[628] The panel in *Mexico – Olive Oil* made the same point: "In general, *unless a specific procedure is set forth in the* [SCM] Agreement *the precise procedures for how investigating authorities will implement those obligations are left to the Member to decide*."[629]

497. Moreover, WTO panels and the Appellate Body have repeatedly endorsed the use of presumptions where they are reasonable and rebuttable. For instance, in *US – Lead and Bismuth II*, the Appellate Body affirmed the ability of investigating authorities to rebuttably presume, in administrative reviews, that a benefit continues to flow from an untied, non-recurring financial contribution.[630] Likewise, in *US – Countervailing Measures on Certain EC Products*, the panel found that "it is a normal and accepted practice . . . for the importing Member to presume that a non-recurring subsidy will provide a benefit over a period of time, which is normally presumed to be the average useful life of assets in the relevant industry."[631]

---

[624] Korea First Written Submission, para. 312.
[625] 19 CFR § 351.525(b)(7) (Exhibit USA-24).
[626] Korea First Written Submission, para. 312.
[627] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 297.
[628] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 294 (emphasis supplied).
[629] *Mexico – Olive Oil*, para. 7.26 n. 63; *see also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 437 (Article 14 of the SCM Agreement contains "guidelines" that "should not be interpreted as rigid rules that purport to contemplate every conceivable factual circumstance") (quotations omitted).
[630] *US – Lead and Bismuth II (AB)*, para. 62.
[631] *US – Countervailing Measures on Certain EC Products (Panel)*, para. 7.75. On appeal, the Appellate Body noted that both parties concurred in the panel's finding with respect to the use of this presumption, and observed that

498. Here, as expressly stated in USDOC regulations, the USDOC will examine any relevant evidence and can draw the opposite conclusion: "If it is demonstrated that the subsidy was tied to more than domestic production, the [USDOC] will attribute the subsidy to multinational production."[632] As discussed above, it is logical to consider that a Member grants a subsidy to benefit domestic production. The USDOC will explore the facts in a given case – as it did here.

499. As discussed above, the record was devoid of evidence establishing that the grant of subsidy was intended to benefit overseas production. Indeed, the evidence suggests only that the subsidy was to benefit *national* economic activities. Nor was there credible evidence that subsidies for R&D and human resources development had an effect on overseas production.

500. *Finally*, Korea fails to account for the administrative burden associated with its overseas effects theory. As discussed above, the effects of R&D subsidies are exceptionally difficult to trace – a task that is made doubly challenging when assessing their possible indirect effects overseas. A company's overseas affiliates are subject to different legal, tax, and other regulations, and may have different manufacturing operations and product lines. These affiliates may also receive subsidies from the Members in whose territory they operate. All of these differences complicate any attempt to trace the indirect effects of domestic R&D and human resource development activities on overseas affiliates.

501. Taken to its logical conclusion, Korea's theory would mean that Members are required to calculate the "precise amount"[633] of sales in each foreign jurisdiction that benefit from the subsidy. 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. Needless to say, the SCM Agreement and GATT 1994 do not compel such an exercise.

5. Conclusion

502. The USDOC provided a reasoned and adequate explanation of its decision to apply an untied attribution methodology in this case. Contrary to Korea's assertion, Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require application of a tied approach here, or use of a denominator that includes sales of goods manufactured overseas.[634]

---

in *US – Lead and Bismuth II* "we found this practice permissible under the SCM Agreement, so long as the presumption was not irrebuttable." *US – Countervailing Measures on Certain EC Products (AB)*, para. 84.

[632] 19 CFR § 351.525(b)(7) (Exhibit USA-24).

[633] Korea First Written Submission, para. 296.

[634] Even aside from the reasons set out above, Korea's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 also fail because Korea misconstrues these provisions. The text of Article 19.4 confirms that this provision is intended to discipline the definitive "levy" of duties – not the prior calculation of the subsidy rate that occurs in a final determination. Footnote 51 of the SCM Agreement explains that "'levy' shall mean the definitive or final legal assessment or collection of a duty or tax." In a retrospective duty system, the "levy" of definitive duties does not occur until after an administrative review has concluded. Any interested party may request that an assessment review be conducted to calculate the actual subsidy rate for the import transactions that occurred in the previous year. An administrative review was initiated on April 30, 2014, but no final assessment rate for Samsung has been calculated and no duties have yet been levied. Thus, as discussed above, there is no basis

The Panel should reject Korea's attempt to graft new requirements into the text of the WTO Agreement.[635]

D. The USDOC's Determination Is Not Inconsistent With Articles 10 and 32.1 of the SCM Agreement

503. The Panel also should reject Korea's consequential claims, predicated on Articles 10 and 32.1 of the SCM Agreement.[636] Article 10 requires investigating authorities to ensure that countervailing duties are imposed in accordance with Article VI of the GATT 1994 and the terms of the SCM Agreement. Likewise, Article 32.1 of the SCM Agreement provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

504. As discussed above, 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.

VI. CONCLUSION

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

for Korea's claim with respect to the quantitative ceiling articulated in Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

[635] *See India – Patents (US) (AB)*, paras. 45-46 ("[P]rinciples of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended. . . . Both panels and the Appellate Body [ ] must not add to or diminish the rights and obligations provided in the WTO Agreement.").

[636] Korea First Written Submission, paras. 344-345.