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

**(DS464)**

# EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

**April 24, 2014**

## I. INTRODUCTION

1. Korea continues to offer the Panel highly charged rhetoric rather than sound legal reasoning. Korea also continues to propose interpretations of the covered agreements that are untenable and inconsistent with the customary rules of interpretation of public international law. The U.S. first written submission demonstrates why Korea's claims fail. Statements and written filings Korea has made since filing its first written submission have not improved Korea's case.

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

2. The U.S. first written submission explains why the Panel should conclude that the measures challenged by Korea are not inconsistent with Article 2.4.2 of the AD Agreement or any other provisions of the covered agreements. Korea's legal arguments remain fatally flawed. The interpretations that the United States proposes are those that result from the proper application of the customary rules of interpretation of public international law. Korea's proposed interpretations, on the other hand, are untenable, in particular because they would read the second sentence of Article 2.4.2 out of the AD Agreement entirely.

3. While Korea and a number of the third parties attack the *Nails* test applied by the USDOC in the washers antidumping investigation, as well as the differential pricing analysis applied by the USDOC in the preliminary results of the first administrative review of the washers antidumping order, neither Korea nor any of those third parties describes how, in their view, an investigating authority *should* discern whether there exists a pattern of export prices which differ significantly among different purchasers, regions, or time periods.

### *Korea's Arguments Related to the "Pattern Clause" Are without Merit*

4. When the USDOC undertook analyses pursuant to the "pattern clause" in the washers antidumping investigation, it took into account all of the "actual export prices" reported. Korea simply is incorrect when it suggests that the USDOC did not "evaluate actual export prices." Korea also is incorrect when it contends that the "pattern clause" requires investigating authorities to examine export prices on an individual basis. The text of the second sentence of Article 2.4.2 of the AD Agreement actually supports the opposite proposition.

5. Korea likewise is incorrect when it argues that the use of average prices rather than so-called "actual prices" "ignored basic principles of data analysis and common sense." The USDOC did not look to price variance (*i.e.*, as quantified by the standard deviation) at the transaction-specific level because the second sentence of Article 2.4.2 is concerned with export prices that "differ significantly *among* different purchasers, regions or time periods." Using weighted-average export sales prices allows the USDOC to disregard variations *within* a purchaser (or region or time period) and focus instead on uncovering a pattern of export prices which differ significantly *among* groups. Korea's proposed transaction-based variance calculation would not only be difficult to administer in most cases (if not impossible), but it also is at odds with the text of the second sentence of Article 2.4.2.

6. Korea objects to the USDOC's alleged "misuse of the standard deviation in the *Nails* test," and, in addition, Korea advances a numbers of statistics-based arguments. Korea's statistical arguments are without merit. The "pattern clause" does not require the use of any specific type of statistical analysis, and the USDOC has not misused standard deviations.

Further, although the USDOC did, in a generic sense, analyze certain statistics, *i.e.*, weighted-average export prices, in the washers antidumping investigation, the "pattern clause" does not require the use of formal statistical techniques.

7. The premises of Korea's statistical arguments are flawed. As a legal matter, the term "significantly" in the second sentence of Article 2.4.2 of the AD Agreement does not require investigating authorities to utilize statistical analyses when examining export prices to determine whether there exists "a pattern of export prices that differ significantly among different purchasers, regions or time periods." The basic logical premise of Korea's arguments is equally flawed. Korea contends that the *Nails* test applied by the USDOC in the challenged antidumping investigation is not suitable to perform a particular type of statistical analysis. However, the *Nails* test does not involve the type of statistical analysis discussed by Korea. Korea's statistical criticism of the *Nails* test simply is inapposite. Korea seeks to replace the USDOC's balanced approach with one of the extremes noted by the USDOC in its determination, namely that only prices at the very bottom of the price distribution (*i.e.*, outliers that are more than two standard deviations from the average market price of all of an exporter's transactions) are sufficient to distinguish the alleged "target" from others. The sole justification for this extreme approach is Korea's insistence on the use of a particular type of statistical analysis, which the AD Agreement does not require.

8. Korea's argument that the USDOC's examination of a "pattern" in the washers antidumping investigation is inconsistent with the "pattern clause" because the USDOC did not examine what Korea terms "qualitative aspects" continues to lack merit. In Korea's view, even after the investigating authority has found a pattern, the investigating authority must then conduct a second, independent investigation of what those differences mean and why they exist. Nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. Korea's proposed interpretation is untenable.

***Korea's Arguments Related to the "Explanation Clause" Are without Merit***

9. In its statements at the first panel meeting and in its responses to the Panel's questions, Korea offers the Panel no compelling reason to find that the USDOC's explanation in the washers antidumping investigation is inconsistent with the "explanation clause." 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. Additionally, the term "appropriately" does not alter the meaning of the terms of the "pattern clause." Korea's proposed reading of the term "appropriately" simply is nonsensical.

10. Korea makes clear its view that "whatever their trends or variations" and "regardless of the size of the price differences," the normal comparison methodologies can take into account "appropriately" any "pattern of export prices which differ significantly among different purchasers, regions, or time periods." This plainly is yet another attempt by Korea to read the second sentence of Article 2.4.2 out of the AD Agreement entirely, using the term "appropriately" as leverage to do so. Korea's proposed interpretation is untenable.

11. Korea argues that "[t]he term 'appropriately' indicates that an adjustment of the W-W method might be sufficient to allow the W-W method to take differences into account with the W-W method, without the need to resort to the W-T comparison method." Korea offers no explanation, however, for why the presence of the term "appropriately" in the second sentence of Article 2.4.2 should be read as altering the application of the comparison methodologies set forth in the first sentence of Article 2.4.2.

12. Korea argues that the USDOC "does not make any effort to consider particular circumstances." Korea's contention is baseless. The USDOC, based on information provided by the respondents, determined what the margins of dumping would have been for LG and Samsung, both using the normal average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology. The USDOC compared the results and discerned that there was a "meaningful difference" in the margins of dumping calculated using the different methodologies. In this way, the USDOC explained why, within "the factual context of a particular case," *i.e.*, the washers antidumping investigation, the average-to-average comparison methodology could not take into account appropriately the pattern of export prices that differ significantly.

13. Korea continues to argue that "the authority must always consider the possibility of a [transaction-to-transaction] comparison." Nothing in the text of Article 2.4.2 supports Korea's proposed interpretation.

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

14. Korea offers little new argumentation to support its claim that the United States has breached the second sentence of Article 2.4.2 as a result of the USDOC's application of the alternative average-to-transaction comparison methodology to all sales in the washers antidumping investigation. Korea appears to argue for the application of the alternative, average-to-transaction comparison methodology only to certain types or models of the product under investigation. However, applying the alternative, average-to-transaction comparison methodology on such a model-specific basis would appear to be directly contrary to what the Appellate Body said about the so-called "targeted dumping" provision in *EC – Bed Linen*.

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

15. The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. The Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection. The Panel should recognize the limited nature and application of the Appellate Body's previous findings related to zeroing and the "fair comparison" language in Article 2.4 of the AD Agreement. The logical extension of the Appellate Body's reasoning that the alternative, average-to-transaction comparison methodology is 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" – is that the alternative comparison methodology *should* "lead to results that are systematically different," *when the conditions for its use have been met*.

16. When the Appellate Body has found prohibitions on zeroing in the past, while it has discussed contextual elements that support its interpretations, those interpretations, on a basic level, are rooted in the text of Article 2.4.2 of the AD Agreement. Specifically, the Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the average-to-average comparison methodology is the presence in the first sentence of Article 2.4.2 of the word "all" in "all comparable export transactions." The Appellate Body has found that the textual basis for the prohibition on the use of zeroing in connection with the application of the transaction-to-transaction comparison methodology is the "the reference to 'a comparison' in the singular" and the term "basis." There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

17. The U.S. first written submission demonstrates "mathematical equivalence," using both hypothetical scenarios and the actual data from the washers antidumping investigation. It also is the case that the actual preliminary result in the first washers antidumping administrative review, if zeroing is prohibited under both methodologies, would be that the average-to-average and the alternative, mixed comparison methodologies would yield mathematically equivalent results. This is further evidence of the veracity of mathematical equivalence. Korea's arguments do not leave mathematical equivalence "broken."

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

18. Korea has given the Panel no reason to find that any so-called "differential pricing methodology" – or any measure in which the USDOC applied a differential pricing analysis – is inconsistent with Article 2.4.2. As we have demonstrated, no "differential pricing methodology" measure exists, and thus no such measure can be found inconsistent with Article 2.4.2, either "as such" or as "ongoing conduct." Additionally, we have shown that the preliminary results of the first administrative review of the washers antidumping order are not within the Panel's terms of reference, so those results, too, cannot be found inconsistent with Article 2.4.2, "as applied." Nevertheless, we address Korea's substantive arguments.

19. The differential pricing analysis the USDOC applied in the first administrative review sought to identify a "pattern," but did not require a "target." A "target" is just one example of a "pattern." While the second sentence of Article 2.4.2 has been described as a provision that addresses "targeting" or "targeted dumping," that is a shorthand reference to the terms of the second sentence of Article 2.4.2. The terms "targeting" and "targeted dumping" are not present in Article 2.4.2 or anywhere else in the AD Agreement.

20. Under the "targeted dumping" approach that the USDOC applied in the washers antidumping investigation, the "target" concept focused only on lower-priced export sales. However, Article 2.4.2 does not require this particular approach to a "pattern" analysis. The differential pricing analysis that the USDOC applied in the preliminary results of the first administrative review looked for export prices to a purchaser, region, or time period which are either significantly higher or significantly lower than the export prices to other purchasers, regions, or time periods. The conceptual framework of that analysis is consistent with the terms of the "pattern clause" of the second sentence of Article 2.4.2, which calls upon the investigating

authority to find "export prices which differ significantly," but which does not require a focus either on lower-priced or higher-priced export sales.

21. The legal premise of Korea's vertical variation argument is flawed. A "target" analysis is just one kind of analysis an investigating authority might undertake when searching for "a pattern of export prices which differ significantly among different purchasers, regions or time periods." Korea is incorrect when it suggests that the USDOC did not evaluate "*all* of the exporter's export prices for the product under investigation." In the preliminary results of the first administrative review, after making comparisons between different purchasers, regions or time periods on a model-specific basis, the USDOC aggregated the results of these model-specific comparisons to establish that 47.12 percent of LG's export sales passed the Cohen's *d* test and that this supported the conclusion that there existed conditions indicative of a pattern of export prices that differed significantly among different purchasers, regions, or time periods. Aggregating the results of the model-specific comparisons among different purchasers, regions, or time periods ensured that the "pattern" identified was for the product under investigation as a whole and was based on the exporter's overall pricing behavior in the U.S. market.

22. Korea contends that the USDOC's differential pricing analysis improperly combines price variation across different purchasers, regions and/or time periods to identify a pattern. However, there is no textual support in Article 2.4.2 for Korea's contention. To identify "a pattern" for the exporter and product as a whole, it may be appropriate for an investigating authority to consider all of that exporter's export prices to discern whether significant differences in the export prices are exhibited collectively among different purchasers, or different regions, or different time periods. In other words, the text of the "pattern clause" contemplates a holistic analysis of the exporter's pricing behavior for the product as a whole, or, in other words, the very "horizontal" analysis to which Korea objects.

23. Korea's argument related to so-called "cross-category" variation fails for the same reason that its "horizontal" variation argument fails. Nothing in the text of the "pattern clause" suggests that the significant export price differences among purchasers (or regions or time periods) cannot be cumulated with the significant differences in export prices among other categories (*i.e.*, purchasers, regions, or time periods) when assessing whether there exists "a pattern of export prices which differ significantly among different purchasers, regions or time periods." The USDOC undertakes a similar process when measuring the amount of dumping. Specifically, the USDOC makes comparisons between normal values and export prices for comparable merchandise, and then aggregates those intermediate comparison results to determine the amount of dumping for that exporter and for the product as a whole. In this way, the use of the Cohen's *d* and ratio tests as part of the USDOC's differential pricing analysis is in accord with prior findings of the Appellate Body elaborating on the obligations set forth in Article 2.4.2.

24. Korea's "systemic disregarding" contention just amounts to another phrasing of Korea's argument that zeroing is always impermissible. However, zeroing is permissible – indeed, it is necessary – when applying the alternative comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. Additionally, because the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology to all sales is permissible, there is no basis for finding that what Korea calls "systemic disregarding" is impermissible. Nothing in the text of the second sentence of Article

2.4.2 supports Korea's claim. When the results of the two comparison methodologies used in a mixed application are aggregated, it is necessary to ensure that the results of the average-to-transaction comparison methodology are not masked or offset by the results of the average-to-average comparison methodology, and the USDOC ensures that that does not happen by not offsetting a positive comparison result of the average-to-transaction comparison methodology with a negative comparison result of the average-to-average comparison methodology.

## III. KOREA HAS FAILED TO DEMONSTRATE THAT THE USDOC'S COUNTERVAILING DUTY DETERMINATION IS INCONSISTENT WITH THE *SCM AGREEMENT* AND THE *GATT 1994*

25. Korea has failed to demonstrate that the USDOC's CVD determination is inconsistent with U.S. obligations under the GATT 1994 and SCM Agreement. Korea's first claim – *i.e.*, that RSTA Article 10(1)(3) subsidies are not *de facto* specific – is legally and factually untenable, and its second specificity claim is equally flawed.

26. Likewise, there is no merit to Korea's assertion that the USDOC should have calculated the subsidy ratios for RSTA Article 10(1)(3) and 26 subsidies using a novel variation of the "tied" approach to attribution. Korea's expense-driven theory has nothing to do with the *bestowal of subsidies*, and fails as a consequence. Korea's belated attempt to introduce materials from separate antidumping investigations cannot rescue this theory.

27. Equally without merit is Korea's assertion that the USDOC should have incorporated revenue from overseas manufacturing into the denominator of the subsidy ratio for RSTA Article 10(1)(3). Here, again, Korea relies on a theory that has no basis in the bestowal of subsidies.

### *The USDOC's Disproportionality Determination Is Consistent With Article 2.1(c) Of The SCM Agreement*

28. Korea asserts that, in *US – Large Civil Aircraft*, the Appellate Body "endorsed" and "implicitly agreed with" the argument that a panel must base its determination on a "second ratio reflecting the expected distribution of the subsidy." Korea mischaracterizes the Appellate Body's findings.

29. The Appellate Body found that it would have expected a "wider distribution" of benefits, given open eligibility criteria and notwithstanding the fact that not every company would be in a position to take advantage of the program. Having found that there was "reason to believe that the IRB subsidies were granted in disproportionately large amounts," the Appellate Body turned to the explanations offered by the parties. The Appellate Body found that the European Communities' "second ratio" was not relevant, as it was not an explanation for the distribution. The Appellate Body also could not accept the United States' explanation based on qualifying investments. The Appellate Body considered the United States' final explanation, which was predicated on the significance of Boeing and Spirit to the Wichita economy, but rejected this defense. The Appellate Body did not "endorse" or even suggest that a disproportionality analysis must include a "second ratio."

30. Korea also continues to cling to arguments that the USDOC appropriately considered and rejected. Korea points to the fact that the "amount of the credit that Samsung received was

solely determined based on the statutory formula," and argues that as a result its "subsidy is proportionate to the amount of its investment." This "common formula" argument reflects a misreading of Article 2.1. The disproportionality inquiry cannot be reduced to the question of whether subsidies are distributed automatically, without the exercise of discretion. Korea's position distorts the inquiry under Article 2.1(c) and would invite ready circumvention of subsidy disciplines. Here, as well, RSTA Article 10(1)(3) does not even contain a single "common formula."

31. Equally groundless is Korea's continued reliance on its "size defense." The fact that Samsung and LG are "large" companies does not explain the skewed distribution evident here. Nor can large size shield recipients from scrutiny under Article 2.1(c) of the SCM Agreement.

32. This was the extent of Samsung's "size defense" before the USDOC – *i.e.*, that, in general, "large" companies will "typically" invest more in research and human resources development than "smaller" companies. To the extent that Samsung was attempting to establish a "second ratio" that would explain the disproportionate subsidy distribution found by the USDOC, it failed to do so. The USDOC also found that this theory was fundamentally at odds with the purpose of the disproportionality inquiry.

33. Here, again, the *US – Large Civil Aircraft* dispute is instructive. The fact that Boeing and Spirit were "large" companies with larger investments in commercial and industrial property than "smaller" companies was not found to explain the disparate distribution and could not avert a disproportionality finding. The Appellate Body did not accept a "size defense" in that case, and the Panel should not do so here. And even assuming some connection between size and R&D activity, this general correlation would not explain the *extent* of the disparity evident here.

34. Nor does the relative size of participants in the RSTA Article 10(1)(3) program explain this disparity. Korea has offered extra-record evidence on Samsung's size relative to the next largest company in Korea, but does not compare participants in the Article 10(1)(3) program. The only known RSTA 10(1)(3) participants for which there is information on the record regarding size are the two companies under investigation – Samsung and LG. Throughout the 2007-2009 period, Samsung and LG both received very large amounts of subsidy. But this information shows a disparity that cannot be explained by relative size. And the disparity in subsidy distribution cannot be explained by the amounts of eligible investments.

35. Other record evidence confirms that this pattern – *i.e.*, the concentration of subsidy benefits in a very small number of recipients – is long-standing. The distribution with respect to RSTA Article 10 is consistent with a broader pattern of concentration of tax benefits in the top "chaebol."

36. In its redetermination, the USDOC further confirmed that Samsung's status as a "large" company cannot explain the distribution of RSTA Article 10(1)(3) subsidies. Korea dismisses the USDOC's redetermination, apparently based on the assertion that the USDOC's findings did not constitute a "second ratio." But the Appellate Body did not require a "second ratio." Korea falls back on the argument that data in the redetermination, which is based on taxable income and tax savings, is "irrelevant," because it may reflect a company's tax planning strategy. But this does not render the data irrelevant, particularly at the level of an aggregate comparison between Samsung and the other 99 companies.

37. Finally, in its first written submission, the United States observed that Korea had failed to make a *prima facie* case with respect to the final sentence of Article 2.1(c) of the SCM Agreement. Korea has failed to cure the deficiencies in its case. Korea asserts that "there is no evidence" that the USDOC took into account the diversification of the Korean economy. To the extent that Korea is asserting that this factor must be addressed explicitly, Korea is incorrect. It is a "publicly-known fact" that Korea is one of the wealthiest, most diversified economies in the world. And because of limitations in the evidence that the GOK provided, the extent of diversification of the economy was not at issue.

***The USDOC's Determination That RSTA Article 26 Subsidies Were Regionally Specific Was Consistent With Article 2.2 Of The SCM Agreement***

38. Korea also failed to establish that the USDOC's specificity determination with respect to RSTA Article 26 subsidies is inconsistent with Article 2.2 of the SCM Agreement.

39. Korea offers a narrow, results-driven interpretation of the term "enterprise" in Article 2.2. Yet when the term "certain enterprises" is read in context with Article 2.2, it is clear that a firm, industry, or group thereof may be "located" in a variety of places, including the site of a head office, branch, manufacturing facility, or other asset or investment.

40. Korea casts a wide net, hoping to find support for its interpretation in other provisions of the SCM Agreement and the GATT 1994. This effort fails. The sharp distinction that Korea seeks to draw between "enterprise" and "facility" defies logic. It is unclear where an enterprise would be located, if not in facilities of some kind. Manufacturing and production does not occur in a vacuum, but instead is undertaken by enterprises in manufacturing facilities.

41. Korea asserts that the Article 26 program "does not impose any limitation on the location of the enterprise that receives the subsidy." But the geographic limitation in the RSTA Article 26 program is imposed with respect to the location of "facilities" in which investments are made. The fact that a company such as Samsung has multiple locations – that fall both within and without a designated region – is of no moment. And Korea's interpretation would create a major loophole in subsidy disciplines.

42. In addition, Korea continues to rely on failed legal theories that have no basis in the text of Article 2.2. Korea clings to its "double basis" theory, yet two panels that have addressed this theory rejected it. Korea also asserts that a geographic region under Article 2.2 must be designated "affirmatively, not by implication or suggestion." But Article 2.2 does not contain the word "explicit," and does not require that a region be "affirmatively" designated. Here, RSTA Article 26 incorporates an express geographic limitation.

43. Korea's continued reliance on its "large region" defense is equally without merit. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large. And it would be particularly inappropriate to overlook the geographic limitation imposed here.

44. Finally, Korea's resort to "policy" arguments also cannot avert a finding of specificity. In fact, these policy arguments confirm that the RSTA Article 26 program is regionally specific.

***The USDOC Appropriately Treated RSTA Subsidies As "Untied" When Calculating Subsidy Ratios***

45. Korea criticizes the USDOC's calculation of the subsidy ratios for RSTA Articles 10(1)(3) and 26. Yet Korea's claim is legally untenable. There can be no doubt that the R&D and facilities subsidies at issue are not "tied" to particular products.

46. Korea distances itself from its previous "retroactive use" theory, but fails to offer a coherent alternative. Korea's attribution theory hinges on *expenditures* that were incurred by the subsidy recipient. Although Korea grounds its theory in expenditures that it says "benefit" production, it uses this term in a way that has no basis in Article 1.1(b) of the SCM Agreement. To the extent that Korea is using the term "benefit" as a short-hand reference to the effect of an expenditure, this too would be inconsistent with the SCM Agreement. Treating expenses as synonymous with subsidies is also inappropriate here, given the structure, architecture, and design of the subsidies at issue.

47. Korea relies heavily on Samsung's internal expense records, which it argues allow Samsung to "'tie' the tax credits that it received to the washers that it produced in its Digital Appliance Division." Korea's focus on record-keeping is misplaced, however, as the attribution of subsidies is not a function of the effect of expenses, but rather the bestowal of the subsidies. So the internal records of these expenses would not provide a basis for calculating subsidy ratios.

48. The record-keeping requirements for RSTA Article 10(1)(3) also do not support Korea's view. Korea admitted that companies are not required to file a form or report as part of their tax return that shows how expenses eligible for Article 10(1)(3) tax credits are associated with particular merchandise. Korea points to Korea's Basic Act on National Taxes, which requires all taxpayers to "prepare and keep faithfully books and documentary evidence related to all transactions." But this is a cross-cutting requirement, applicable to all taxpayers in all contexts.

49. Moreover, Samsung did not submit any records – internal or otherwise – to the granting authority, the Government of Korea ("GOK"), that would have shown which expenses were allegedly spent in connection with a particular product. Korea has conceded that even the "detailed breakdown" of expenses that it touted in its first written submission was never presented to the GOK. Likewise, it is undisputed that the "200 page document" (which Korea says the USDOC should have reviewed) was never submitted to the GOK, and did not inform the bestowal of the subsidies. Korea asserts that such a product-specific breakdown would not be possible because of the way Samsung does business. But, if this is so, even Samsung is unable to provide what Korea argues is *required* to be analyzed under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

50. Finally, even if Samsung had submitted a product-by-product breakdown in its tax return to the GOK, this would not necessarily be a sufficient basis for finding that the RSTA Article 10(1)(3) and 26 subsidies were "tied" to particular products. There is no merit to Korea's assertion that the USDOC's treatment of subsidies under RSTA Articles 10(1)(1) and 10(1)(2) as "untied" was somehow "inconsistent" with its treatment of RSTA Article 10(1)(3) subsidies – which were also treated as untied. The USDOC found that there was no evidence in the tax returns themselves to indicate that RSTA Article 10(1)(1) and 10(1)(2) subsidies were tied to specific products.

51. Korea attempts to buttress its expense-driven tying theory by adducing materials from two separate antidumping investigations. Yet the verification reports and verification exhibits that Korea submitted from these proceedings were never a part of the washers CVD record. These materials are also irrelevant on their face, as they do not refer to or address the RSTA Article 10(1)(3) subsidy program. Moreover, Korea attempts to rely on these documents to support a legal theory the United States has previously explained is erroneous. Cost accounting principles used in antidumping proceedings are an inappropriate basis for attributing subsidies.

52. Finally, Korea offers a flawed and incomplete description of the USDOC's cost accounting in these AD investigations. Korea fails to mention that the USDOC presumptively follows the investigated company's books and records in carrying out this calculation. Korea likewise fails to mention that U.S. courts have imposed a substantial evidentiary hurdle and strict requirements for departing from an investigated company's books and records.

***Korea's Overseas Effects Theory Is Groundless***

53. Equally, there is no merit to Korea's argument that the USDOC should have incorporated overseas manufacturing into the denominator of the subsidy ratio for RSTA Article 10(1)(3). The obligations that Korea grounds its claim in – Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement – do not support its theory, and focus exclusively on domestic production. Nor do these provisions support an effects-based attribution theory.

54. In addition, Korea's approach is at odds with the facts here, which confirm that Korea bestowed RSTA Article 10(1)(3) subsidies on domestic production – not overseas manufacturing. Korea impugns the USDOC for alleged inconsistency in its approach. But the alleged "change in position" between the USDOC's preliminary and final determination reflected the correction of Samsung's misreported data.

55. Korea argues that "[i]t is common sense that the results of the R&D will normally benefit all operations of a company, wherever located." Korea fails to support this conclusory assertion with any evidence.

56. Korea further argues that, for the USDOC to attribute subsidies to domestic production, it must prove that the effects of R&D "were limited to washer production in Korea." Korea's approach would distort the provisions on which it grounds its claims. Korea also fails to address the troubling implications of its approach, which would inject an overseas dimension into subsidy attribution, with potentially far-reaching consequences.

57. Korea again takes refuge in antidumping proceedings. But these involved a different product and different jurisdiction, and have no bearing on the attribution of RSTA Article 10(1)(3) subsidies. In fact, Korea's reliance on a royalty payment made by Samsung undercuts its overseas attribution theory.

## IV. CONCLUSION

58. For the reasons set forth above, along with those set forth in other U.S. written filings and oral statements, the United States respectfully requests that the Panel reject Korea's claims.