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

(AB-2016-2 / DS464)

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Presiding Member and members of the Division:

1. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat staff assisting you, for your work on this appeal. The United States appreciates this opportunity to present its views on the issues that have been appealed. As evidenced by the written submissions of the participants and the third participants, this dispute places before the Appellate Body a number of important questions concerning the proper interpretation and application of the AD Agreement,[1] the SCM Agreement,[2] and the GATT 1994.[3]

2. Korea, both before the Panel and still on appeal, has failed to engage seriously with the text of the relevant covered agreements, and has failed to propose interpretations that would accord with the customary rules of interpretation of public international law, as is required by Article 3.2 of the DSU.[4] Instead, Korea urges the Appellate Body to adopt interpretations that are utterly divorced from the text of the covered agreements, and which would render certain terms of those agreements – even an entire sentence – *inutile*. Korea has given no explanation for why the common intention of WTO Members in agreeing to the second sentence of Article 2.4.2 of the AD Agreement would have been to give it no meaning.

3. The U.S. appellant and appellee submissions discuss in great detail the interpretative questions that have been presented to the Appellate Body. In this statement, we would like to highlight certain issues that are critical to the Appellate Body's resolution of this dispute.

Antidumping Issues

4. We turn first to the antidumping issues. This dispute involves the questions of when and how an investigating authority may employ the exceptional, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. These are questions of first impression for the Appellate Body.

5. In particular, while the issue of zeroing has been addressed previously, under other provisions and methodologies, the Appellate Body has never before been presented with a dispute actually involving a Member's application of the alternative comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. Indeed, the Appellate Body has explicitly stated that it has "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."[5]

6. Accordingly, there is no truth whatsoever to the argument, advanced by Korea and certain of the third participants, that the Appellate Body has already found that zeroing is impermissible under any comparison methodology. Neither is there any truth to Korea's suggestion that the United States offers "reasons to disregard prior Appellate Body clarification of key issues."[6] The questions presented here, concerning the interpretation and application of

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] *Agreement on Subsidies and Countervailing Measures*.
[3] *General Agreement on Tariffs and Trade 1994*.
[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes*.
[5] *US – Stainless Steel (Mexico) (AB)*, para. 127. *See also US – Zeroing (Japan) (AB)*, paras. 135-136; *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.
[6] Korea Appellee Submission, para. 1.

the second sentence of Article 2.4.2, are new, and they have not been decided previously. The Appellate Body will need to resolve them by applying the customary rules of interpretation.

7. Korea, to put it simply, asks the Appellate Body to read the second sentence of Article 2.4.2 out of the AD Agreement. That is the stark and unavoidable implication of Korea's arguments, in particular its contention that the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology set forth in that sentence, as well as Korea's separate claim against the U.S. Department of Commerce's ("USDOC") approach to the application of a "mixed" comparison methodology. What Korea seeks is untenable under the customary rules of interpretation.

8. Korea suggests that the United States would have the principle of effectiveness, identified by the Appellate Body in its report in *Japan – Alcoholic Beverages II*,[7] "take precedence over all other principles of interpretation."[8] That is nonsense. The U.S. appellant submission sets forth in great detail the "interpretative pathway"[9] that leads to the conclusion that the second sentence of Article 2.4.2, interpreted "in good faith in accordance with the ordinary meaning of the terms … in their context,"[10] allows the use of zeroing – indeed, requires it – in connection with the alternative, average-to-transaction comparison methodology.[11]

9. First, as a textual matter, none of the terms in the second sentence of Article 2.4.2 establishes a prohibition on the use of zeroing in connection with the alternative comparison methodology. The Panel highlighted the word "individual" in the second sentence of Article 2.4.2, suggesting that it simultaneously reduces and expands the export transactions that are to be included in the alternative, average-to-transaction comparison methodology – both limiting the scope of application of that methodology and also prohibiting zeroing.[12] That conclusion is not supported by the ordinary meaning of the term "individual," read in its context.[13] Korea has made no attempt to identify any terms in the second sentence of Article 2.4.2 that might establish a prohibition on the use of zeroing, looking instead to contextual elements outside of the second sentence.

10. In contrast, the prohibitions on the use of zeroing in certain circumstances that the Appellate Body has found in the past should be understood as rooted in the text of the first sentence of Article 2.4.2. 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."[14] 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-

[7] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[8] Korea Appellee Submission, para. 10.
[9] China Third Participant Submission, para. 143.
[10] Vienna Convention, Article 31.
[11] *See* U.S. Appellant Submission, paras. 96-114.
[12] *See* Panel Report, paras. 7.22, 7.190.
[13] *See* U.S. Appellant Submission, paras. 87-90.
[14] *See EC – Bed Linen (AB)*, para. 55.

transaction comparison methodology is "the reference to 'a comparison' in the singular" and the term "basis."[15]

11. There simply is no comparable textual foundation 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.

12. Second, as a contextual matter, while the Appellate Body has previously discussed contextual elements that support its textual interpretations, including, *inter alia*, the terms "dumping" and "margin of dumping," those contextual elements do not support a finding that the use of zeroing is prohibited when applying the alternative comparison methodology pursuant to the second sentence of Article 2.4.2. The Appellate Body has never found that the "concepts of 'dumping' and 'margin of dumping'"[16] themselves impose a prohibition on zeroing. The Appellate Body has been far more cautious than that. Indeed, at the same time that it has found zeroing prohibited under various comparison methodologies, including based on a contextual analysis of the terms "dumping" and "margin of dumping," the Appellate Body has qualified those findings, emphasizing that it was not making a finding about the permissibility of zeroing under the second sentence of Article 2.4.2.[17]

13. A proper contextual analysis, as we have demonstrated, reveals that the use of zeroing is permissible – indeed, it is necessary – in connection with the alternative, average-to-transaction comparison methodology.[18] It is of particular relevance, contextually, that the comparison methodology set forth in the second sentence is an "exception"[19] to the comparison methodologies set forth in the first sentence.

14. As an exception, the alternative comparison methodology logically *should* "lead to results that are *systematically* different"[20] from the two comparison methodologies that are to be used "normally." If the exceptional comparison methodology will always yield the same result as the normal methodologies, there is no reason for Members to have agreed that specific conditions must be met before the exceptional methodology may be used. Indeed, there is no reason for Members to have agreed to include an exceptional methodology at all.

15. The U.S. appellant submission discusses what has been called the mathematical equivalence argument.[21] The concept of mathematical equivalence is critical to the resolution of the interpretative questions before the Appellate Body. If a proposed interpretation of the AD Agreement would lead to the exceptional, average-to-transaction comparison methodology yielding, in all cases, results that are identical to the results of the "normally"-used average-to-average comparison methodology, then that proposed interpretation is revealed as flawed and

[15] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.
[16] Korea Appellee Submission, paras. 8, 42, 46, 50, 52, 53, 90, 162.
[17] *See US – Stainless Steel (Mexico) (AB)*, para. 127; *US – Zeroing (Japan) (AB)*, para. 136; *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98.
[18] *See* U.S. Appellant Submission, paras. 96-114.
[19] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 86; *see also, id.*, para. 97; *see also US – Zeroing (Japan) (AB)*, para. 131.
[20] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93 (emphasis added).
[21] *See* U.S. Appellant Submission, paras. 115-195.

cannot be accepted. Such an interpretation would render the second sentence of Article 2.4.2 ineffective, and would reduce Members' agreement to that sentence to a nullity. That is precisely what would happen if the Appellate Body accepts Korea's arguments concerning zeroing and the USDOC's approach to the application of a "mixed" comparison methodology.

16. The United States has demonstrated mathematical equivalence, and that demonstration has not been rebutted. The dispute between the parties is not about arithmetic or algebra. The dispute is about so-called "assumptions," including that weighted-average normal value and adjustments for price comparability are the same under both the average-to-average comparison methodology and the average-to-transaction comparison methodology. The Panel agreed with those "assumptions," which is to say the Panel agreed that nothing in the text of the AD Agreement suggests that weighted-average normal value should be calculated differently or that different adjustments should be made to export prices under the different comparison methodologies.[22]

17. Korea wants to manipulate variables in one of the equations but not the other as part of its effort to "break" or "avoid" mathematical equivalence.[23] Korea never explains, though, *why* manipulation or adjustment of the calculation of normal value, which is based on sales prices in the *home* market, would be an appropriate way to take into account a pattern of prices that differ significantly in the *export* market.

18. Instead, Korea suggests that manipulating normal value or making different adjustments to export prices "would allow a more precise comparison,"[24] which Korea belatedly proposes is the true purpose of the second sentence of Article 2.4.2 of the AD Agreement.[25] Korea's suggestion is illogical and simply is not credible. The transaction-to-transaction comparison methodology, set forth in the first sentence of Article 2.4.2, already provides an investigating authority with the possibility of undertaking what Korea calls a "granular examination of individual export prices,"[26] as well as individual normal value sales transactions. It is not necessary for an investigating authority to establish the conditions in the second sentence of Article 2.4.2 before resorting to the transaction-to-transaction comparison methodology. Given that the alternative, average-to-transaction comparison methodology is an exception to the comparison methodologies to be used normally, it does not "make sense"[27] that the purpose of the exceptional methodology is to permit a kind of analysis that an investigating authority may undertake under normal circumstances. Furthermore, it is likely that, in reality, Korea's suggestion would only serve to prompt additional disputes focusing on the subjective nature of selecting alternative normal values and making new adjustments.

19. The United States has acknowledged that changing the temporal basis for the calculation of weighted-average normal value *could* result in somewhat different outcomes, as could making different adjustments to export prices, though the actual outcome in any given situation would be

[22] *See* Panel Report, paras. 7.165-166.
[23] Korea Appellee Submission, para. 74.
[24] Korea Appellee Submission, para. 75.
[25] Korea Other Appellant Submissions, paras. 115-134.
[26] Korea Other Appellant Submission, para. 197.
[27] Korea Other Appellant Submission, para. 118.

unpredictable. However, the possibility of achieving different mathematical outcomes through illogical and strained manipulations of normal value and export prices proves nothing. Even if Korea could successfully "break" mathematical equivalence with such contortions, it still would have done nothing to give meaning to the second sentence of Article 2.4.2 of the AD Agreement. Getting an unpredictably different mathematical result by using different normal values or making different adjustments for price comparability does not ensure that a pattern of export prices that differ significantly among different purchasers, regions, or time periods can be "taken into account appropriately."[28]

20. In sum, the objections to the mathematical equivalence argument raised by Korea and certain third participants are not well founded, and no Member, nor the Panel, has provided an alternative understanding of the second sentence of Article 2.4.2 that would give meaning to that provision without using zeroing. Australia[29] and the European Union[30] have come to the same conclusion as the United States on the question of mathematical equivalence and the use of zeroing in connection with addressing "targeted" dumping. It also appears that the economist to whose work Japan referred in its third party written submission to the Panel agrees that "[t]he average-to-average and average-to-transaction method would result in the same duty were it not for the use of zeroing."[31] Korea itself even demonstrated mathematical equivalence in its own Exhibit KOR-93. The first two columns of Table 7, on page 11 of Exhibit KOR-93 show that, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the washers antidumping investigation, and that is also the case with respect to hypothetical data that Korea presents in the first example in Exhibit KOR-93.[32]

21. Finally, we recall that the U.S. appellant submission explains how documents from the negotiating history of the AD Agreement confirm that the use of zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2.[33] What these negotiating history documents establish is that the purported problem

[28] AD Agreement, Article 2.4.2, second sentence.
[29] *See* Australian Government, Anti-Dumping Commission, *Statement of Essential Facts No. 219: Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* (18 September 2014), p. 49 (Exhibit USA-33), *affirmed in Anti-Dumping Notice No. 2014/132: Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam* (10 December 2014) (Exhibit USA-34).
[30] Council of the European Union, *Council Implementing Regulation No. 78/2013*, of 17 January 2013, *imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain tube and pipe fittings of iron or steel originating in Russia and Turkey*, para. 31(Exhibit USA-35).
[31] Exhibit JPN-3, p. 17.
[32] Exhibit KOR-93, paras. 13 and 23, and Tables 2 and 4 (demonstrating that applying the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing), based on the same annual weighted-average normal value and same export transactions, results in a "5%" overall dumping margin under both methodologies.).
[33] U.S. Appellant Submission, paras. 196-206.

with the asymmetrical comparison methodology was that zeroing was an inherent feature of that comparison methodology.[34]

22. Indeed, Japan's proposed solution to what it viewed as a problem was to "disallow the practice of calculating 'normal value' on an average basis and then to compare it to 'export price' on an individual basis."[35] Similarly, Hong Kong described its concerns with asymmetrical comparisons and the treating of "the 'negative' dumping margin … as zero."[36] Like Japan, Hong Kong "propose[d] 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."[37]

23. Neither Japan nor Hong Kong mentioned "zeroing" in their proposed changes to the Antidumping Code. Evidently, neither viewed doing so as necessary. It was sufficient that the revised Code require the use of symmetrical comparisons, which would, by necessity, in their view, preclude the use of the zeroing methodology about which they had expressed concerns.

24. But Article 2.4.2 of the AD Agreement, as agreed by the WTO Members, does not impose an absolute prohibition on the use of asymmetrical comparisons. Members are required to use one of the symmetrical comparison methodologies "normally," but may use an asymmetrical comparison methodology when certain conditions are met.

25. Given that the Appellate Body has grounded its view on zeroing in the text of the first sentence of Article 2.4.2 (*i.e.*, "all comparable export transactions", "basis", and "a comparison"), and given the absence of any express reference to zeroing in Article 2.4.2, either prohibiting its use or allowing it, the cited negotiating history documents are consistent with the view that the use of zeroing is impermissible in connection with the application of the symmetrical comparison methodologies, but its use is allowed in connection with the application of the alternative, asymmetrical comparison methodology.

26. The text of Article 2.4.2 therefore reflects a balance of the interests of Members. The United States agreed to discontinue its practice at the time of primarily using an asymmetrical comparison methodology in favor of "normally" using one of the symmetrical comparison methodologies going forward. Japan and Hong Kong, and other *demandeurs*, agreed, as a compromise, that, while an asymmetrical comparison methodology was "normally" not to be

[34] *See Communication from Japan*, GATT Doc. No. MTN.GNG/NG8/W/81, p. 2 (July 9, 1990) (Exhibit USA-17) (italics added; underlining in original); *see also* U.S. First Written Submission, para. 248; *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); *see also* U.S. First Written Submission, para. 247; *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).
[35] *Communication from Japan*, GATT Doc. No. MTN.GNG/NG8/W/81, p. 2 (July 9, 1990) (Exhibit USA-17) (italics added; underlining in original); *see also* U.S. First Written Submission, para. 248.
[36] *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); *see also* U.S. First Written Submission, para. 247.
[37] *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).

used, its use would be permissible under certain conditions. The compromise is evidenced on the face of Article 2.4.2,[38] and is confirmed by reference to documents from the negotiating history. Korea asks the Appellate Body to upend this agreed balance of interests by reading the second sentence of Article 2.4.2 out of the AD Agreement. It is imperative that the Appellate Body reject Korea's request to rewrite the text that was agreed by Korea and all WTO Members.

27. With respect to the remaining antidumping issues on appeal, in the interest of time, the United States simply notes that it continues to rely on the arguments presented in its written submissions. We look forward to further clarifying those arguments in response to any questions the Appellate Body may have.

Countervailing Duty Issues

28. We now turn to the countervailing duty issues in this dispute. Korea appeals the Panel's findings with respect to two subsidy programs: RSTA Article 10(1)(3), which provides tax credits to companies for investments in "research and human resources development," and RSTA Article 26, which provides tax credits for eligible investments in facilities. It is undisputed that, under these programs, Samsung received approximately KRW[[***]], equivalent to USD[[***]].[39] Korea has not contested the findings of the U.S. International Trade Commission with respect to the injury caused by these subsidies.

29. In this appeal, Korea challenges the Panel's rejection of three claims, but Korea's arguments are no more correct or persuasive now. Korea argues that the USDOC erred (1) in finding that the RSTA Article 26 program was regionally specific – yet the RSTA Enforcement Decree explicitly identifies, by name, the region ineligible for program benefits (and by implication the region that is eligible for benefits); (2) in calculating the overall subsidy ratio for Samsung on an "untied" basis – even though the tax credits were not bestowed "on" or "upon" the manufacture, production, or export of a particular product; and (3) in not including sales of goods manufactured by Samsung's overseas affiliates in the denominator of the subsidy ratio – even though the subsidy was conferred by the Korean government exclusively on Korean recipients, who did not carry out any overseas manufacturing. As discussed in the U.S. appellee submission, Korea's arguments on appeal with respect to these claims have no basis in the text of the SCM Agreement or GATT 1994, much less the factual record. We highlight a few key points now.

Regional specificity

30. Turning first to regional specificity, it is beyond dispute that the Government of Korea has imposed a regional limitation on access to subsidies under RSTA Article 26. Article 2.2 of the SCM Agreement provides 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." Here, subsidies are only available for investments in newly-acquired facilities located in a designated geographical region – i.e., the territory of Korea that falls outside the "Seoul

[38] *See* EU Third Participant Submission, para. 53.
[39] Final Samsung CVD Calculation Memorandum, Attachments 6, 9 (Exhibit USA-26) (BCI).

overcrowding region." As the Panel's findings confirm, this program falls squarely within Article 2.2.

31. Korea argues that the Panel should have accepted Korea's argument that, to fall within Article 2.2, a subsidy program must be both (1) limited to a designated geographical region, and (2) limited to the location of an individual recipient's "legal personality."[40] This argument is similar to Korea's assertion before the Panel that specificity must be established on a "double basis."[41] But as the Panel explained, and other reports have confirmed, Article 2.2 does not call for a double inquiry, or imply that only a subset of regionally specific subsidies – those that are limited based on legal personality – fall within its scope.[42]

32. Korea's theory rests on a host of improbable arguments, which defy logic and have no basis in Article 2.2. For instance, Korea asserts that an "enterprise" can never be located at its "facilities"[43] – even though the SCM Agreement provides no textual support for a "headquarters" approach, and an enterprise plainly "takes up business" and is "established" in those facilities.[44] Korea also seeks to graft "benefit" concepts onto Article 2.2, such that the only "location" of relevance is the place where a benefit is conferred[45] – even though this argument lacks a textual basis and the Appellate Body has rejected this type of reasoning.[46]

33. Korea also argues that where a subsidy measure employs language designating a region that is excluded from its scope, no geographic region is "affirmatively designated."[47] This argument is untenable: such an exclusion also designates the region that is included and eligible for subsidies.[48] And Korea goes so far as to deny the common-sense notion that "enterprises" can have multiple locations.[49]

34. Korea's "large region" theory is particularly problematic, as it would exempt from Article 2.2 any program for which the designated region is deemed sufficiently "large." Nothing in Article 2.2 supports this exemption. The text is not qualified in any way, confirming that the designation of any geographical region, large or small, is sufficient for purposes of Article 2.2.[50] The European Union agrees.[51]

35. Korea attempts to justify its position through "policy" arguments, and asserts that the Panel's approach would "improperly constrain Members' ability to take corrective measures" with respect to overcrowding and urban sprawl.[52] But the application of Article 2.2 does not

[40] Korea Other Appellant Submission, paras. 238, 263.
[41] Panel Report, paras. 7.284-7.288.
[42] Panel Report, paras. 7.266-7.274, 7.286-7.288.
[43] Korea Other Appellant Submission, para. 238.
[44] Panel Report, para. 7.270.
[45] Korea Other Appellant Submission, paras. 235-240, 263.
[46] U.S. Appellee Submission, paras. 232-237.
[47] Korea Other Appellant Submission, paras. 280-282.
[48] U.S. Appellee Submission, paras. 252-253.
[49] Korea Other Appellant Submission, para. 253.
[50] U.S. Appellee Submission, paras. 254-265.
[51] EU Third Participant Submission, para. 130.
[52] Korea Other Appellant Submission, para. 288.

hinge on the policy objective supporting a program. The fact that a subsidy program may seek to address "urban sprawl" by encouraging development in another region does not take the program outside the scope of Article 2.2.

36. Korea represented to the Panel that the RSTA Article 26 program is intended to address overcrowding in the Seoul overcrowding area by "encouraging investments in the other 98 percent of Korea's territory."[53] A program that intends to encourage investment in a designated region by limiting eligibility to facilities located within that region is precisely what Article 2.2 was designed to address. Exceptionally, Article 8.2(b) of the SCM Agreement applied to render regional assistance programs non-actionable, if certain criteria were met. This provision lapsed, however. As a consequence, such programs fall within Article 2.2.

"Tying"

37. Korea's "tying" claim is equally deficient. Under Korea's approach, a tax credit would be "tied" to a product wherever the activity associated with a qualifying expenditure has some effect on that product. Korea's effects theory contrasts with the inquiry suggested by Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. These provisions suggest that, 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 a subsidy are a key consideration.

38. In other words, the question is whether subsidies have been bestowed on a product – not whether underlying activities may have had an effect on that product. As the Panel found, "[i]t is the 'proceeds of the tax credit' – rather than the underlying R&D activity – that constitute the subsidy. That subsidy is only provided at the time that the tax credit is provided."[54]

39. Here, the facts confirm that the R&D and facilities subsidies at issue were not bestowed on a particular product:

- The RSTA legislation did not specify any product-specific tie, and eligibility criteria were not limited by product type.[55] In this respect, the Panel emphasized that the RSTA programs did not require that the recipient use subsidies in connection with a particular product.[56]

- In addition, the structure, architecture, and design of the RSTA subsidy programs did not reflect a product-specific tie. As the Panel found, the tax credits were conferred by reference to "total R&D activities."[57] Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on how the expenses

[53] Korea Opening Statement at the First Panel Meeting, para. 90 (emphasis added).
[54] Panel Report, para. 7.304.
[55] Washers Final CVD I&D Memo, pp. 11-12, 41-42 (Exhibit KOR-77).
[56] Panel Report, paras. 7.303, 7.305, 7.306; Washers Final CVD I&D Memo, pp. 11-12, 41-42 (Exhibit KOR-77); Korea First Written Submission, para. 250; *see also* Samsung Washers Verification Report, Ex. 10 (Exhibit KOR-79) (BCI).
[57] Panel Report, para. 7.303.

related to *aggregate* and *average* expenses for the company's entire domestic operations over the previous four years.[58]

- Moreover, Samsung's tax return did not indicate any intent to use RSTA subsidies in connection with a particular product, and the granting authority did not acknowledge such a product-specific use at the time of bestowal.[59] As the Panel observed, Korea stated in its questionnaire responses that "the tax return did not specify the merchandise for which this reduction was to be provided."[60]

Overseas manufacturing

40. Korea's appeal of the Panel's findings with respect to its overseas manufacturing claim is equally without merit.

41. Here, again, Korea relies exclusively on the alleged overseas effect of R&D activity – not on facts relating to the bestowal of subsidies. Not surprisingly, and appropriately, the Panel rejected this theory. The Panel observed that "[t]he positive effect of the underlying R&D alluded to by Korea does not constitute 'benefit' within the meaning of Article 1.1(b) of the SCM Agreement."[61]

42. The Panel further explained that "the fact that the underlying R&D activities may have been beneficial to the production operations of Samsung's overseas subsidiaries does not mean that the benefit conferred by the tax credit subsidies also passed through to those overseas operations."[62] Contrary to Korea's assertion,[63] the Panel did not posit a "pass-through" requirement here. Instead, the Panel underscored the incoherence of Korea's theory. That is, the overseas effect of an activity is not a valid basis for attributing subsidies, and does not in any sense "bestow" subsidies on those overseas subsidiaries. One does not follow from the other.

43. And, here, the facts do not remotely suggest the bestowal of subsidies on overseas manufacturing. RSTA Article 10(1)(3) subsidies are only available to Korean companies, and only with respect to R&D activities that occur in Korea. In the investigation, Korea made clear that this program is intended to subsidize Korean R&D and thereby "boost the general national economic activities"[64] – not overseas production.

44. The structure of this program is reflected in the tax returns filed by Samsung, which do not identify or include any R&D occurring outside Korea, or otherwise indicate an intent by Korea to subsidize overseas production.[65] And as the Panel observed, "the recipients of the tax credit subsidies (Samsung and its Korean affiliates) only produced in the territory of the

[58] Washers Final CVD I&D Memo, pp. 41-42 (Exhibit KOR-77).
[59] Panel Report, para. 7.303.
[60] Panel Report, para. 7.303 (quoting Samsung April 9, 2012 QR at Ex. 24, p. 2 (Exhibit KOR-72)).
[61] Panel Report, para. 7.318.
[62] Panel Report, para. 7.319 (emphasis supplied).
[63] Korea Other Appellant Submission, para. 370.
[64] U.S. Appellee Submission, para. 431 (quoting GOK April 9, 2012 QR at App. Vol. 108 (Exhibit KOR-75)).
[65] U.S. Appellee Submission, para. 431.

subsidizing Member."[66] These findings further confirm that the overseas manufacturing at issue was conducted by Samsung's overseas affiliates (not Samsung or its Korean affiliates), and that these overseas affiliates did not carry out qualifying activities or receive subsidies themselves.[67]

45. In short, subsidies were not "bestowed" on the manufacturing, production, or export of goods overseas. There is no legal or factual basis for Korea's theory.

Conclusion

46. Presiding Member, members of the Division, this concludes our opening statement. We would be pleased to respond to your questions.

[66] Panel Report, para. 7.319.
[67] Panel Report, paras. 7.318 n.539, 7.319.