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

**(AB-2016-2 / DS464)**

# APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

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# I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. Korea appeals a number of Panel findings related to the U.S. antidumping and countervailing duty measures that Korea has challenged in this dispute. As demonstrated in this submission, the Panel did not err in its interpretation and application of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Additionally, as shown below, Korea's various claims that the Panel acted inconsistently with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") lack merit.

2. The U.S. appellee submission is organized as follows, and includes detailed discussion of, *inter alia*, the following arguments.

3. Section II.A responds to Korea's appeal of the Panel's findings related to the approach of the U.S. Department of Commerce ("USDOC") to the application of a "mixed" comparison methodology. In Korea's view, the Panel should have found the USDOC's approach inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement for the same reasons that it found zeroing inconsistent with those provisions of the AD Agreement. The Panel was correct to reject Korea's claims. Indeed, if, as the Panel found, the alternative comparison methodology can only be applied to a subset of sales, then the Panel's finding with respect to a "mixed" comparison methodology is the only way to interpret the second sentence of Article 2.4.2 so as to give meaning to this key provision of the AD Agreement.

4. Korea fails to offer any legal argument against the USDOC's approach that would accord with the customary rules of interpretation as to why mandatory re-masking is required under the second sentence of Article 2.4.2 of the AD Agreement. Instead, Korea argues that the USDOC's approach is the "functional equivalent of zeroing," and Korea asserts that previous Appellate Body findings are dispositive of its claims. Korea's arguments lack any merit.

5. 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. This dispute presents an issue of first impression for the Appellate Body.

6. To the extent that the USDOC's approach to the application of a "mixed" comparison methodology can be likened to zeroing, the U.S. appellant submission demonstrates 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. Additionally, the U.S. appellant submission shows that the application of the alternative, average-to-transaction comparison methodology to all sales (with zeroing) is not inconsistent with Article 2.4.2 of the AD Agreement.

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[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 4,130 words (including footnotes), and this U.S. appellee submission (not including the text of the executive summary) contains 48,435 words (including footnotes).

7. There is no legal basis for finding that the USDOC's approach to the application of a "mixed" comparison methodology is impermissible. Where an investigating authority applies the average-to-transaction comparison methodology to fewer than all export prices, the AD Agreement does not obligate the investigating authority to offset or re-mask the evidence of dumping that has been unmasked through the use of average-to-transaction comparisons. Korea's arguments in support of its position lack merit.

8. The Panel did not find that "individual low prices" can be "dumped" or that "dumping" can "exist at the level of individual export prices." The Panel found that the second sentence of Article 2.4.2 of the AD Agreement provides a means for investigating authorities "to ensure that any <u>evidence of dumping</u> with regard to [pattern transactions] <u>is not masked</u> by non-dumping in respect of transactions falling outside of the pattern." When the price of an export transaction is below normal value, that may, indeed, be "evidence of dumping." When the price of an export transaction is above normal value, that may be evidence suggesting that no dumping has occurred. However, such a price also could be masking evidence of dumping under certain circumstances, such as when the "stringent conditions" set forth in the second sentence of Article 2.4.2 of the AD Agreement have been established.

9. Contrary to Korea's argument, the second sentence of Article 2.4.2 establishes "special rules." The Panel was right to interpret the second sentence of Article 2.4.2 as being an exception to the first sentence of Article 2.4.2, and as setting forth a special methodology for establishing margins of dumping that may be used when certain conditions are met.

10. The United States does not disagree that all of an exporter's export transactions must be "taken into account" in the determination of dumping. The USDOC's approach does, in fact, take account of all export transactions. What Korea really means, however, is that evidence of "targeted dumping" must be re-masked by aggregating all results for all transactions in the numerator of the calculation of the margin of dumping. Korea provides no legal or logical basis for this conclusion.

11. Korea's arguments raise the question of what it means for an export transaction to be "consider[ed]" or "taken into account." To the extent that certain export transactions may be masking "evidence of dumping," it is appropriate for those export transactions to be "taken into account" in a way that prevents such masking.

12. The weakness of Korea's appeal is evidenced by Korea's astonishing attempt to contest the clear and obvious role of the second sentence of Article 2.4.2 within the context of the AD Agreement as a whole. Korea now argues that the "purpose" of the second sentence "is simply to allow the authority to undertake the more careful examination of individual export prices that the [average-to-transaction] method makes possible." Korea's argument makes no sense. If Korea were correct, there would never be any reason for an investigating authority to resort to the alternative, average-to-transaction comparison methodology described in the second sentence of Article 2.4.2. 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 such a "granular examination of individual export prices," and also individual normal value sales transactions.

13. The only logical conclusion, as the Appellate Body has itself observed, and as the Panel, both of the parties (at one time or another), and all but one of the third parties in this dispute agreed, is that the second sentence of Article 2.4.2 of the AD Agreement is intended "to enable investigating authorities to 'unmask' so-called 'targeted dumping'."

14. Korea's arguments related to mathematical equivalence lack merit. The U.S. appellant submission discusses the Appellate Body reports in prior disputes to which Korea refers and demonstrates that the Appellate Body's previous consideration of mathematical equivalence neither supports rejection of the mathematical equivalence argument in this dispute, nor compels it. Korea also contends that the Panel "provided no support" for its mathematical equivalence finding. However, it is evident from the panel report that, after considering the positions of the parties, the Panel agreed with the United States and did not agree with Korea.

15. The U.S. appellant submission conclusively demonstrates mathematical equivalence. It is evident from Korea's arguments regarding different weighted average normal values and different adjustments that breaking mathematical equivalence is Korea's goal. Korea is not seeking an interpretation that gives meaning to the second sentence of Article 2.4.2 of the AD Agreement. On the contrary, Korea seeks to read the second sentence of Article 2.4.2 out of the AD Agreement entirely. Such an interpretation is inconsistent with the customary rules of interpretation of public international law, in particular the principle of effectiveness.

16. Korea also argues that the Panel erred in finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent, "as such," with Article 2.4 of the AD Agreement. Korea's arguments concerning Article 2.4 are dependent on its arguments concerning Article 2.4.2, and lack merit for the same reasons. Additionally, Korea requests that the Appellate Body complete the legal analysis, but the reasons Korea gives for doing so are not availing, and the Appellate Body should reject Korea's request.

17. Section II.B responds to Korea's appeal of certain Panel findings related to the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement. The "pattern clause" sets forth the first of the two conditions for using the alternative, average-to-transaction comparison methodology, and provides that an investigating authority may utilize the alternative comparison methodology "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods."

18. Korea argues that the Panel mischaracterized its claim, as if Korea's claim were solely that an investigating authority must state the "reasons" why export prices differ. Korea alleges that the Panel "recast[] Korea's argument into something different from – and substantially narrower than – what Korea actually argued." Korea contends that, by recasting its claim too narrowly, the Panel failed to address the claim that Korea actually made, which, Korea asserts, related to the obligation to undertake a qualitative analysis when determining whether there exists a "pattern" of export prices which differ "significantly." The Panel did not mischaracterize Korea's claims.

19. Korea appears to misunderstand the difference between claims and arguments. Consistent with the DSU and prior Appellate Body guidance, Korea's "claims" necessarily are

those set forth in Korea's request for the establishment of a panel. The two relevant claims set forth in Korea's panel request relate to the "reasons" or "explanations" for why export prices differ – or the factors to which the pattern of export prices is "attributable" – and the USDOC's decision not to consider the reasons why export prices differ as part of its analysis. Neither claim refers more broadly to an obligation to examine so-called "qualitative aspects." The Panel examined Korea's panel request and correctly understood the nature and scope of Korea's claims. On appeal, Korea attempts to expand its claims beyond what is set forth in its panel request. That is not possible, and Korea's attempt should be rejected.

20. Korea also argues that the Panel incorrectly interpreted the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, and erroneously found that it does not require an investigating authority to examine the reasons why export prices differ. Korea's arguments lack merit.

21. The Panel agreed that the term "significantly" has a qualitative dimension as well as a quantitative dimension. However, the Panel did not agree with Korea that it follows from this that an investigating authority is obligated to assess the "reasons" why export prices differ when it is determining whether there exists a pattern of export prices which differ significantly.

22. Korea is incorrect when it suggests that the Panel "dismissed" the *US – Upland Cotton* panel report and the *US – Large Civil Aircraft (Second Complaint)* Appellate Body report. On the contrary, the Panel appropriately relied on those reports as support for its own interpretative conclusions. The Panel correctly noted, however, that those reports do not support Korea's argument that the underlying reasons are relevant to an examination of significance.

23. Korea's understanding of the term "significant" would read the quantitative dimension out of that term, necessitating an exclusive focus on Korea's understanding of the qualitative dimension. In Korea's view, any numerical difference in export prices can be explained away. Korea's proposed interpretation is 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."

24. Section II.C responds to Korea's appeal of certain Panel findings related to the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement. The "explanation clause" sets forth the second of two conditions for using the alternative, average-to-transaction comparison methodology, and provides that an investigating authority may utilize the alternative comparison methodology "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."

25. Korea argues that the Panel incorrectly interpreted the "explanation clause" by finding that it does not require an investigating authority to provide an explanation regarding both the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. Korea's arguments lack merit. The Panel's interpretation follows from a proper analysis pursuant to the customary rules of interpretation of public international law. Korea's proposed interpretation fails to read the terms of the "explanation clause" in their proper context,

in particular in the context of the first sentence of Article 2.4.2, which affords an investigating authority discretion in selecting whether to use the average-to-average comparison methodology or the transaction-to-transaction comparison methodology.

26. Korea's proposed interpretation also does not accord with prior Appellate Body guidance concerning the relationship of the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. 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."

27. Korea's proposed interpretation also is not logical. Logically, if an investigating authority is free to choose between the average-to-average comparison methodology and the transaction-to-transaction comparison methodology, and those 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.

28. Finally, Korea's concern about the purported "potential for serious abuse" lacks foundation, both in the evidentiary record before the Panel and in logic. Korea appears to suggest that an investigating authority might first opt to use the average-to-average comparison methodology, and then, when considering whether to use the alternative, average-to-transaction comparison methodology, explain only why the transaction-to-transaction comparison methodology could not take into account appropriately the pattern of export prices which differ significantly. Of course, this is not what the USDOC did in the washers antidumping investigation, nor has Korea pointed to any evidence that its concern has ever manifested itself in any USDOC determination.

29. Furthermore, in light of previous Appellate Body guidance, an investigating authority is obligated to reach conclusions that are "reasoned and adequate," and the investigating authority's reasoning must be "coherent and internally consistent." The hypothetical scenario Korea about which Korea speculates likely would not meet those requirements.

30. In section III, we address Korea's appeal of certain Panel findings with respect to the USDOC's countervailing duty determination.

31. Section III.A addresses Korea's claim that the Panel erred in rejecting its specificity claim with respect to RSTA Article 26. Contrary to Korea's assertions in this appeal, the Panel was faced with 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."

32. The RSTA Article 26 subsidy program is expressly limited to investments in newly-acquired facilities located in a designated geographic region – i.e., the territory of Korea that falls outside the "Seoul overcrowding area." The Panel appropriately found no error in the USDOC's determination that this express limitation on access to a designated region rendered the subsidies regionally specific.

33. On appeal, Korea asserts a series of increasingly untenable legal and factual arguments.

34. Korea adduces a narrow, results-oriented reading of Article 2.2 of the SCM Agreement. According to Korea, the phrase "certain enterprises" in Article 2.2 means that regional specificity exists only where access to a subsidy is limited to the "legal personality" of enterprises falling within the region. On this theory, an enterprise can only have a single "location" – i.e., the "place" of its legal personality (despite the fact that an enterprise's legal personality is a fiction, and may not be affixed to a particular location).

35. The Panel correctly rejected this interpretative legerdemain. As the Panel observed, this line of reasoning is inconsistent with the text, context, and rationale of Article 2.2. Article 2.2 applies to situations in which access to subsidies is limited to a designated geographical region. The term "certain enterprises," which appears in Article 2.2, does not imply an additional requirement – i.e., that subsidies also must be limited with respect to the "location" of an individual enterprise's legal personality. Such a reading would be inconsistent with the definition of "certain enterprises" found in the chapeau of Article 2.1(a) of the SCM Agreement, and the ordinary meaning of the terms within that definition. Nor is Article 2.2 restricted to the location in which an enterprise happens to receive the "benefit" of a subsidy (which may or may not correspond to the location of that enterprise's "legal personality"). Korea's attempt to conflate concepts of "benefit" and specificity is improper.

36. And Korea's approach would create gaping loopholes where the text does not provide for them. Korea draws a sharp distinction between an "enterprise" and its "facilities," asserting that the latter are somehow excluded from the former and irrelevant to Article 2.2. This interpretation would permit RSTA Article 26 subsidies – which are available with respect to "facilities" that are located in a designated region – to evade scrutiny under the SCM Agreement.

37. In addition, Korea effectively re-asserts its argument that there is a "hierarchy" between Articles 2.1(b) and 2.2 of the SCM Agreement. The Panel correctly rejected this theory. There is no textual or logical basis for the assertion that a finding of regional specificity under Article 2.2 is subject to a finding under Article 2.1(b).

38. Korea criticizes the Panel's interpretation and application of the phrase "designated geographical region" in Article 2.2. Korea complains that the Panel should have adopted a series of results-oriented interpretations – for instance, finding in Article 2.2 an alleged requirement that a Member "affirmatively" designate a geographical region for a subsidy to be regionally specific. But the Panel correctly reasoned that Korea's argument would mean that where a Member expressly identifies a region in which access to subsidies is <u>excluded</u>, there is no "affirmative" designation of a region, despite the fact that such a designation would also make clear which geographical region is <u>included</u>, and have the same effect. The Panel correctly

found that Article 2.2 does not include the "affirmatively" identify requirement Korea seeks to read into the text, which would reduce the inquiry under Article 2.2 to a semantic game, inviting ready circumvention of subsidy disciplines.

39. Korea then falls back on the "object and purpose" of Article 2.2, arguing that regional specificity is a "flexible" test, based on a sliding scale. But where the text of the measure limits access to a designated geographical region, no amount of "flexibility" makes it contrary to Article 2.2 to find that the subsidy is regionally specific. Among its many deficiencies, this argument would create a carve-out of certain regions from Article 2.2 that is nowhere found in the text, and fundamentally distort the nature of the inquiry under this provision.

40. Korea deploys "policy" arguments to buttress its critique. Korea asserts that subsidies are often a "first-best policy," and suggests that the Panel's interpretation would "improperly constrain" Member's ability to provide subsidies that address "overcrowding and urban sprawl." Korea goes so far as to impugn the Panel for having "impose[d] its own preferences on Members." The Panel did nothing of the sort, and this argument provides no basis to conclude that it is contrary to Article 2.2 to find a subsidy regionally specific where the text of the subsidy limits access to a designated geographical region.

41. Finally, Korea asserts two claims under Article 11 of the DSU. Korea asserts that the Panel's interpretation of Article 2.2 was insufficiently "positive" and "coherent," and makes the facially implausible claim that the Panel "completely fail[ed] to review" the USDOC's determination. These arguments are unsupported, and have no basis in Article 11.

42. In <u>Section III.B</u>, we address Korea's arguments with respect to the USDOC's calculation of the subsidy ratio for RSTA Articles 10(1)(3) and 26. Korea impugns the USDOC's decision to calculate these ratios in an "untied" manner. According to Korea, the USDOC should have employed a novel variation of the "tied" approach to attribution. Under Korea's theory, the USDOC should have carved up both the numerator and denominator of the subsidy ratio, based on a forensic accounting analysis of R&D and facilities expenses previously incurred.

43. The Panel appropriately rejected Korea's novel theory. As the Panel found, Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require that approach. Korea's theory is based on the alleged effect – which Korea misleadingly refers to as the "benefit" – of <u>expenses</u> that were incurred and associated <u>activities</u> that were undertaken well before the subsidy was bestowed. The Panel observed that the concept of an "expense" or "activity" conferring a "benefit" is alien to the SCM Agreement.

44. As the Panel's findings and record demonstrate, the R&D and facilities subsidies at issue lacked a "tie" to particular products:

- The RSTA legislation did not specify any product-specific tie, and eligibility criteria were not limited by product type. In particular, the legislation did not require that the recipient use subsidies in connection with a particular product.

- 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." Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on formulas that related to *aggregate* and *average* expenses for the company's entire domestic operations – and not to particular products.

- Samsung's tax return did not indicate any product-specific use of RSTA subsidies, and the granting authority – the Government of Korea ("GOK") – did not acknowledge any such product-specific use at the time of bestowal.

45. Korea's remaining assertions – including its reliance on cost accounting materials from separate antidumping proceedings – are equally deficient. As the Panel explained, there is no basis for importing cost accounting principles into this countervailing duty proceeding. Nor did the Panel fail to conduct an objective assessment under Article 11 of the DSU, as Korea asserts.

46. Section III.C refutes Korea's claim with respect to overseas manufacturing. Korea criticizes the Panel for upholding the USDOC's decision not to include overseas sales in the denominator of the ratio for RSTA Article 10(1)(3) subsidies. Korea portrays this as a failure to "match" the elements in the numerator and denominator.

47. But like Korea's "tying" theory, this claim has no grounding in the bestowal of subsidies. This theory would require the attribution of subsidies based on the indirect overseas effect of R&D activity. The Panel appropriately rejected this theory.

48. 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. To the contrary, the language of these provisions suggests a focus on production activity occurring within the territory of the granting Member.

49. Korea dismisses the Panel's findings, on the grounds that the Panel improperly substituted a different rationale from the USDOC's. But it was entirely appropriate for the Panel to respond to Korea's claim in these proceedings, and assess its consistency with the SCM Agreement.

50. Korea relies heavily on cost verification documents from separate antidumping proceedings. Yet neither of these antidumping proceedings has any bearing on the subsidy attribution issue here. Even if R&D expenses or activities could be said to "benefit" or affect an overseas subsidiary for cost accounting purposes, this would not mean that subsidies should be attributed to overseas production.

51. Moreover, Korea fails to address the troubling implications of its theory. Investigating authorities would be required to conduct a jurisdiction-by-jurisdiction inquiry into how R&D activities affect production across the globe.

52. The USDOC presumed (rebuttably) that a Member grants a subsidy to benefit domestic production. Korea challenges that Panel's finding that the USDOC was entitled to conclude that

this presumption was not rebutted on these facts. Here, again, Korea relies on separate antidumping proceedings, but they cannot rebut a presumption with respect to the attribution of the "benefit" of a subsidy to overseas manufacturing.

53. Korea falls back on a series of factual arguments. Korea's apparent request to have the Appellate Body render factual findings is improper. In any event, Korea's factual assertions are inaccurate and misleading, and Korea neglects other facts which strongly militate against its theory.

## II. KOREA'S APPEAL OF CERTAIN PANEL FINDINGS CONCERNING THE AD AGREEMENT IS WITHOUT MERIT

### A. The Panel Did Not Err in Rejecting Korea's Claims Concerning the USDOC's Approach to the Application of a "Mixed" Comparison Methodology

54. Korea appeals the Panel's findings related to the USDOC's approach to the application of a "mixed" comparison methodology,[2] which the USDOC has used when it has applied a differential pricing analysis.[3] As the Panel explained, under the USDOC's approach:

> when the [average-to-transaction] comparison methodology for pattern transactions is combined with the use of the [average-to-average] or [transaction-to-transaction] comparison methodology for non-pattern transactions, any negative amount of dumping resulting from the [average-to-average] or [transaction-to-transaction] comparison methodology is set to zero.[4]

55. Before the Panel, Korea claimed that the USDOC's approach is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement, and with Article 2.4 of the AD

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[2] Before the Panel and now on appeal, Korea has described the USDOC's approach to the application of a "mixed" comparison methodology as "systemic disregarding," a term Korea coined for the purpose of attempting to advance its arguments that the USDOC's approach is somehow inconsistent with WTO rules. *See, e.g.,* Other Appellant Submission of Korea (Confidential) (April 25, 2016) ("Korea Other Appellant Submission"), para. 2. The USDOC, however, does not use this term in any of its determinations or memoranda. Moreover, the United States strongly disagrees that the USDOC's approach can fairly be characterized as "disregarding." The United States requested that the Panel use a more neutral term in the panel report. *See United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Report of the Panel, WT/DS464/R (March 11, 2016) ("Panel Report"), para. 6.92. The Panel did not accommodate the U.S. request. The Panel considered that its use of Korea's term was not "unbalanced" and explained that "in addition to referring to this term in quotation marks, we have also qualified the term with the wording 'so-called' to indicate that this term is used only as a shorthand reference." Panel Report, para. 6.94.

[3] *See* Korea Other Appellant Submission, paras. 50-153.

[4] Panel Report, para. 7.148. As explained in the U.S. Appellant Submission, the United States does not agree with and has appealed the Panel's interpretation of the relevant "pattern." *See* U.S. Appellant Submission, paras. 26-55. Additionally, the United States suggests that "any negative amount of dumping" should be read as "a negative overall comparison result" because the AD Agreement does not contemplate the possibility of "negative dumping" and the intermediate comparison result of the average-to-average comparison methodology in a "mixed" comparison methodology is not itself a margin of dumping. *See US – Zeroing (Japan) (AB)*, para. 115; *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 87.

Agreement. The Panel rejected Korea's claims,[5] reasoning, *inter alia*, that "[a]fter allowing an authority to unmask dumping in respect of pattern transactions, it makes no sense to require that authority to then *re-mask* such dumping by providing offsets for negative dumping in respect of non-pattern transactions."[6] As demonstrated below, the Panel was correct to reject Korea's claims. Indeed, if, as the Panel found, the alternative methodology can only be applied to a subset of sales, then the Panel's finding with respect to a "mixed" comparison methodology is the only way to interpret the second sentence of Article 2.4.2 so as to give meaning to this key provision of the AD Agreement.

56. On appeal, Korea argues, as it did before the Panel, that the USDOC's approach to the application of a "mixed" comparison methodology is "the functional equivalent of zeroing."[7] In Korea's view, the Panel should have found the USDOC's approach inconsistent with Articles 2.4.2 and 2.4 of the AD Agreement for the same reasons that it found zeroing inconsistent with those provisions of the AD Agreement. This argument must be rejected. What Korea argues, in essence, is that the second sentence of Article 2.4.2 requires the mandatory re-masking of below-normal value export sales. Such an interpretation is unsupportable under the text of the AD Agreement, and would render the second sentence of Article 2.4.2 inutile.

#### 1. Explanation of the USDOC's Approach to the Application of a "Mixed" Comparison Methodology

57. The Panel explained that the issue underlying Korea's claims "arises in the specific situation where the [differential pricing analysis] combines the results of applying the [average-to-transaction] comparison methodology in respect of pattern transactions with the results of applying the [average-to-average] comparison methodology in respect of non-pattern transactions."[8] As the Panel observed, "[i]f methodologies are combined, one must consider how the results of the combined methodologies should be aggregated."[9]

58. The preliminary results of the first administrative review of the washers antidumping order, which Korea submitted to the Panel,[10] provide an example of the USDOC's approach to the application of a "mixed" comparison methodology. In the "mixed" approach that the USDOC used for respondent LG in the preliminary results of the first administrative review, the USDOC compared a weighted average normal value to the prices of certain export transactions

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[5] *See* Panel Report, paras. 7.167 and 7.169.
[6] Panel Report, para. 7.162 (emphasis in original).
[7] Korea Other Appellant Submission, para. 57. *See also* Panel Report, para. 7.163.
[8] Panel Report, para. 7.161.
[9] Panel Report, para. 7.161.
[10] Before the Panel, the United States argued that the preliminary results of the first administrative review of the washers antidumping order are not within the Panel's terms of reference. In light of "as such" findings the Panel made regarding the USDOC's differential pricing analysis and the use of zeroing in connection with the alternative, average-to-transaction comparison methodology, the Panel considered that it was not necessary to address Korea's "as applied" claims related to the preliminary results of the first administrative review, nor was it necessary for the Panel to address the procedural issue of whether the preliminary results of the first administrative review fall within the Panel's terms of reference. *See* Panel Report, paras. 7.170, 7.193, 7.209. Korea has not appealed this aspect of the panel report. Nevertheless, the United States maintains on appeal that neither the preliminary nor the final results of the first administrative review are within the Panel's terms of reference.

(*i.e.*, those that passed the Cohen's *d* test) on an average-to-transaction basis, and separately compared a weighted average normal value to a weighted average of the prices of the remaining export transactions (*i.e.*, those that did not pass the Cohen's *d* test).[11] For the average-to-average comparisons, the USDOC took the sum total of the evidence of dumping (*i.e.*, the positive comparison results) and offset this amount with export sales that were greater than normal value (*i.e.*, the negative comparison results) up to the amount of the sum total of the evidence of dumping (*i.e.*, the USDOC did not use zeroing). For the average-to-transaction comparisons, the USDOC took the sum total of the evidence of dumping and made no offsets for export sales above normal value (*i.e.*, the USDOC used zeroing).

59. The USDOC then combined the sum total of the comparison results of each comparison methodology to determine the margin of dumping for the exporter and the product as a whole. In undertaking that aggregation of the comparison results, the USDOC did not permit an overall negative comparison result of the average-to-average comparison methodology to offset the evidence of dumping from the average-to-transaction comparisons. This was a logical and necessary approach because, as the Panel reasoned, after unmasking "targeted" or concealed dumping[12] by using the alternative, average-to-transaction comparison methodology, it would "make[] no sense … to then *re-mask* such dumping by providing offsets" for an overall negative comparison result yielded by application of the average-to-average comparison methodology to the remaining transactions.[13]

### 2. The USDOC's Approach to the Application of a "Mixed" Comparison Methodology Is Not Inconsistent with the Second Sentence of Article 2.4.2 of the AD Agreement

60. Korea's arguments against the USDOC's approach to the application of a "mixed" comparison methodology are devoid of any connection to the text of the AD Agreement, to the context of the second sentence of Article 2.4.2 of the AD Agreement, or to the object and purpose of the AD Agreement. Korea completely fails to offer any legal argument that would accord with the customary rules of interpretation as to why mandatory re-masking is required under the legal provision at issue, namely the second sentence of Article 2.4.2 of the AD Agreement. Instead, Korea argues that the USDOC's approach to the application of a "mixed" comparison methodology is the "functional equivalent of zeroing,"[14] and Korea asserts that previous Appellate Body are dispositive of its claims concerning the USDOC's approach.[15] Korea's arguments lack any merit.

[11] *See* Washers AD Administrative Review Preliminary Decision Memo, p. 9 (p. 8 of the PDF version of Exhibit KOR-96).
[12] *See US – Zeroing (Japan) (AB)*, para. 135; *EC – Bed Linen (AB)*, para. 62.
[13] Panel Report, para. 7.162 (emphasis in original).
[14] Korea Other Appellant Submission, paras. 57, 70.
[15] *See* Korea Other Appellant Submission, paras. 50-144.

#### a. The Appellate Body Has Never Addressed a Member's Application of the Second Sentence of Article 2.4.2 of the AD Agreement

61. Contrary to Korea's arguments and extensive discussion concerning earlier Appellate Body reports, 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, the Appellate Body has never been called upon previously to assess whether an antidumping measure adopted by a Member is consistent with the terms of the second sentence of Article 2.4.2.

62. 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.[16]

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.[17]

Accordingly, the permissibility of zeroing under the alternative, average-to-transaction comparison methodology provided in the second sentence of Article 2.4.2 and the permissibility of the USDOC's approach to the application of a "mixed" comparison methodology are novel issues for the Appellate Body.

#### b. Like Zeroing, the USDOC's Approach Is Permissible – and Necessary – when Applying the Alternative, Average-to-Transaction Comparison Methodology

63. To the extent that the USDOC's approach to the application of a "mixed" comparison methodology can be likened to zeroing, the U.S. appellant submission demonstrates 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.[18] This conclusion follows from a proper application of the customary rules of interpretation of public international law, and it is the logical extension of the Appellate Body's

[16] *See US – Stainless Steel (Mexico) (AB)*, para. 127.
[17] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98. *See also US – Zeroing (Japan) (AB)*, para. 136.
[18] *See* Appellant Submission of the United States of America (Confidential) (April 19, 2016) ("U.S. Appellant Submission"), paras. 79-218.

previous findings related to zeroing. Additionally, the U.S. appellant submission shows that the application of the alternative, average-to-transaction comparison methodology to all sales (with zeroing) is not inconsistent with Article 2.4.2 of the AD Agreement.[19]

64. Furthermore, there is no legal basis for finding that the USDOC's approach to the application of a "mixed" comparison methodology is impermissible. Where an investigating authority applies the average-to-transaction comparison methodology to fewer than all export prices, the AD Agreement does not obligate the investigating authority to offset or re-mask the evidence of dumping that has been unmasked through the use of average-to-transaction comparisons. There simply is nothing in the text of the second sentence of Article 2.4.2 that supports such an outcome. As the Panel correctly observed, "[a]fter allowing an authority to unmask dumping in respect of pattern transactions, it makes no sense to require that authority to then *re-mask* such dumping by providing offsets" for an overall negative comparison result yielded by application of the average-to-average comparison methodology to the remaining transactions.[20]

#### c. Korea's Arguments Against the USDOC's Approach to the Application of a "Mixed" Comparison Methodology Lack Merit

65. Korea's other appellant submission presents several arguments in support of Korea's position that the AD Agreement should be construed as requiring investigating authorities to re-mask below-normal-value sales identified through the application of the alternative, average-to-transaction comparison methodology. As demonstrated below, all of Korea's arguments lack merit.

66. First, Korea contends that the Panel, when considering how a "mixed" comparison methodology should be applied, "confused the distinction between intermediate comparisons for some export prices and 'dumping' based on all export prices."[21] Korea argues that, given prior Appellate Body guidance, "the concept [of] 'dumping' simply does not exist at the level of individual export prices or even partial combinations of those prices."[22] Korea's arguments are unavailing.

67. Once again, the Appellate Body has never examined a Member's application of the alternative, average-to-transaction comparison methodology in a situation where the conditions set forth in the second sentence of Article 2.4.2 have been established. Accordingly, Korea is incorrect when it argues that the Appellate Body's previous findings have already resolved the questions before the Appellate Body in this dispute.

68. Additionally, Korea misreads the panel report. The Panel did not find that "individual low prices" can be "dumped" or that "dumping" can "exist at the level of individual export prices." As explained in the U.S. appellant submission, the United States also does not argue

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[19] *See* U.S. Appellant Submission, paras. 56-78.
[20] Panel Report, para. 7.162 (emphasis in original).
[21] Korea Other Appellant Submission, para. 97; *see also¸ id.*, paras. 97-100, 102-103, 107.
[22] Korea Other Appellant Submission, para. 56.

that 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.[23] The United States is mindful that the Appellate Body has found previously that "'dumping' and 'margins of dumping' must be established for the product under investigation as a whole."[24] The Panel was mindful of this as well.[25]

69. The Panel found that the second sentence of Article 2.4.2 of the AD Agreement provides a means for investigating authorities "to ensure that any evidence of dumping with regard to [pattern transactions] is not masked by non-dumping in respect of transactions falling outside of the pattern."[26] Korea criticizes the Panel for finding "what it called 'dumping' or 'evidence of dumping' without first considering all of the exporter's sales."[27] In Korea's view, "[t]he Panel essentially found what it considered to be a separate 'margin of dumping' for each of the two subsets, instead of a single 'margin of dumping' for all export sales considered as a whole."[28] Korea's criticism is misplaced.

70. When the price of an export transaction is below normal value, that may, indeed, be "evidence of dumping," as the Panel correctly suggested. When the price of an export transaction is above normal value, that may be evidence suggesting that no dumping has occurred, or, as the Panel put it, it may suggest the "absence of dumping."[29] However, such a price also could be masking evidence of dumping under certain circumstances, such as when the "stringent conditions"[30] set forth in the second sentence of Article 2.4.2 of the AD Agreement have been established. The second sentence of Article 2.4.2 provides a means for investigating authorities to unmask such masked dumping.[31]

71. Second, Korea complains that "the Panel found that [average-to-transaction] comparisons pursuant to the second sentence of Article 2.4.2 were somehow different from comparisons in all other contexts under the Anti-Dumping Agreement and deserved special rules."[32] This, however, is no basis for complaint. The Panel was entirely correct on that point. The Appellate Body has found that "[t]he asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which are normally to be used."[33] In other words, the second sentence of Article 2.4.2 does establish "special rules."[34] The Panel was right to interpret the second sentence of Article 2.4.2 as being an exception to the first sentence of Article

[23] 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.
[24] *See, e.g., US – Zeroing (EC) (AB)*, para. 126.
[25] *See* Panel Report, para. 7.160.
[26] Panel Report, para. 7.154 (emphasis added).
[27] Korea Other Appellant Submission, para. 70.
[28] Korea Other Appellant Submission, para. 70.
[29] Panel Report, para. 7.162.
[30] Panel Report, para. 7.162.
[31] *See US – Zeroing (Japan) (AB)*, para. 135; *EC – Bed Linen (AB)*, para. 62.
[32] Korea Other Appellant Submission, para. 70.
[33] *US – Zeroing (Japan) (AB)*, para. 131; *see also US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97.
[34] Korea Other Appellant Submission, para. 70.

2.4.2, and as setting forth a special methodology for establishing margins of dumping that may be used when certain conditions are met.

72. Third, Korea argues that "[b]eyond allowing an exception to the normal comparison methods, neither the second sentence of Article 2.4.2 nor Article 2.4.2 more generally creates any exception to the basic concepts of 'dumping' and 'margin of dumping'."[35] Korea's argument is circular and unconvincing. The "basic concept" of dumping – as set out in the text of the AD Agreement – includes approaches that allow for the unmasking of targeted dumping under the rules set out in the second sentence of Article 2.4.2. Korea, however, contends that the "basic concept of dumping" does not include approaches authorized under this provision. This is plainly incorrect.

73. Further, the Panel did not find that the second sentence of Article 2.4.2 creates an exception to the "basic concepts" or "general principle" to which Korea refers, and the United States likewise does not argue that the second sentence of Article 2.4.2 creates such an exception. On the contrary, the Panel explicitly recalled the Appellate Body's previous findings on zeroing as it considered the USDOC's approach to "the determination of dumping for the product as a whole in the context of the exceptional methodology."[36]

74. Fourth, Korea argues that "[a]ny analysis within the subset is an intermediate stage in the analysis, and is not yet what can properly be considered 'dumping'."[37] This argument is beside the point, and proves nothing. The Panel did not disagree with Korea, and neither does the United States. The Panel suggested that the results of the average-to-transaction comparison methodology may be "evidence of dumping,"[38] which is to be taken into account as part of an overall analysis of all of an exporter's export transactions. This is precisely what occurs when the USDOC combines the results of the alternative, average-to-transaction comparison methodology and the average-to-average comparison methodology, without the mandatory re-masking advocated by Korea.

75. To avoid any confusion on this point, the United States notes that it does not disagree with Korea that all of an exporter's export transactions should be "taken into account" in the determination of dumping.[39] It further bears emphasis that the USDOC's approach does, in fact, take account of all export transactions. What Korea really means, however, is that evidence of "targeted dumping" must, as a matter of an obligation under the AD Agreement, be re-masked by aggregating all results for all transactions in the numerator of the calculation of the margin of dumping. Korea, however, provides no legal or logical basis for this conclusion.[40]

[35] Korea Other Appellant Submission, para. 78.
[36] Panel Report, para. 7.163.
[37] Korea Other Appellant Submission, para. 79.
[38] Panel Report, para. 7.154, 7.157, 7.160.
[39] *See* Korea Other Appellant Submission, para. 98.
[40] While the Appellate Body has addressed in prior disputes the question of the comparison results that must be included in the numerator when calculating an overall margin of dumping, none of those prior disputes involved a Member's application of the alternative, average-to-transaction comparison methodology in a situation where the conditions set forth in the second sentence of Article 2.4.2 had been established, let alone a Member's application of a "mixed" comparison methodology involving the application of the alternative comparison methodology to certain

76. Finally, Korea's arguments raise the question of what it means for an export transaction to be "consider[ed]"[41] or "taken into account"[42] when an investigating authority applies the alternative, average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2 of the AD Agreement. When a "pattern of export prices which differ significantly"[43] has been identified, the second sentence of Article 2.4.2 contemplates that an investigating authority will consider whether the differences in export prices can be "taken into account appropriately"[44] by one of the comparison methodologies that are to be used "normally."[45] To the extent that certain export transactions may be masking "evidence of dumping" that would be revealed by other export transactions, it is appropriate for those export transactions to be "taken into account" in a way that prevents such masking.

77. In sum, the application of the alternative, average-to-transaction comparison methodology to all sales (with zeroing) is one means of taking into account the export transactions that would mask evidence of dumping, and thereby prevent such masking. Another means of doing so is by applying the alternative, average-to-transaction comparison methodology to a subset of transactions (again with zeroing), while applying a "normal[]" comparison methodology to the remaining transactions, as the USDOC has done. Under such a "mixed" comparison approach, the "relevance of the subset analyzed using the [average-to-average] comparison method"[46] is that it may provide evidence of dumping or it may be masking evidence of dumping. Any such masking should be taken into account in the overall determination of dumping.

#### d. Korea Misunderstands the Purpose of the Second Sentence of Article 2.4.2 of the AD Agreement

78. The weakness of Korea's appeal is evidenced not only by Korea's argument that Article 2.4.2 provides for the mandatory re-masking of evidence of dumping discovered through the application of the second sentence of Article 2.4.2, but also by Korea's astonishing attempt to contest the clear and obvious role of this provision within the context of the AD Agreement as a whole. In particular, Korea now appears to disagree that the second sentence of Article 2.4.2 of the AD Agreement is intended to provide investigating authorities a means to "unmask targeted dumping," as the Appellate Body has observed previously.[47]

79. This is notwithstanding Korea's own acknowledgement at the outset of the panel proceeding that "[t]hat exception 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

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export sales and the application of the average-to-average comparison methodology to other export sales. *See, e.g., US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 106-109; *US – Zeroing (EC)*, para. 133.

[41] Korea Other Appellant Submission, para. 105.
[42] Korea Other Appellant Submission, para. 101.
[43] AD Agreement, Article 2.4.2, second sentence.
[44] AD Agreement, Article 2.4.2, second sentence.
[45] AD Agreement, Article 2.4.2, first sentence.
[46] Korea Other Appellant Submission, para. 110.
[47] Korea Other Appellant Submission, paras. 115-134.

other U.S. sales.'"[48] Later in the panel proceeding, Korea shifted its position, suggesting that "the 'unmasking' occurs by undertaking a more detailed examination of individual export prices."[49]

80. Now, before the Appellate Body, Korea argues that the "purpose" of the second sentence "is simply to allow the authority to undertake the more careful examination of individual export prices that the [average-to-transaction] method makes possible."[50] Korea's new position is completely unconvincing. A "more careful examination" means nothing if the provision, as Korea insists, requires the re-masking of "targeted dumping."

81. Korea's argument starts with the uncontroversial observation that, "[w]hen interpreting the purpose of text, it is important to stay grounded in purposes that make sense given the text."[51] Yet, Korea's conception of the purpose of the second sentence of Article 2.4.2 fails Korea's own test. If Korea were correct that the only "purpose" of the second sentence is to permit what Korea describes elsewhere as "a more granular examination of individual export prices,"[52] then there would never be any reason for an investigating authority to resort to the alternative, average-to-transaction comparison methodology described in the second sentence of Article 2.4.2. 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 such a "granular examination of individual export prices," and also 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"[53] that the purpose of the exceptional methodology is to permit a kind of analysis that an investigating authority may undertake under normal circumstances.

82. Contrary to Korea's arguments, the only logical conclusion, as the Appellate Body has itself observed, and as the Panel, both of the parties (at one time or another), and all but one of the third parties in this dispute agreed, is that the second sentence of Article 2.4.2 of the AD Agreement is intended "to enable investigating authorities to 'unmask' so-called 'targeted dumping'."[54]

83. Korea makes one additional argument, which is likewise unavailing. Korea argues that, even if the Appellate Body has acknowledged previously that the purpose of the second sentence of Article 2.4.2 of the AD Agreement is to "unmask targeted dumping,"[55] "the Appellate Body decisions on zeroing make quite clear that by 'unmask' the Appellate Body certainly did not

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[48] First Written Submission of Korea (Confidential) (September 29, 2014) ("Korea First Written Submission"), para. 153.
[49] Second Written Submission of Korea (Confidential) (April 17, 2015) ("Korea Second Written Submission"), para. 25.
[50] Korea Other Appellant Submission, para. 118.
[51] Korea Other Appellant Submission, para. 118.
[52] Korea Other Appellant Submission, para. 197.
[53] Korea Other Appellant Submission, para. 118.
[54] Panel Report, para. 7.26.
[55] *US – Zeroing (Japan) (AB)*, para. 135.

mean that zeroing (the denial of offsets) would be allowed to 'unmask' some export transactions as 'dumping' without considering all export transactions."[56] To the contrary, neither the Appellate Body nor any panel has made such findings. Indeed, the Appellate Body has carefully noted that it has never ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2,[57] the Appellate Body has, in fact, implied that zeroing may be permitted under the second sentence.[58]

#### e. Korea's Criticism of the Panel's Reference to the Negotiating History of the AD Agreement Is Misplaced

84. As explained in the U.S. appellant submission, the proper interpretation of the second sentence of Article 2.4.2 can be confirmed through recourse to documents from the negotiating history of the AD Agreement.[59] The purpose of the second sentence of Article 2.4.2 of the AD Agreement – *i.e.*, that it is intended "to enable investigating authorities to 'unmask' so-called 'targeted dumping'" – likewise can be confirmed by the negotiating history, as the Panel correctly observed.[60]

85. Korea criticizes the Panel's reference to "a single document from the negotiating history," asserting that it is an "unpersuasive piece of evidence."[61] Yet, Korea points to nothing else from the negotiating history of the AD Agreement that suggests that the drafters intended that the second sentence of Article 2.4.2 of the AD Agreement should serve a different purpose.

86. Korea suggests that the Panel "ignored the extensive arguments presented by China and Japan that fundamentally disagreed with the U.S. reading of [the] negotiating history."[62] Korea argues that "[b]oth China and Japan stressed in their third party submissions that many WTO Members opposed the U.S. practice of denying offsets, and that the negotiating history considered more broadly shows this opposition."[63] As an initial matter, Korea provides no support for the proposition that a panel in its report must include extensive discussion of arguments presented by third parties.

87. In any event, Korea's argument actually supports the U.S. reading of the negotiating history. Neither the Panel nor the United States have suggested that Japan and Hong Kong supported the use of zeroing when implementing the second sentence of Article 2.4.2. Rather,

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[56] Korea Other Appellant Submission, para. 133.
[57] *See US – Stainless Steel (Mexico) (AB)*, para. 127; *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98. *See also US – Zeroing (Japan) (AB)*, para. 136.
[58] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 98 ("[T]he 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."), 100 ("It 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*.").
[59] *See* U.S. Appellant Submission, paras. 196-206.
[60] Panel Report, para. 7.26.
[61] Korea Other Appellant Submission, para. 122.
[62] Korea Other Appellant Submission, para. 125.
[63] Korea Other Appellant Submission, para. 125.

before the panel[64] and on appeal,[65] the United States has quoted directly from documents circulated by Japan and Hong Kong during the negotiation of the AD Agreement. In those documents, Japan and Hong Kong raised their concerns about the use of an asymmetrical comparison methodology and their opposition to the use of zeroing in connection with such a comparison methodology. What is established by these documents, and the other document we provided to the Panel, is that the concern about and opposition to asymmetrical comparisons and zeroing were connected.

88. Indeed, Japan's proposed solution to what it viewed as a problem was to "disallow the practice of calculating 'normal value' on an <u>average</u> basis and then to compare it to 'export price' on an <u>individual</u> basis."[66] Similarly, Hong Kong described its concerns with asymmetrical comparisons and the treating of "the 'negative' dumping margin … as zero."[67] 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."[68]

89. Neither Japan nor Hong Kong mentioned "zeroing" in their proposed changes to the Antidumping Code, likely because neither viewed doing so as necessary. That is, they appear to have considered it 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.

90. Japan and Hong Kong, however, like the United States, did not get everything they wanted in the final text of the AD Agreement. 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.

91. Given that the Appellate Body has grounded its findings on zeroing in the text of Article 2.4.2 (*i.e.*, "all comparable export transactions", "basis", and "comparison"),[69] and given the absence of any express reference to zeroing, 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,

[64] *See* First Written Submission of the United States of America (Confidential) (November 24, 2014) ("U.S. First Written Submission"), paras. 242-250.
[65] U.S. Appellant Submission, paras. 196-206.
[66] *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; U.S. Appellant Submission, para. 202.
[67] *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; U.S. Appellant Submission, para. 201.
[68] *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; U.S. Appellant Submission, para. 201.
[69] *See* U.S. Appellant Submission, para. 104.

but its use is allowed in connection with the application of the alternative, asymmetrical comparison methodology.

92. It is for this reason that the United States suggests that Article 2.4.2, as construed by the Appellate Body, reflects a compromise. The United States agreed to discontinue its practice at the time of 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 used, its use would be permissible under certain conditions. The compromise is evidenced on the face of Article 2.4.2 of the AD Agreement, and is confirmed by reference to documents from the negotiating history. The notion that Article 2.4.2 does not reflect such a compromise among WTO Members simply is not credible. Korea asks the Appellate Body to ignore what is evident in the text of Article 2.4.2 and confirmed by the negotiating history of the AD Agreement. Korea does so in service of its aim to render the second sentence of Article 2.4.2 of the AD Agreement ineffective.

93. Korea also asserts that the Appellate Body has been presented with documents from the negotiating history of the AD Agreement previously, but the Appellate Body "has never had any need to turn to the negotiating history and has instead relied on its analysis under Article 31 of the Vienna Convention."[70] Once again, however, we recall that the Appellate Body has never before addressed a Member's application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement, when the conditions for the use of that methodology have been established, as in this dispute. In the context of the present dispute, the documents from the negotiating history of the AD Agreement to which the United States has referred, and on which the Panel relied, confirm the correct interpretation of the second sentence of Article 2.4.2 of the AD Agreement.

#### f. Korea's Arguments Concerning Mathematical Equivalence Lack Merit

94. Finally, Korea argues that the Panel was "incorrect"[71] to find that requiring an investigating authority to provide offsets when applying a "mixed" comparison methodology "would … lead to mathematical equivalence with the results of a straightforward application of the [average-to-average] comparison methodology to all transactions."[72] Korea's arguments lack merit.

95. Korea asserts that the Appellate Body has "considered and rejected" the mathematical equivalence argument in prior disputes.[73] The U.S. appellant submission discusses the Appellate Body reports in the prior disputes to which Korea refers and demonstrates that the Appellate

[70] Korea Other Appellant Submission, para. 124.
[71] Korea Other Appellant Submission, para. 135; *see also, id.,* paras. 135-144.
[72] Panel Report, para. 7.164.
[73] Korea Other Appellant Submission, para. 137; *see* also, *id.*, para. 142.

Body's previous consideration of the mathematical equivalence argument neither supports rejection of the mathematical equivalence argument in this dispute, nor compels it.[74]

96. Korea also contends that the Panel "provided no support" for its mathematical equivalence finding.[75] In fact, the Panel had before it extensive argumentation from the parties about mathematical equivalence.[76] The United States presented to the Panel a hypothetical demonstrating that mathematical equivalence would result between a "mixed" comparison methodology, comprising the average-to-average and average-to-transaction comparison methodologies (without zeroing and with offsets), and an average-to-average comparison methodology applied to the same universe of export prices.[77] The United States also demonstrated mathematical equivalence to the Panel using actual data from the preliminary results of the first washers antidumping administrative review.[78] As Korea's other appellant submission notes, Korea argued to the Panel "that using a different assumption for determining normal value led to a materially different margin of dumping."[79] The panel report cites to Exhibit KOR-93 and the U.S. second written submission, in addition to referring to and discussing arguments made by Korea.[80] It is evident from the panel report that, after considering the positions of the parties, the Panel agreed with the United States and did not agree with Korea's arguments.[81]

97. We recall that the U.S. appellant submission conclusively demonstrates the type of mathematical equivalence that the Panel found, using both hypothetical data and the actual data

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[74] U.S. Appellant Submission, paras. 168-182.
[75] Korea Other Appellant Submission, para. 138.
[76] U.S. First Written Submission, paras. 181-241; Oral Statement of the Republic of Korea at the First Meeting of the Panel (March 10, 2015) ("Korea Opening Statement at the First Panel Meeting"), paras. 5, 7, 16-20; Exhibit KOR-93; Responses of the United States to the Panel's First Set of Questions to the Parties (March 31, 2015) ("U.S. Responses to the Panel's First Set of Questions"), paras. 106-119; Answers of Korea to Written Questions by the Panel (Confidential) (March 31, 2015) ("Korea Responses to the Panel's First Set of Questions"), paras. 138-141, 147-162; Second Written Submission of the United States of America (Confidential) (April 17, 2015) ("U.S. Second Written Submission"), paras. 125-142; Korea Second Written Submission, paras. 33-61; Exhibit KOR-118; Opening Statement of the United States of America at the Second Substantive Meeting of the Panel (May 20, 2015) ("U.S. Opening Statement at the Second Panel Meeting"), paras. 12-19; Oral Statement of the Republic of Korea at the Second Meeting of the Panel (May 20, 2015) ("Korea Opening Statement at the Second Panel Meeting"), paras. 2-3, 9-16, 20; Answers of Korea to Written Questions by the Panel to the Parties for the Second Substantive Meeting of the Panel with the Parties (Confidential) (June 12, 2015) ("Korea Responses to the Panel's Second Set of Questions (AD Issues)"), paras. 102, 114-117; Comments of the United States on Korea's Responses to the Panel's Second Set of Questions to the Parties Related to Antidumping Issues (June 26, 2015) ("U.S. Comments on Korea's Response to the Panel's Second Set Questions (Antidumping Issues)"), paras. 16, 50; Comments by Korea on U.S. Responses to the Panel's Second Set of Questions (Relating to Antidumping Issues) (Confidential) (June 26, 2015) ("Korea Comments on the U.S. Responses to the Panel's Second Set Questions (Antidumping Issues)"), paras. 34-39, 59-60, 68, 70-72.
[77] U.S. First Written Submission, paras. 186-191, 231-240.
[78] U.S. Second Written Submission, paras. 127-131.
[79] Korea Other Appellant Submission, para. 141.
[80] *See* Panel Report, para. 7.165, footnote 303.
[81] *See* Panel Report, paras. 7.165-7.166. We note that the Panel did not ignore Korea's exhibits related to the mathematical equivalence argument. In particular, in addition to citing to Exhibit KOR-93 in the panel report, *see* Panel Report, para. 7.165, footnote 303, the Panel asked the United States to respond to the contents of Exhibit KOR-93 and the United States did so. *See* U.S. Responses to Panel's First Set of Questions, paras. 106-118.

from the preliminary results of the first administrative review of the washers antidumping order.[82] The U.S. appellant submission also demonstrates that, in light of mathematical equivalence, if zeroing is prohibited under both the average-to-average and average-to-transaction comparison methodologies, and offsets are required under the "mixed" comparison methodology, then all of those methodologies – average-to-average, average-to-transaction, and "mixed" – will yield mathematically equivalent results in all cases. That would render the second sentence of Article 2.4.2 of the AD Agreement *inutile*, contrary to the principle of effectiveness.[83]

98. Korea has never argued with the math itself. Rather, before the panel and now on appeal, Korea has attempted to "break" mathematical equivalence with arguments that obfuscate but do not help illuminate the meaning of the second sentence of Article 2.4.2 of the AD Agreement.[84]

99. An analogy offered by a panelist during the second panel meeting is quite apt, and is a useful, visual representation of how Korea's extreme position renders the second sentence of Article 2.4.2 of the AD Agreement *inutile*.[85] The panelist asked the parties to consider a pen. The original pen represents an average-to-average comparison methodology, applied to all export prices. Taking off the pen's cap represents dividing export prices into so-called "pattern" and "non-pattern" transactions, and applying the average-to-transaction and average-to-average comparison methodologies to each set of transactions, respectively.[86] Aggregating those intermediate comparison results without zeroing – and without preventing offsetting some other way – means that the parts of the pen are put back together unchanged.

100. Korea asserted before the Panel that "each part of the pen changes."[87] Korea was, and still is wrong. Relying on data from the preliminary results of the first washers antidumping administrative review, the United States has demonstrated that, if zeroing is prohibited under the average-to-transaction comparison methodology, and if the results of the average-to-average comparisons must be allowed to offset the results of the average-to-transaction comparisons, then the results of the "mixed" comparison methodology (without zeroing) and the average-to-average comparison methodology applied to all export prices will be mathematically equivalent.[88] The practical implication is that Korea's proposed methodology would result in putting the mask back on the dumped transactions that the investigating authority has just unmasked. That is an untenable result and Korea's proposed interpretation is not in accordance with the customary rules of interpretation, namely the principle of effectiveness.[89]

[82] *See* U.S. Appellant Submission, paras. 144-153 and 161-164.
[83] *See* U.S. Appellant Submission, paras. 115-167.
[84] Korea Other Appellant Submission, para. 139.
[85] *See* Korea Responses to the Second Set of Panel Questions (AD Issues), paras. 134-135; *see also* U.S. Comments on Korea Responses to the Second Set of Panel Questions (AD Issues), para. 50.
[86] The United States disagrees with the Panel's understanding of what comprises the relevant pattern and has appealed that Panel finding. *See* U.S. Appellant Submission, paras. 26-55.
[87] Korea Responses to the Panel's Second Set of Questions (AD Issues), para. 135.
[88] *See* U.S. Appellant Submission, paras. 161-164.
[89] As the Appellate Body has found, "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

101. As noted above, Korea argued before the Panel that mathematical equivalence could be avoided simply by using different weighted average normal values when applying the average-to-average comparison methodology and the alternative, average-to-transaction comparison methodology, or by making different adjustments to ensure price comparability under each comparison methodology.[90] Korea makes the same argument on appeal, and contends that the Panel was wrong to reject Korea's argument.[91] Korea suggests that:

> The Panel's rationale was that if the Anti-Dumping Agreement did not require changes to normal value or adjustments, then the authorities could choose to use the same normal value and the same adjustments and by doing so face mathematical equivalence. But this argument essentially begs the question, because the authority is creating its own dilemma by choosing to use exactly the same normal value and exactly the same adjustments in exactly the same way. Any departure from any of these assumptions breaks mathematical equivalence.[92]

102. Korea misreads the panel report. The Panel agreed with the United States that nothing in Article 2.4.2 of the AD Agreement supports the proposition that either the weighted average normal value used or the adjustments made for price comparability should be any different in the application of the average-to-average and average-to-transaction comparison methodologies.[93] The Panel found that "there is nothing to suggest that the second sentence … envisages the establishment of a separate weighted average normal value with respect to some sub-category of domestic transactions."[94] The Panel similarly found that "there is nothing to suggest that adjustments that would be appropriate in the context of the first sentence comparison methodologies would cease to be appropriate in the context of the second sentence methodology."[95]

103. The Panel found no support for Korea's argument either in the text of the second sentence of Article 2.4.2 or in logic. On appeal, Korea still fails to explain how manipulating *normal value* in the way that Korea proposes would in any way address a pattern of significantly differing *export prices* among different purchasers, regions, or time periods. Nor does Korea explain what in the text of the second sentence of Article 2.4.2 – or in logic – supports its proposition that an investigating authority should make more or different adjustments beyond what is contemplated by Article 2.4 of the AD Agreement, or why adjustments for the purpose of the "mixed" comparison methodology would be different from adjustments made when applying one of the normal comparison methodologies described in the first sentence of Article 2.4.2.

104. Most revealing is Korea's suggestion that "[a]ny departure from any of these assumptions breaks mathematical equivalence."[96] It is evident that breaking mathematical equivalence is

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to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *US – Gasoline (AB)*, p. 23. *See also Japan – Alcoholic Beverages II (AB)*, p. 12.

[90] *See* Panel Report, paras. 7.165-166.

[91] Korea Other Appellant Submission, paras. 139-140.

[92] Korea Other Appellant Submission, para. 139 (emphasis in original; citations omitted).

[93] *See* Panel Report, paras. 7.165-166.

[94] Panel Report, para. 7.165.

[95] Panel Report, para. 7.166.

[96] Korea Other Appellant Submission, para. 139 (emphasis added).

Korea's goal. Korea is not seeking an interpretation that gives meaning to the second sentence of Article 2.4.2 of the AD Agreement. On the contrary, Korea seeks to read the second sentence of Article 2.4.2 out of the AD Agreement entirely. Such an interpretation is inconsistent with the customary rules of interpretation of public international law, in particular the principle of effectiveness.

105. For the reasons given above, Korea's arguments relating to the USDOC's approach to the application of a "mixed" comparison methodology are without merit, and the Panel did not err in concluding that the USDOC's approach is not inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement.[97]

#### 3. The USDOC's Approach to the Application of a "Mixed" Comparison Methodology Is Not Inconsistent, "As Such," with Article 2.4 of the AD Agreement

106. Korea argues that the Panel also erred in finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent, "as such," with Article 2.4 of the AD Agreement.[98] Korea asserts that the Panel "repeats the legal errors" that Korea alleges the Panel committed with respect to its interpretation of the second sentence of Article 2.4.2 of the AD Agreement.[99] Korea contends that, "[t]herefore, for the reasons set forth in more detail in Sections III.B and III.C" of Korea's other appellant submission, the Appellate Body should "also … reverse these Panel findings regarding Article 2.4."[100] Korea's arguments lack merit.

107. As demonstrated above in section II.A.2, the Panel did not err in finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent with the second sentence of Article 2.4.2 of the AD Agreement. Likewise, the Panel did not err when it found that, in light of its finding that the USDOC's approach is not inconsistent with Article 2.4.2 of the AD Agreement, "there is no basis … to accept Korea's argument that [the USDOC's approach] is unfair and contrary to Article 2.4 because it inflates the margin of dumping."[101] Accordingly, the Panel's finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent with Article 2.4 of the AD Agreement should not be reversed.[102]

108. In addition to seeking reversal of the Panel's finding, Korea requests that the Appellate Body complete the legal analysis and find that the USDOC's approach to the application of a "mixed" comparison methodology "is inconsistent with the 'fair comparison' requirement of Article 2.4 of the Anti-Dumping Agreement."[103] Korea suggests that "[f]indings under Article 2.4 will provide a more complete resolution of this dispute."[104] The United States does not agree

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[97] Accordingly, it would not be necessary for the Appellate Body to complete the legal analysis, as Korea has requested. *See* Korea Other Appellant Submission, para. 145.
[98] Korea Other Appellant Submission, paras. 147-153.
[99] Korea Other Appellant Submission, para. 148.
[100] Korea Other Appellant Submission, para. 149.
[101] Panel Report, para. 7.169.
[102] *See* Panel Report, para. 7.169.
[103] Korea Other Appellant Submission, para. 150.
[104] Korea Other Appellant Submission, para. 153.

that it would be appropriate for the Appellate Body to complete the analysis and make the finding under Article 2.4 that Korea requests.

109. As an initial matter, for the reasons given above, the Panel's finding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent with Article 2.4 of the AD Agreement should not be reversed, so there is no need for the Appellate Body to complete the legal analysis.

110. Additionally, the reasons Korea gives for the Appellate Body to complete the legal analysis are not availing. Korea suggests that "the Appellate Body should follow the approach adopted by the Appellate Body in *US – Zeroing (Japan)*."[105] Korea asserts that "[t]he Appellate Body appears to have made specific findings because of the extent to which the U.S. zeroing practices at issue in that dispute were so fundamentally at odds with the Appellate Body's prior decisions."[106] Korea's characterization of the basis for the Appellate Body's decision to make findings under Article 2.4 in the *US – Zeroing (Japan)* dispute is dubious. Assuming *arguendo*, however, that Korea's characterization is correct, there is no similar basis for the Appellate Body to make findings under Article 2.4 in this dispute. While in *US – Zeroing (Japan)* the Appellate Body noted its prior findings concerning the transaction-to-transaction comparison methodology,[107] which it was considering again in that dispute, this dispute represents the first time that the Appellate Body has had occasion to examine a Member's application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement, when the conditions for the use of that alternative methodology have been established. Thus, the analogy Korea draws between this dispute and *US – Zeroing (Japan)* is not apt.

111. Furthermore, there is no basis for finding that the USDOC's approach to the application of a "mixed" 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. As we have explained, the second sentence of Article 2.4.2 of the AD Agreement provides Members a means to "unmask targeted dumping"[108] in "exceptional"[109] situations. It is "fair" to take steps to "unmask targeted dumping" by faithfully applying a comparison methodology consistent with the second sentence of Article 2.4.2, when the conditions for the use of the alternative comparison methodology are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased.[110]

112. Finally, Korea's argument that "[n]arrow findings under the second sentence of Article 2.4.2 may have the unintended consequence of encouraging new measures and yet further disputes as the United States seeks new ways to deny offsets" is troubling.[111] It is wholly inappropriate for Korea to question the United States' commitment to complying in good faith

[105] Korea Other Appellant Submission, para. 151.
[106] Korea Other Appellant Submission, para. 151.
[107] *See US – Zeroing (Japan) (AB)*, para. 146.
[108] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62.
[109] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, paras. 86, 97; *US – Zeroing (Japan) (AB)*, para. 131.
[110] *See US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 138.
[111] Korea Other Appellant Submission, para. 153.

with the adopted recommendations and rulings of the Dispute Settlement Body, especially now, before any recommendations and rulings have been adopted. As noted in the U.S. appellant submission, the United States has fully complied with earlier findings of the Appellate Body and other panels concerning zeroing by changing its normal approach for calculating the margin of dumping.[112]

113. Korea also is wrong when it suggests that "[t]he problem is not the specific method for denying offsets under the [differential pricing analysis]."[113] On the contrary, that alleged "problem," and not some other, indeterminate, future measure, is precisely the "matter referred to the DSB" by Korea.[114] It is not possible for a panel or the Appellate Body to make findings regarding anything other than the matter referred to the DSB. Korea's request for "[b]road findings under Article 2.4" is inconsistent with the DSU.

114. For the reasons given above, the United States respectfully requests that the Appellate Body find that the Panel did not err in concluding that the USDOC's approach to the application of a "mixed" comparison methodology is not inconsistent, "as such," with the Article 2.4 of the AD Agreement. Should the Appellate Body reverse the Panel's finding, the United States respectfully suggests that it would not be appropriate for the Appellate Body to complete the legal analysis.

### B. The Panel Did Not Err in its Interpretation of the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement

115. Korea appeals certain Panel findings related to the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.[115] The "pattern clause" sets forth the first of the two conditions for using the alternative, average-to-transaction comparison methodology,[116] and provides that an investigating authority may utilize the alternative comparison methodology "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods."[117]

116. The Panel found that the USDOC did not act inconsistently with the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement "by determining the existence of a 'pattern of export prices which differ significantly' among purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences."[118] The Panel also found that the USDOC's differential pricing analysis, which similarly does not require "any qualitative assessment of the reasons for the relevant price differences," is not inconsistent, "as such," with the second sentence of Article 2.4.2.[119]

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[112] *See* U.S. Appellant Submission, para. 23.
[113] Korea Other Appellant Submission, para. 153.
[114] *See* DSU, Article 7.1.
[115] *See* Korea Other Appellant Submission, paras. 154-186.
[116] *See* Panel Report, para. 7.9.
[117] AD Agreement, Article 2.4.2, second sentence.
[118] Panel Report, para. 7.52.
[119] *See* Panel Report, para. 7.119.a.

117. Korea advances two main arguments on appeal. First, Korea argues that the Panel mischaracterized its claim, as if Korea's claim were solely that an investigating authority must state the "reasons" why export prices differ. Korea contends that, by recasting its claim too narrowly, the Panel failed to address the claim that Korea actually made, which, Korea asserts, related to the obligation to undertake a qualitative analysis when determining whether there exists a "pattern" of export prices which differ "significantly." Second, Korea argues that the Panel incorrectly interpreted the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, and erroneously found that it does not require an investigating authority to examine the reasons why export prices differ when determining the existence of a pattern of export prices which differ significantly. As demonstrated below, Korea's arguments lack merit.

### 1. The Panel Did Not Mischaracterize Korea's Claims

118. Korea argues that "[t]he Panel's initial error was to read Korea's claim too narrowly."[120] Korea contends that, *inter alia*, it "argued that the proper interpretation of the terms 'pattern' and 'significantly' in the second sentence of Article 2.4.2 require the authority to consider both qualitative and quantitative aspects of the differences in export prices."[121] Korea alleges that the Panel "recast[] Korea's argument into something different from – and substantially narrower than – what Korea actually argued."[122] Korea is incorrect. The Panel did not mischaracterize Korea's claims.

119. Korea appears to misunderstand the difference between claims and arguments. Consistent with the DSU and prior Appellate Body guidance, Korea's "claims" necessarily are those set forth in Korea's request for the establishment of a panel.[123] As the Appellate Body has observed, "there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions, and the first and second panel meetings with the parties as a case proceeds."[124]

120. In this dispute, Korea's panel request includes a *claim* that "the USDOC acts inconsistently with Article 2.1, Article 2.4, and Article 2.4.2 of the *Anti-Dumping Agreement* and Article VI:1 and Article VI:2 of the GATT 1994" because, *inter alia*, "[t]he failure of the USDOC to consider the legitimate <u>commercial reasons and market explanations</u> for any patterns of differing prices is clearly inconsistent with the meanings of 'pattern' and 'differ significantly.'"[125]

121. Korea's panel request also includes a separate, but apparently related *claim* that the "USDOC's 'targeted dumping' and 'differential pricing' methodologies for determining the

[120] Korea Other Appellant Submission, para. 158.
[121] Korea Other Appellant Submission, para. 158.
[122] Korea Other Appellant Submission, para. 160.
[123] *See India – Patents (US) (AB)*, para. 89.
[124] *India – Patents (US) (AB)*, para. 88 (emphasis in original).
[125] *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Request for the Establishment of a Panel by the Republic of Korea, WT/DS464/4, (December 6, 2013) ("Panel Request"), p. 5, section III.3 (emphasis added).

applicability of the second sentence of Article 2.4.2 are 'as such' inconsistent with the meanings of 'pattern of prices' and 'differ significantly' and are thus inconsistent with the United States' obligations under Article 2.4.2 of the *Anti-Dumping Agreement*" because "[t]he USDOC refuses to consider economic or market factors that would demonstrate that any significant difference in the pattern of prices is attributable to such factors rather than to the pricing decision of the respondent exporter."[126]

122. Both of these claims relate to the "reasons" or "explanations" for why export prices differ – or the factors to which the pattern of export prices is "attributable" – and the USDOC's decision not to consider the reasons why export prices differ as part of its analysis.[127] Neither claim refers more broadly to an obligation to examine so-called "qualitative aspects." Indeed, the term "qualitative aspects" does not appear anywhere in Korea's panel request, and nothing in Korea's panel request can be read as referring more broadly to such "qualitative aspects." Rather, Korea's panel request refers only narrowly to "commercial reasons and market explanations for any patterns of differing prices"[128] and to "economic or market factors that would demonstrate that any significant difference in the pattern of prices is attributable to such factors rather than to the pricing decision of the respondent exporter."[129]

123. Without question, Korea argued in its written submissions, statements to the Panel, and responses to the Panel's questions, that "the proper interpretation of the terms 'pattern' and 'significantly' in the second sentence of Article 2.4.2 require the authority to consider both qualitative and quantitative aspects of the differences in export prices."[130] Korea advanced its *arguments* concerning qualitative aspects, including that the reasons for the export price differences should be considered among such qualitative aspects, in support of its *claims* that the United States breached the AD Agreement because the USDOC did not consider the reasons for the export price differences. The *arguments* Korea made to the Panel, however, did not, and could not, change the *claims* set forth in Korea's panel request.[131]

124. The Panel correctly understood the nature and scope of Korea's claims. In its evaluation, the Panel referred to "Korea's claim that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation by determining the existence of a 'pattern of export prices which differ significantly' among purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences."[132] This accords with the text of Korea's panel request, as discussed above. In a separate part of the panel report, the Panel discussed its own examination of Korea's panel request, which the Panel undertook to discern the nature and scope of Korea's claims. Among the claims in Korea's panel request, the Panel found that "Korea claims that '[t]he failure of the USDOC to consider legitimate commercial reasons and market

[126] Panel Request, p. 5, section IV.2 (emphasis added).
[127] *See* Washers AD Final I&D Memo, pp. 23-24 (Exhibit KOR-18).
[128] Panel Request, p. 4, section III.3.
[129] Panel Request, p. 5, section IV.2.
[130] Korea Other Appellant Submission, para. 158.
[131] *See India – Patents (US) (AB)*, para. 88 (quoting *EC – Bananas III (AB)*, para. 143).
[132] Panel Report, para. 7.52. *See also*, *id.*, paras. 7.30 and 7.44.

explanations for any patterns of differing prices is clearly inconsistent with the meanings of 'pattern' and 'differ significantly''."[133]

125. When Korea's panel request and the panel report are read together, it is clear that the Panel did not mischaracterize Korea's claims or read them too narrowly. Rather, on appeal, Korea is attempting to expand its claims beyond what is set forth in its panel request. That is not possible, and Korea's attempt should be rejected.[134]

126. For these reasons, the Appellate Body should find that the Panel properly characterized Korea's claims and correctly addressed the claims that Korea presented in its request for the establishment of a panel.

#### 2. The Panel Did Not Err in Finding that the "Pattern Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Does Not Require an Investigating Authority to Examine the Reasons Why Export Prices Differ

127. Korea also argues that, "to the extent that Korea's claim can be interpreted as requiring that the authority must investigate the reasons why prices differ, the Panel still erred in finding that [the] pattern clause of the second sentence of Article 2.4.2 does not require the authority to determine why prices differ as part of the requirement that export prices differ 'significantly' and constitute a 'pattern'."[135] Korea's arguments lack merit. As demonstrated below, the Panel correctly found that the "pattern clause" of the second sentence of Article 2.4.2 does not require an investigating authority to examine the reasons why export prices differ, and the Panel did not err in rejecting Korea's claims.

128. Korea criticizes the Panel for not considering the terms "pattern" and "significantly" "in the context of how these terms are used elsewhere in the Anti-Dumping Agreement."[136] Korea also asserts that "the Panel found that the terms 'pattern' and 'significantly' had narrower meanings than Korea had argued, and could be established by the authority solely based on quantitative differences – the size of the price differences – regardless of the factual context of the prices and the differences."[137] Korea misreads the panel report.

129. As an initial matter, the Panel did consider Korea's argument distinguishing the terms "significant" and "large."[138] While the Panel did not discuss other provisions of the AD Agreement that use those terms, to which Korea had referred, this is of no moment. It is well established that a Panel is not required to address each and every argument made by a party.[139] In any event, the Panel agreed with Korea's argument – as did the United States – that the term significantly has a qualitative dimension. Specifically, the Panel found that "[i]n certain factual

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[133] Panel Report, para. 7.83.
[134] *See India – Patents (US) (AB)*, para. 88 (quoting *EC – Bananas III (AB)*, para. 143).
[135] Korea Other Appellant Submission, para. 167.
[136] Korea Other Appellant Submission, para. 168.
[137] Korea Other Appellant Submission, para. 154.
[138] *See* Panel Report, para. 7.48.
[139] *See, e.g.*, *US – Carbon Steel (India) (AB)*, para. 4.233.

circumstances, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances."[140] The Panel did not agree with Korea, however, that it follows from this that an investigating authority "must assess the reasons for price differences in order to determine whether those price differences are 'significant' within the meaning of the second sentence."[141]

130. Korea also argues that the Panel erred by failing to consider the terms "pattern" and "significantly" "in the specific context of the explanation clause."[142] In Korea's view:

> The proper interpretation of the second sentence, therefore, is one that recognizes the interrelationship between the pattern clause and explanation clause. The need to consider qualitative factors – the factual circumstances in which certain export price differences occur – rests on the terms "significantly", "pattern", and "appropriately" when read together. They each should be interpreted in light of the others, and collectively make clear the second sentence requires the authority to consider qualitative factors.[143]

131. Once again, Korea misreads the panel report. As noted above, the Panel agreed with Korea – and the United States – that the term "significantly" has a qualitative dimension as well as a quantitative dimension. So, Korea simply is incorrect when it asserts that "[t]he Panel seemed to think that because it found a textual basis in the explanation clause to consider qualitative factors, it could reject any such textual basis in the pattern clause."[144] That is not what the Panel found at all.

132. Furthermore, even if the terms "pattern," "significantly," and "appropriately" should be read together such that qualitative aspects may be relevant to an investigating authority's application of the "pattern clause," it does not follow that an investigating authority is obligated to assess the "reasons" why export prices differ when it is determining whether there exists a pattern of export prices which differ significantly.

133. The Panel correctly observed that the text of Article 2.4.2 of the AD Agreement contains no requirement to consider the reasons why export prices differ.[145] As the Panel noted, Korea's argument that such a requirement exists "is based on its interpretation of the terms 'pattern' and 'significant'."[146] The Panel agreed with the parties that "a 'pattern' is '[a] regular and intelligible form or sequence discernible in certain actions or situations'."[147] The Panel did not agree with Korea's contention that "'to be 'intelligible' or to 'serve to govern the execution of something',

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[140] Panel Report, para. 7.49.
[141] Panel Report, para. 7.48.
[142] Korea Other Appellant Submission, para. 168. *See also, id.*, paras. 177-181.
[143] Korea Other Appellant Submission, para. 181.
[144] Korea Other Appellant Submission, para. 177.
[145] *See* Panel Report, para. 7.46.
[146] Panel Report, para. 7.45.
[147] Panel Report, para. 7.45.

the pattern must be meaningful to the purpose of what is being undertaken', i.e. 'targeting conduct'."[148] The Panel reasoned that:

> [A] form or sequence of price differences may be "intelligible" in the context of the second sentence if there is regularity to that form or sequence that may be detected in respect of a particular purchaser, region or time period. Although the term "intelligible" excludes random price variation, it does not require consideration of the purpose of the price variations. A regular series of price variation relating to a particular purchaser, region or time period may be detected on the basis of an objective assessment of the data, even if one does not know the reason for, or purpose behind, such variation.[149]

134. The Panel's reasoning concerning the interpretation of the term "pattern" is sound. The notion of a "regular" and "intelligible" form or sequence simply means that the form or sequence (*i.e.*, pattern) is discernible. That is, it must be capable of being observed and identified. As the Panel explained, "the fact that prices differ in a regular and intelligible form may be discerned through a simple examination of the relevant numerical price values."[150]

135. The Panel also disagreed with Korea's argument that "an authority must assess the reasons for price differences in order to determine whether those price differences are 'significant' within the meaning of the second sentence."[151] The Panel "consider[ed] that the term 'significant' should be understood to mean 'important, notable; consequential'."[152] The Panel noted that this "was the definition applied by the Appellate Body in *US – Tyres* and *US – Large Civil Aircraft (2nd Complaint)*, and by the panel in *US – Upland Cotton*."[153] The Panel disagreed with Korea's contention that "there is nothing 'notable' about a price difference that results from normal commercial considerations, such as when prices are lowered during a well-known holiday season sale period."[154] In the Panel's view:

> [A]n authority might properly find that certain prices differ "significantly" if those prices are notably greater – in purely numerical terms – than other prices, irrespective of the reasons for those differences. The price difference is noteworthy because it stands out, and it stands out because of its size, or scale, <u>rather than the reasons behind it</u>.[155]

136. The Panel further reasoned that:

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[148] Panel Report, para. 7.47 (citations omitted).
[149] Panel Report, para. 7.47. The United States disagrees with the Panel's understanding of what comprises the "relevant pattern" and has appealed the Panel's findings in that regard. *See* U.S. Appellant Submission, paras. 26-55.
[150] Panel Report, para. 7.46.
[151] Panel Report, para. 7.48.
[152] Panel Report, para. 7.48 (citations omitted).
[153] Panel Report, para. 7.48 (citations omitted).
[154] Panel Report, para. 7.48 (citations omitted).
[155] Panel Report, para. 7.48 (emphasis added; citations omitted).

> In certain factual circumstances, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances. Thus, a relatively minor numerical difference between two large prices may not be "significant", whereas the same numerical difference between two much smaller prices may well be "significant". In addition, a small price difference in a price-competitive market may be "significant". However, this aspect of significance pertains to *how* the relevant prices differ, not *why* they differ.[156]

The Panel found support for its view in the panel report in *US – Upland Cotton* and the Appellate Body reports in *US – Large Civil Aircraft (Second Complaint)* and *China – GOES*.[157]

137. Thus, Korea simply is incorrect when it suggests that the Panel "dismissed" the *US – Upland Cotton* panel report and the *US – Large Civil Aircraft (Second Complaint)* Appellate Body report, each of which addresses the term "significant."[158] On the contrary, the Panel appropriately relied on those reports as support for its own interpretative conclusions.[159] Indeed, after quoting several paragraphs of the *US – Upland Cotton* panel report, the Panel, rather than dismissing that report, stated expressly that it "agree[s] with the *US – Upland Cotton* panel that certain factual circumstances regarding the product and/or market may be relevant to the assessment of whether a difference is 'significant'."[160] The Panel correctly noted, however, that the panel report in *US – Upland Cotton* "did not refer to the underlying reasons for price suppression or depression as being relevant to the potential significance of the degree of price suppression or depression."[161]

138. Likewise, the Panel "[found] support in the statement by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* that the assessment of the significance of lost sales has both 'quantitative and qualitative dimensions'."[162] In *US – Large Civil Aircraft (Second Complaint)*, 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*.[163]

139. The Appellate Body was suggesting in *US – Large Civil Aircraft (Second Complaint)* 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. The same may be true when applying the "pattern clause" in the second

[156] Panel Report, para. 7.49 (underlining added; italics in original).
[157] *See* Panel Report, paras. 7.49-7.51 and 7.48, footnote 105.
[158] *See* Korea Other Appellant Submission, paras. 163, 164, 174, 176.
[159] *See* Panel Report, paras. 7.49-7.51.
[160] Panel Report, para. 7.50.
[161] Panel Report, para. 7.50.
[162] Panel Report, para. 7.51 (citations omitted).
[163] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.

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.[164] In this way, the term "significantly" in the "pattern clause" can have both quantitative and qualitative dimensions.

140. Once again, the Panel did not "dismiss" the Appellate Body report in *US – Large Civil Aircraft (Second Complaint)*, as Korea suggests.[165] On the contrary, the Panel relied on that Appellate Body report.[166] The Panel correctly observed, however, that in *US – Large Civil Aircraft (Second Complaint)*, there "was no suggestion by the Appellate Body that the 'qualitative dimension' of the significance of lost sales extends to consideration of the reasons for those lost sales."[167]

141. The Panel also observed that, in *China – GOES*, "the Appellate Body considered that an authority could determine the existence of 'significant price undercutting' simply by comparing two prices."[168] This suggested to the Panel that "the concept of significance may properly be assessed on a purely numerical basis."[169] Again, though, the Panel stressed that "[i]n certain factual circumstances, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances."[170]

142. Thus, Korea's suggestion that the Panel ignored or "dismissed" relevant panel and Appellate Body reports utterly lacks foundation. In reality, it is Korea that departs from the Appellate Body's prior findings. As noted above, the Appellate Body has explained that the term significant has "both quantitative and qualitative dimensions."[171] Korea's understanding of the term "significant" would read the quantitative dimension out of that term, necessitating an exclusive focus on Korea's understanding of the qualitative dimension.

143. The Panel asked Korea whether its reading of "significantly" would read the quantitative dimension out of that term. Not surprisingly, Korea denied that its proposed interpretation would have such an effect.[172] More telling than Korea's denial, though, is Korea's response to another Panel question. The Panel asked the parties whether lower prices during key holiday seasons are not evidence of prices that differ by period, as envisaged by the second sentence of Article 2.4.2.[173] Korea responded, "No. Lower prices during the holiday season might be prices that 'differ' by period, but they are not prices that 'differ significantly' by period under the second

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[164] *See* Panel Report, para. 7.49.
[165] *See* Korea Other Appellant Submission, paras. 164, 176.
[166] *See* Panel Report, para. 7.51.
[167] Panel Report, para. 7.51.
[168] Panel Report, para. 7.48, footnote 105 (quoting *China – GOES (AB)*, para. 241).
[169] Panel Report, para. 7.48, footnote 105 (quoting *China – GOES (AB)*, para. 241).
[170] Panel Report, para. 7.49.
[171] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.
[172] *See* Korea Responses to the Panel's First Set of Questions, paras. 67-70.
[173] *See* Korea Responses to the Panel's First Set of Questions, paras. 33-36.

sentence of Article 2.4.2."[174] Importantly, Korea asserted that "[e]ven a large difference is not necessarily significant."[175] Later in the panel proceeding, Korea asserted that, "[i]f the price difference – no matter how large – can be largely explained by some external factor, such as changing costs, that price difference might not be 'significant.'"[176]

144. In other words, in Korea's view, any numerical difference in export prices can be explained away. Export prices can be found to "differ significantly" only if they are found to differ "significantly" in a qualitative sense, as Korea understands that concept, *i.e.*, the "reason" for the difference must be so-called "targeting." The quantitative difference between the export prices, in Korea's view, does not matter. Korea's proposed interpretation is untenable. It is 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."[177]

145. Korea argued to the Panel that, because of the qualitative connotations of the terms "pattern" and "significantly," the differences in export prices "must reveal a particular design or purpose,"[178] and they must "reflect a meaning or purpose other than random price variation or price differences that reflect normal commercial factors."[179] Korea further suggested, 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."[180]

146. 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"? 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.[181]

147. Indeed, Korea criticized the USDOC for not considering whether there were commercial reasons, market explanations, or other exogenous factors for the pattern of export prices identified in the washers antidumping investigation.[182] Korea cited 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.

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[174] Korea Responses to the Panel's First Set of Questions, para. 33.
[175] Korea Responses to the Panel's First Set of Questions, para. 35.
[176] Korea Responses to the Panel's Second Set of Questions (AD Issues), para. 3.
[177] *See US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1272.
[178] Korea First Written Submission, para. 131.
[179] Korea First Written Submission, para. 138.
[180] Korea First Written Submission, para. 133.
[181] *See, e.g.,* Korea Responses to the Panel's First Set of Questions, para. 61; Korea Opening Statement at the First Panel Meeting, para. 26; *see also* China's Responses to Questions from the Panel (March 31, 2015), para. 4.
[182] *See* Korea First Written Submission, paras. 148-153.

148. Again, 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 application of the "pattern clause," which examines whether a specific condition exists that may lead an investigating authority to use the alternative comparison methodology.

149. Korea confuses the "pattern of export prices which differ significantly," which is described in the text of the "pattern clause" of the second sentence of Article 2.4.2, with the intention of an exporter to "target" its dumping and to "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 the 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 subjective intent, or scrutinize the commercial reasons underlying a pattern of export prices which differ significantly, would be inconsistent with the customary rules of interpretation of public international law.

150. Korea asserted to the Panel that it "is not suggesting that the authority must consider the exporter's subjective intent in setting export prices."[183] This was an attempt by Korea to reframe its original argument to establish that the investigating authority must consider *why* export prices differ significantly among different purchasers, regions, or time periods. Regardless of whether Korea frames its argument in terms of discerning an exporter's *intent* or identifying the "reasons" why there exists a pattern of export prices that differ significantly (whatever those reasons might be), nothing in the text of the "pattern clause" requires an investigating authority to conduct a separate examination of *why* export prices differ significantly. We further note that certain third parties agreed before the Panel that the second sentence of Article 2.4.2 does not require an investigating authority to discern why such patterns arise.[184] That said, to the extent qualitative aspects are relevant in a particular case, the USDOC would examine them to discern *how* the export prices differ from each other. In other words, the USDOC would assess whether export prices differ in a way that qualitatively is notable or important, and thus is "significant."[185]

151. Additionally, Korea's reasoning is unsound. Korea asserted to the Panel 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."[186] However, such "'low' prices of sales," if they are below normal value, still constitute evidence that would

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[183] Korea Opening Statement at the First Panel Meeting, para. 26; *see also* Korea Responses to the Panel's First Set of Questions, para. 88. *See also* Korea Other Appellant Submission, para. 162.
[184] *See, e.g.,* Brazil's Responses to the Written Questions from the Panel after the First Substantive Meeting (March 31, 2015), p. 3 ("it seems that there is nothing in the text of the Anti-Dumping Agreement that suggests that the investigating authority is compelled to assess why certain export prices were significantly lower for certain regions, purchasers or time periods"); European Union Third Party Submission (December 8, 2014), para. 40.
[185] *See* U.S. First Written Submission, para. 81; U.S. Opening Statement at the First Panel Meeting, paras. 30-31.
[186] Korea First Written Submission, para. 153.

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.

152. Furthermore, the particular "reasons" to which Korea referred during the panel proceeding actually just confirm that the "'low' prices of sales to the subset"[187] were indeed "targeted" to particular time periods and customers. Before the Panel, Korea sought support for its argument in injury determinations made by the U.S. International Trade Commission ("USITC").[188] Korea asserted that it is "well known" that many technology products have prices that fall sharply over the product's life cycle as new products are introduced,[189] and that "[d]iscounting is prevalent in the [washers] market, particularly during promotion events."[190] Such factual assertions, however, do not go to the qualitative question of *how* export prices differ. Moreover, Korea's argument ignores that deliberately setting one's export prices lower at certain times of the year is evidence that would tend to *confirm* that the exporter's pricing behavior formed a "pattern of export prices which differ significantly" among different time periods.[191]

153. Indeed, in discussing the issue of holiday pricing in its final injury determination, the USITC noted that, "[a]lthough all responding producers and importers engaged in discounting, responding purchasers reported that LG and Samsung offered larger discounts than GE or Whirlpool."[192] The USITC also found that "pervasive subject import underselling depressed domestic like product prices to a significant degree."[193] Thus, in the context of the washers antidumping investigation, evidence suggests that LG and Samsung took the lead in setting export prices that differed significantly among different time periods, such as the holiday promotion periods that Korea highlighted.

154. Regardless of whether Samsung and LG intended to "dump" large residential washers, their admittedly "low price" targeting in the United States, when compared with average normal value in Korea, led to a situation, as the USDOC ultimately discovered, where dumping would be "masked" by higher price sales if the average-to-average comparison methodology were used.

155. Finally, we note that Korea asserted before the Panel that the USDOC "does not so much as try to consider qualitative aspects in regards to why prices differ."[194] Korea repeats this

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[187] Korea First Written Submission, para. 153.
[188] *See* Korea Responses to the Panel's First Set of Questions, paras. 35-36.
[189] Korea Responses to the Panel's First Set of Questions, para. 35 (citing *DRAMS and DRAM Modules from Korea*, Inv. No. 701-TA-431 (Final), USITC Pub. 3616 (Aug. 2003), p. I-11 (Exhibit KOR-101)).
[190] Korea Responses to the Panel's First Set of Questions, para. 36; Exhibit KOR-102 at PDF p. 3.
[191] *See* U.S. First Written Submission, para. 88; *see also* U.S. Responses to the Panel's First Set of Questions, paras. 1, 7, 60. The same would be true of evidence demonstrating that an exporter deliberately set export prices lower to certain purchasers or regions.
[192] *See Certain Large Residential Washers from Korea and Mexico*, Inv. Nos. 701-TA-488 and 731-TA-1199-1200 (Final), USITC Pub. 4378 (Feb. 2013), p. 22 (Exhibit USA-67).
[193] *See Certain Large Residential Washers from Korea and Mexico*, Inv. Nos. 701-TA-488 and 731-TA-1199-1200 (Final), USITC Pub. 4378 (Feb. 2013), pp. 36, 44-46 (Exhibit USA-67).
[194] Korea Opening Statement at the First Panel Meeting, para. 25. Korea attempted to support this contention by referring to "at least 14 different cases" where the USDOC purportedly "rejected arguments about changing costs." Korea Responses to the Panel's First Set of Questions, para. 60; Exhibit KOR-104. We note that none of the

assertion on appeal.[195] Korea is incorrect. To the extent qualitative aspects are relevant in a particular case, the USDOC would examine them to discern *how* the export prices differ from each other.[196] This is consistent with the U.S. Statement of Administrative Action, which provides that, "in determining whether a pattern of significant price differences exist, [the USDOC] will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."[197]

156. In the washers antidumping investigation, the USDOC considered and responded to so-called "qualitative" arguments made by LG and Samsung.[198] However, 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.

157. Additionally, we observe that the USDOC's quantitative analyses actually do take into account the qualitative nature of the product under investigation. Both the *Nails* test, as it was applied in the washers antidumping investigation, and the differential pricing analysis rely on measuring whether the prices between the allegedly targeted group or test group and the comparison group are significant relative to the general pricing behavior of the respondent in the export market, *i.e.*, what is "significant" in a given situation is determined based on the respondent's actual prices in the export market.

158. Under the *Nails* approach applied in the washers antidumping investigation, in the first stage, which the USDOC refers to as the standard deviation test, if the weighted-average export price to an allegedly targeted group is lower than a "floor" price, then those sales pass the first stage of the *Nails* test. This "floor" price is calculated based on the weighted-average export price and the standard deviation of these averages. In the second stage, the gap test, if the "gap" between the weighted-average export price to the allegedly targeted group and the next highest weighted-average export price to a non-targeted group is larger than the weighted-average gap between non-targeted groups, then those sales pass the second stage of the *Nails* test.[199] Each of the stages of the *Nails* test is dependent upon the respondent's specific export prices and their relationship to one another.

159. Under the differential pricing analysis, in the Cohen's *d* test, the difference of the weighted-average export prices for the test group and the comparison group is measured relative to the pooled standard deviation. The pooled standard deviation is essentially a simple average

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determinations to which Korea refers, all of which *post-date* the final determination in the washers AD investigation, were before the Panel. *See* Exhibit KOR-104. Furthermore, Korea's argument that an investigating authority must "at least address and consider the reasons for price differences in a particular case" simply is not supported by the text of the second sentence of Article 2.4.2. Korea Responses to the Panel's First Set of Questions, para. 61.

[195] *See* Korea Other Appellant Submission, paras. 183 and 184.

[196] *See* U.S. First Written Submission, para. 81; U.S. Opening Statement at the First Panel Meeting, paras. 30-31.

[197] Statement of Administrative Action for the Uruguay Round Agreements Act, located in Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H. DOC. 103-316(I), 103d Cong. 2d Sess. (September 27, 1994), at 843 (p. 7 of the PDF version of Exhibit KOR-5).

[198] Washers AD Final I&D Memo, pp. 23-24 (Exhibit KOR-18).

[199] *See* Washers AD Final I&D Memo, pp. 19-20 (Exhibit KOR-18) (explaining operation of the *Nails* test).

of the standard deviations (or variances) of the export prices in the test group and the export prices in the comparison group. Accordingly, the determination of whether observed differences are "significant" is dependent upon the variation in export prices exhibited in each group. Thus, when the variations in export prices are large in one or both of these groups, the corresponding difference in the weighted-average export prices must be larger to be found significant. Likewise, when the variations in the export prices are small in one or both of these groups, the corresponding difference in the weighted-average export prices can be smaller to be found significant.

160. Thus, under the USDOC's analyses, "the size or scale of a price difference [is] assessed in light of the prevailing factual circumstances."[200] In this way, the USDOC assesses the significance of export price differences taking into consideration "both 'quantitative and qualitative dimensions'."[201]

161. For the reasons given above, the Panel did not err in rejecting Korea's claim that the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement in the washers antidumping investigation by determining the existence of a pattern of export prices which differ significantly among different purchasers, regions, or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences.[202] The Panel also did not err when it found, based on reasoning set forth earlier in the panel report,[203] that the USDOC's differential pricing analysis, which similarly does not require any qualitative assessment of the reasons why export prices differ, is not inconsistent "as such" with the second sentence of Article 2.4.2.[204]

162. Accordingly, the United States respectfully requests that the Appellate Body reject Korea's appeal of the Panel's finding that the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement does not require an investigating authority to examine the reasons why export prices differ, and its findings in this regard that, in the washers antidumping investigation, the USDOC did not act inconsistently with the second sentence of Article 2.4.2, and the USDOC's differential pricing analysis is not inconsistent, "as such," with the second sentence of Article 2.4.2.

[200] Panel Report, para. 7.49
[201] Panel Report, para. 7.51 (citations omitted).
[202] *See* Panel Report, para. 7.52.
[203] *See* Panel Report, para. 7.119. The Panel noted that the legal arguments Korea advanced in connection with Korea's claim against the USDOC's differential pricing analysis were essentially the same as the arguments Korea made with respect to the USDOC's examination of the "pattern" in the washers antidumping investigation, as were the U.S. arguments in response. The Panel referred to its earlier findings, which it found applied *mutatis mutandis* in the context of the USDOC's differential pricing analysis.
[204] Panel Report, para. 7.119.a.

### C. The Panel Did Not Err in Finding that the "Explanation Clause" of the Second Sentence of Article 2.4.2 of the AD Agreement Does Not Require Investigating Authorities to Address Both the Average-to-Average Comparison Methodology and the Transaction-to-Transaction Comparison Methodology

163. Korea appeals certain Panel findings related to the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.[205] The "explanation clause" sets forth the second of two conditions for using the alternative, average-to-transaction comparison methodology,[206] and provides that an investigating authority may utilize the alternative comparison methodology "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."[207]

164. The Panel found that the USDOC did not act inconsistently with the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement when it explained, in the washers antidumping investigation, why the pattern of significantly differing export prices it had found could not be taken into account appropriately by the use of the average-to-average comparison methodology, without also addressing the transaction-to-transaction comparison methodology.[208] The Panel also found that the USDOC's differential pricing analysis, which "does not require the USDOC to also consider whether the relevant price differences could be taken into account appropriately by the [transaction-to-transaction] comparison methodology," likewise is not inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement.[209]

165. Korea argues that the Panel incorrectly interpreted the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement. As it did before the Panel,[210] Korea argues that "the 'explanation clause' requires the authority to consider both of the normal comparison methods – both the [average-to-average] comparison method and the [transaction-to-transaction] comparison method – before turning to the exceptional [average-to-transaction] comparison method."[211] Korea is wrong, and the Panel was right to reject Korea's argument.

166. As demonstrated below, the Panel correctly interpreted the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement when it found that the "explanation clause" does not require an investigating authority to address both the average-to-average comparison methodology and the transaction-to-transaction comparison methodology in connection with the "explanation" given pursuant to the second sentence of Article 2.4.2.[212]

[205] Korea Other Appellant Submission, paras. 187-203.
[206] *See* Panel Report, para. 7.9.
[207] AD Agreement, Article 2.4.2, second sentence.
[208] *See* Panel Report, para. 7.81.
[209] Panel Report, para. 7.119.b.
[210] *See* Korea First Written Submission, para. 167.
[211] Korea Other Appellant Submission, para. 187.
[212] *See* Panel Report, paras. 7.79-81, 7.119.b.

167. As contemplated by the customary rules of interpretation of public international law,[213] the Panel appropriately began its analysis by considering the text of the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement. The Panel "note[d] that an explanation is required of why 'a' [average-to-average] 'or' [transaction-to-transaction] 'comparison' cannot take into account appropriately the relevant price differences."[214] The Panel reasoned that "[t]he indefinite Article [sic] ('a') combined with the disjunctive ('or'), coupled with the use of the term 'comparison' in the singular, together suggest that the requisite explanation need only be provided in respect of one type of comparison, be it [average-to-average] 'or' [transaction-to-transaction]."[215]

168. Korea argues that the Panel misinterpreted the terms "a" and "or" in the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.[216] Korea asserts that:

> The use of the term "a" reflects the fact that in the end the authority will be using "a" single comparison method. It would make little sense to refer to two different comparison methods being used at the same time. Similarly, the use of the term "or" simply reflects this choice between two alternative normal comparison methods.[217]

Korea's assertion appears to be correct, as far as it goes. However, Korea then contends that:

> The use of the singular article and disjunctive conjunction in the context of the second sentence simply recognizes that there are two alternative normal comparison methods that must be considered. The fact that the [average-to-average] and [transaction-to-transaction] comparison methods are symmetrical and exist as equal alternatives without any hierarchy does not mean that considering one means the authority has automatically fulfilled its obligation to consider the other.[218]

The legal conclusion for which Korea argues does not follow from its assertions about the terms "a" and "or." The interpretative question that underlies Korea's claims cannot be answered simply by reading the terms "a" and "or" in the second sentence in isolation. Those terms must be read in the context of Article 2.4.2 of the AD Agreement as a whole, which is how the Panel read them.

169. The Panel correctly considered "the broader context of the explanation clause" and noted that "the Appellate Body has found that '[a]n investigating authority may choose between the

[213] *See Vienna Convention on the Law of Treaties* ("Vienna Convention"), Article 31. *See also US – Gasoline (AB)*, p. 17.
[214] Panel Report, para. 7.79.
[215] Panel Report, para. 7.79.
[216] *See* Korea Other Appellant Submission, paras. 192-193.
[217] Korea Other Appellant Submission, para. 192.
[218] Korea Other Appellant Submission, para. 193.

two [comparison methodologies in the first sentence of Article 2.4.2] depending on which is most suitable for the particular investigation.'"[219] The Panel observed that:

> The choice between the two normal methodologies provided for in the first sentence would likely be made *before* the application of the second sentence is considered, in light of, for example, the number of domestic and export transactions involved, differences between the domestic and export models, and other factors concerning the complexity of the comparison. If an authority were to opt for the [average-to-average] comparison methodology to avoid an overly burdensome comparison process, but then ascertain the existence of significant price differences by purchaser, region or time period, it would seem anomalous for that authority to then have to incur the burden of reverting to the [transaction-to-transaction] comparison methodology in the context of the explanation clause, before being able to apply the [average-to-transaction] comparison methodology.[220]

170. The Panel's conclusion that the "explanation clause" does not require an investigating authority to address both the average-to-average comparison methodology and the transaction-to-transaction comparison methodology follows from a proper application of the customary rules of interpretation of public international law. It is also logical and accords with prior Appellate Body guidance concerning Article 2.4.2 of the AD Agreement.

171. 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."[221] The Appellate Body has further explained that it would be illogical if these two comparison methodologies were to yield "results that are systematically different."[222] As the Panel noted,[223] the Appellate Body also has found 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."[224]

172. Logically, if an investigating authority is free to choose between the average-to-average comparison methodology and the transaction-to-transaction comparison methodology, and those comparison methodologies yield systematically similar results,[225] 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

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[219] Panel Report, para. 7.80 (citing *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.
[220] Panel Report, para. 7.80.
[221] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[222] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[223] *See* Panel Report, para. 7.80.
[224] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[225] The United States agrees with Korea that the average-to-average and transaction-to-transaction comparisons are both symmetrical, but they are not the same, *i.e.*, they would not be expected to yield mathematically equivalent results. *See* Korea Other Appellant Submission, para. 196.

of export prices that differ significantly cannot be taken into account appropriately by the average-to-average comparison methodology.

173. Furthermore, the transaction-to-transaction comparison methodology may be particularly unsuitable, and application of the transaction-to-transaction comparison methodology could be quite burdensome, when there is a large number of sales transactions in both the home market and the export market. In any event, nothing in the first sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to apply both of the "normal" comparison methodologies in the course of a single antidumping investigation. Korea appears to agree with this proposition,[226] and it 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.

174. As the Panel reasoned, the use of the term "or" in the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement "suggest[s] that the requisite explanation need only be provided in respect of one type of comparison, be it [average-to-average] 'or' [transaction-to-transaction]."[227] In this regard, the United States observes that the word "or" in the second sentence could not be replaced with the word "and" because that would make no sense. The result of doing so would be that an investigating authority would be required to provide an explanation of "why such differences cannot be taken into account appropriately by the use of an average-to-average *and* transaction-to-transaction comparison." However, it is difficult to imagine why an investigating authority would ever have a practical need to use both an average-to-average comparison methodology and a transaction-to-transaction comparison methodology together in the same proceeding to calculate a single margin of dumping for a given exporter. Again, Korea signaled its agreement with this proposition, asserting that "[i]t would make little sense to refer to the two different comparison methods [in the first sentence of Article 2.4.2] being used at the same time."[228]

175. Moreover, the first sentence of Article 2.4.2 does not appear to contemplate such a mixed application of the normal comparison methodologies, as it uses the word "or" and not the word "and." That is, the first sentence of Article 2.4.2 affords investigating authorities the option of using the average-to-average comparison methodology "or" the transaction-to-transaction comparison methodology. Accordingly, "or" is likewise the proper term to be used in the second sentence of Article 2.4.2.

176. An example may help illustrate this point. Imagine a senior partner at a law firm provides a junior attorney with a blue pen and a black pen and instructs the junior attorney to write a legal brief with either one of those pens, but the partner indicates that the junior attorney also could use a pencil if it is not possible to use either of the pens appropriately. The junior attorney explains that she cannot use the black pen because she might make mistakes that would need to be corrected, so the pencil, with the possibility of erasing, would be a more appropriate tool. There is no reason for the partner to press the junior attorney to explain why the blue pen also would be an inappropriate tool. While they are not identical, the black and blue pens would yield systematically similar results.

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[226] *See* Korea Other Appellant Submission, para. 192.
[227] Panel Report, para. 7.79.
[228] Korea Other Appellant Submission, para. 192.

177. Thus it is with the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. They are similar, but not identical tools, which the Appellate Body has found should not yield "systematically different" results.[229] The investigating authority may choose which of the "normal[]" tools to use and the first sentence of Article 2.4.2 does not require the investigating authority to use one comparison methodology over the other.

178. This interpretation is further supported by reading the two sentences of Article 2.4.2 of the AD Agreement as describing a logical progression, in which the investigating authority first selects whether to use the average-to-average comparison methodology or the transaction-to-transaction comparison methodology as a "normal[]" methodology under the first sentence. The Panel read Article 2.4.2 this way when it suggested that "[t]he choice between the two normal methodologies provided for in the first sentence would likely be made *before* the application of the second sentence is considered."[230] After deciding which of the "normal[]"comparison methodologies to use, the investigating authority examines whether there is a "pattern of export prices which differ significantly" and, if so, whether the "normal[]" methodology that the investigating authority has chosen cannot take such differences into account appropriately.

179. Reading the "or" in the second sentence this way accords with the meaning of the term "or" in the first sentence and is consistent with the Appellate Body's observation that the average-to-average comparison methodology and the transaction-to-transaction comparison methodology should be interpreted as yielding results that are not "systematically different," with the investigating authority having the option of choosing between the two "normal[]" comparison methodologies.[231]

180. Regarding the order of analysis under Article 2.4.2 of the AD Agreement, Korea argued before the Panel that "[t]he authority has discretion to choose between [the two normal comparison methodologies] in the first instance, but then must again consider both comparison methods before turning to [an average-to-transaction] comparison as the exceptional method."[232] On appeal, Korea advances a different argument. Korea contends that:

> The Panel created an artificial distinction that the authority "would likely" have chosen a preferred method under the first sentence before turning to the second sentence. Such a choice may or may not have been made. It is equally possible the authority would be considering all three options at once. Nothing in the text of second sentence Article 2.4.2 requires the explanation relate to the comparison method already chosen under the first sentence.[233]

181. The Panel did not find that Article 2.4.2 "requires" a particular order of analysis. An investigating authority might indeed consider all three options at once, or it might make a choice among the two "normal[]" comparison methodologies before proceeding to consider whether the

[229] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[230] Panel Report, para. 7.80.
[231] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 93.
[232] Panel Report, para. 7.80 (citations omitted).
[233] Korea Other Appellant Submission, para. 198.

use of the alternative comparison methodology is justified. As Korea itself has acknowledged, "[t]he authority is to [sic] free to choose either the [average-to-average] or the [transaction-to-transaction] comparison method, and has no obligation to explain that choice between these two normal methods."[234] Korea's proposed interpretation of the "explanation clause," however, would impose on investigating authorities an obligation to explain the choice made under the first sentence of Article 2.4.2 between the "normal[]" comparison methodologies. Such an obligation is not supported by the text of the first sentence of Article 2.4.2. As the Panel reasoned, "the initial discretion of an investigating authority to choose between the [average-to-average] and [transaction-to-transaction] comparison methodologies would be undermined by Korea's approach to the explanation clause."[235]

182. Korea suggests that "[t]he Panel seemed to think it would be burdensome and serve no purpose to require the authority to address the [transaction-to-transaction] comparison method if the authority had selected the [average-to-average] comparison method."[236] Korea argues that "[t]here is no excessive burden."[237] Korea is wrong.

183. The Panel reasoned that "it would seem anomalous" for an investigating authority "to incur the burden of reverting to the [transaction-to-transaction] comparison methodology in the context of the explanation clause" after it had opted previously to use the average-to-average comparison methodology.[238] In the context of the washers antidumping investigation, the USDOC sought to meet the requirements of the "explanation clause" by comparing the results of the average-to-average comparison methodology with the results of the average-to-transaction comparison methodology.[239] This required the USDOC to undertake the complex calculations involved in applying both the average-to-average comparison methodology and the average-to-transaction comparison methodology, based on information provided by respondents LG and Samsung. Under Korea's proposed interpretation, an investigating authority would be obligated to undertake the transaction-to-transaction comparison methodology as well. As the Panel suggested, "reverting to the [transaction-to-transaction] comparison methodology" in this way would be a "burden."[240]

184. Korea also argues, as it does elsewhere in its other appellant submission, that "the purpose of the second sentence of Article 2.4.2 is to allow a more granular examination of individual export prices and this purpose relates to the choice of the comparison method."[241] Korea contends that "[t]he more granular examination may well facilitate the choice among the three possible comparisons [sic] methods under the second sentence, and ensure that the choice is in fact 'appropriate.'"[242] However, as discussed in above in section II.A.2.d., Korea's proposed purpose of the second sentence of Article 2.4.2 of the AD Agreement is inconsistent

[234] Korea Other Appellant Submission, paras. 189, 193 (emphasis added); *see also* Korea Second Written Submission, para. 156.
[235] Panel Report, para. 7.80.
[236] Korea Other Appellant Submission, para. 194.
[237] Korea Other Appellant Submission, para. 194.
[238] Panel Report, para. 7.80.
[239] *See* Panel Report, paras. 7.54-7.56; *see also* Washers AD Final I&D Memo, p. 20 (Exhibit KOR-18).
[240] Panel Report, para. 7.80.
[241] Korea Other Appellant Submission, para. 197.
[242] Korea Other Appellant Submission, para. 197.

with the Appellate Body's observation that the second sentence of Article 2.4.2 permits an investigating authority to "unmask targeted dumping,"[243] and also is contrary to the text of Article 2.4.2.

185. Finally, Korea raises a concern about the purported "potential for serious abuse" because, as Korea contends, "[u]nder the Panel's logic, the authority could address why the [transaction-to-transaction] comparison method does not work in a particular case, and on that basis alone decide to turn to the [average-to-transaction] comparison method without ever considering the [average-to-average] comparison method at all."[244] In other words, although Korea does not state its concern with perfect clarity, it appears that Korea is suggesting that an investigating authority might first opt to use the average-to-average comparison methodology, and then, when considering whether to use the alternative, average-to-transaction comparison methodology, explain only why the transaction-to-transaction comparison methodology could not take into account appropriately the pattern of export prices which differ significantly. Of course, this is not what the USDOC did in the washers antidumping investigation, nor has Korea pointed to any evidence that its concern has ever manifested itself in any USDOC determination.

186. Furthermore, the likelihood of such abuse would appear to be very low, given what the Appellate Body has said about the general obligation for an investigating authority to reach conclusions that are "reasoned and adequate."[245] As the Appellate Body has explained, an investigating authority's reasoning must be "coherent and internally consistent."[246] If an investigating authority presented an explanation of the difficulties of using the transaction-to-transaction comparison methodology, which are unique to that particular comparison methodology, as justification for not using the "normal[]" average-to-average comparison methodology, it is doubtful that a panel would find such an explanation to be "reasoned and adequate." On the other hand, though, where the reason for finding that one "normal[]" comparison methodology cannot take into account appropriately the pattern of export prices which differ significantly is the same as the reason for finding that the other "normal[]" comparison methodology cannot be used appropriately, *i.e.*, because "targeted dumping" would be "masked," then it is not necessary to address both comparison methodologies in the context of the "explanation" provided.

187. For the reasons given above, when the "explanation clause" is read in the context of Article 2.4.2 of the AD Agreement as a whole, it is clear that an investigating authority is not obligated to include a discussion of both the average-to-average comparison methodology and the transaction-to-transaction comparison methodology in the "explanation" it provides pursuant to the "explanation clause" of the second sentence of Article 2.4.2.

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[243] *US – Zeroing (Japan) (AB)*, para. 135; *see also EC – Bed Linen (AB)*, para. 62 ("This provision [the second sentence of Article 2.4.2 of the AD Agreement] 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.").

[244] Korea Other Appellant Submission, para. 198.

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

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

188. Consequently, the Panel did not err in rejecting Korea's claim that "the USDOC acted inconsistently with the explanation clause [of the second sentence of Article 2.4.2 of the AD Agreement] by failing to explain why the relevant price differences could not be taken into account appropriately by the [transaction-to-transaction] comparison methodology."[247] The Panel also did not err when it found, based on reasoning set forth earlier in the panel report,[248] that the USDOC's differential pricing analysis "is not inconsistent with the explanation clause when, after the USDOC concludes that the [average-to-average] comparison methodology cannot appropriately take into account the observed pattern of significantly different prices, the [differential pricing analysis] does not require the USDOC to also consider whether the relevant price differences could be taken into account appropriately by the [transaction-to-transaction] comparison methodology."[249]

189. Accordingly, the United States respectfully requests that the Appellate Body reject Korea's appeal of the Panel's findings related to the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement.

## III. KOREA'S APPEAL OF CERTAIN PANEL FINDINGS WITH RESPECT TO THE USDOC'S COUNTERVAILING DUTY DETERMINATION IS WITHOUT MERIT

190. Korea's appeal of the Panel's countervailing duty findings is equally without merit. Before the Panel, Korea challenged the USDOC's determination with respect to two subsidy programs: RSTA Article 10(1)(3), which provides tax credits to companies for investments in "research and human resources development," and RSTA Article 26 (entitled "Tax Deduction for Facilities Investments"), which provides tax credits for eligible investments in facilities. Samsung received massive amounts of subsidy under these programs in 2011 – a total of approximately KRW[[***]], equivalent to USD[[***]].[250]

191. Contrary to the rhetoric in Korea's submissions, the USDOC's findings were thoughtful, reasoned, and grounded in the evidence. The USDOC circulated multiple rounds of questionnaires, reviewed extensive written submissions from the parties, and conducted a hearing – generating an administrative record that runs thousands of pages long. Both Korea and Samsung actively participated in these proceedings and had ample opportunity to offer arguments and evidence. The USDOC, in turn, produced lengthy written determinations that expressly addressed this evidence and the parties' arguments and concerns. Out of approximately seventeen programs challenged in the petition, Commerce found that only four conferred countervailable subsidies.[251] And the overall subsidy rate calculated for Samsung was

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[247] Panel Report, para. 7.81.
[248] *See* Panel Report, para. 7.119. The Panel noted that the legal arguments Korea advanced in connection with Korea's claim against the USDOC's differential pricing analysis were essentially the same as the arguments Korea made with respect to the USDOC's "explanation" in the washers antidumping investigation, as were the U.S. arguments in response. The Panel referred to its earlier findings, which it found applied *mutatis mutandis* in the context of the USDOC's differential pricing analysis.
[249] Panel Report, para. 7.119.b.
[250] Final Samsung CVD Calculation Memorandum, Attachments 6, 9 (Exhibit USA-26) (BCI).
[251] Washers Final CVD I&D Memo at 8-24 (Exhibit KOR-77).

a mere 1.85 percent.[252] These are hardly the acts of an investigating authority bent on delivering results-oriented findings and "dramatically inflating" subsidy ratios, as Korea suggests.[253]

192. Korea seeks to overturn the Panel's findings with respect to three of its claims. In each instance, however, the Panel has not erred in its interpretation or application of any provision of the SCM Agreement or the GATT 1994.

193. Korea first argues that the Panel erred in rejecting its specificity claim with respect to RSTA Article 26. The Panel found no error in the USDOC's determination that subsidies conferred under this program were regionally specific. Korea goes to great lengths to impugn the Panel's findings, yet fails to identify any deficiencies in the Panel's interpretation of Article 2.2 of the SCM Agreement. The Panel appropriately rejected Korea's narrow, results-oriented reading of terms such as "certain enterprises" and "designated geographical region," which would re-write the text of Article 2.2 and create gaping loopholes where none exist in the text. Nor was there error in the Panel's rejection of other arguments asserted by Korea, such as its "policy" defense of regional assistance subsidies.

194. Korea's "tying" claim fares no better. According to Korea, the Panel should have found that subsidies under RSTA Article 10(1)(3) and 26 were "tied" to particular products – i.e., products from Samsung's Digital Appliance unit. Yet Korea fails to establish how its preferred methodology for calculating subsidy ratios was required on the facts of this case under Article VI:3 of the GATT 1994 or Article 19.4 of the SCM Agreement. Here, again, Korea relies on an unsound legal theory, based on the alleged effect of expenses that were incurred and associated activities that were undertaken well before the subsidy was bestowed. The Panel appropriately rejected these and other novel legal theories asserted by Korea, including Korea's attempt to inject cost accounting principles from the antidumping context into this CVD proceeding.

195. Korea's final claim – its "overseas effects" theory – is equally deficient. Korea asserts that the USDOC should have incorporated sales by overseas affiliates into the denominator of Samsung's RSTA Article 10(1)(3) subsidy ratio. Like Korea's tying theory, Korea's overseas effects theory is predicated on the effect of R&D activities, and not on the bestowal of subsidies. Here, again, Korea relies on cost accounting materials from separate antidumping proceedings. The Panel correctly found that Korea's arguments had no basis in the text of the SCM Agreement or the GATT 1994.

### A. The Panel Did Not Err In Its Interpretation And Application of Article 2.2 of the SCM Agreement

196. Contrary to Korea's assertions in this appeal, the Panel was faced with 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."

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[252] Washers CVD Final Determination, 77 Fed. Reg. at 75,977 (Exhibit KOR-2).
[253] Korea Other Appellant Submission, para. 37.

197. The RSTA Article 26 subsidy program is expressly limited to investments in newly-acquired facilities located in a designated geographic region – i.e., the territory of Korea that falls outside the "Seoul overcrowding area." The Panel appropriately found no error in the USDOC's determination that this express limitation on access to a designated region rendered the subsidies regionally specific.[254]

198. On appeal, Korea asserts a series of increasingly untenable legal and factual arguments.

199. First, Korea adduces a narrow, results-oriented reading of Article 2.2 of the SCM Agreement. According to Korea, the phrase "certain enterprises" in Article 2.2 means that regional specificity exists only where access to a subsidy is limited to the "legal personality" of enterprises falling within the region. On this theory, an enterprise can only have a single "location" – i.e., the "place" of its legal personality (despite the fact that an enterprise's legal personality is a fiction, and may not be affixed to a particular location).

200. The Panel correctly rejected this interpretative legerdemain. As the Panel observed, this line of reasoning is inconsistent with the text, context, and rationale of Article 2.2. Article 2.2 applies to situations in which access to subsidies is limited to a designated geographical region. The term "certain enterprises," which appears in Article 2.2, does not imply an additional requirement – i.e., that subsidies also must be limited with respect to the "location" of an individual enterprise's legal personality. Such a reading would be inconsistent with the definition of "certain enterprises" found in the chapeau of Article 2.1(a) of the SCM Agreement, and the ordinary meaning of the terms within that definition. Nor is Article 2.2 restricted to the location in which an enterprise happens to receive the "benefit" of a subsidy (which may or may not correspond to the location of that enterprise's "legal personality"). Korea's attempt to conflate concepts of "benefit" and specificity is improper.

201. And Korea's approach would create gaping loopholes where the text does not provide for them. Korea draws a sharp distinction between an "enterprise" and its "facilities," asserting that the latter are somehow excluded from the former and irrelevant to Article 2.2. This interpretation would permit RSTA Article 26 subsidies – which are available with respect to "facilities" that are located in a designated region – to evade scrutiny under the SCM Agreement.

202. Second, Korea effectively re-asserts its argument that there is a "hierarchy" between Articles 2.1(b) and 2.2 of the SCM Agreement. The Panel correctly rejected this theory. There is no textual or logical basis for the assertion that a finding of regional specificity under Article 2.2 is subject to a finding under Article 2.1(b).

203. Third, Korea criticizes the Panel's interpretation and application of the phrase "designated geographical region" in Article 2.2. Korea complains that the Panel should have adopted a series of results-oriented interpretations – for instance, finding in Article 2.2 an alleged requirement that a Member "affirmatively" designate a geographical region for a subsidy to be regionally specific. But the Panel correctly reasoned that Korea's argument would mean that where a Member expressly identifies a region in which access to subsidies is excluded, there is

[254] Panel Report, paras. 7.256-7.289.

no "affirmative" designation of a region, despite the fact that such a designation would also make clear which geographical region is included, and have the same effect. The Panel correctly found that Article 2.2 does not include the "affirmatively" identify requirement Korea seeks to read into the text, which would reduce the inquiry under Article 2.2 to a semantic game, inviting ready circumvention of subsidy disciplines.

204. Fourth, Korea falls back on the "object and purpose" of Article 2.2, arguing that regional specificity is a "flexible" test, based on a sliding scale. But where the text of the measure limits access to a designated geographical region, no amount of "flexibility" makes it contrary to Article 2.2 to find that the subsidy is regionally specific. Among its many deficiencies, this argument would create a carve-out of certain regions from Article 2.2 that is nowhere found in the text, and fundamentally distort the nature of the inquiry under this provision.

205. Fifth, Korea deploys "policy" arguments to buttress its critique. Korea asserts that subsidies are often a "first-best policy," and suggests that the Panel's interpretation would "improperly constrain" Member's ability to provide subsidies that address "overcrowding and urban sprawl."[255] Korea goes so far as to impugn the Panel for having "impose[d] its own preferences on Members."[256] The Panel did nothing of the sort, and this argument provides no basis to conclude that it is contrary to Article 2.2 to find a subsidy regionally specific where the text of the subsidy limits access to a designated geographical region.

206. Finally, Korea asserts two claims under Article 11 of the DSU. Korea asserts that the Panel's interpretation of Article 2.2 was insufficiently "positive" and "coherent," and makes the facially implausible claim that the Panel "completely fail[ed] to review" the USDOC's determination. These arguments are unsupported, and have no basis in Article 11.

207. Below, we address each of these arguments in turn.

### 1. The Panel Appropriately Rejected Korea's Attempt To Limit The Scope Of Article 2.2 To An Enterprise's "Legal Personality"

208. Korea challenges the Panel's interpretation and application of the phrase "certain enterprises" in Article 2.2. In essence, Korea complains that the Panel did not accept its argument that an "enterprise" is distinct from its "facilities," and that only the location of the "legal personality" of the enterprise counts for purposes of Article 2.2. Korea asserts an array of interpretative arguments, with the goal of securing a narrow, results-driven interpretation of the provision.

209. Through these arguments, Korea attempts to erect an additional barrier to establishing regional specificity under Article 2.2. To fall within Article 2.2, a subsidy would have to be (1) limited to a designated geographical region, and (2) limited to the location of an individual recipient's "legal personality." In this respect, Korea's arguments echo its position before the Panel that regional specificity had to be established on a "double basis" – i.e., limited to a designated geographical region and limited to only a subset of enterprises within that region.

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[255] Korea Other Appellant Submission, paras. 287-288.
[256] Korea Other Appellant Submission, para. 293.

Consistent with findings of panels in other disputes, the Panel appropriately rejected Korea's double basis theory, observing that "Article 2.2 provides that a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region."[257] Korea has not appealed this finding.

210. Korea's emphasis on the "legal personality" of the recipient has no basis in the text of Article 2.2, which applies to situations in which access to subsidies is limited to a designated geographical region. Korea's reading of the term "certain enterprises" in Article 2.2 would be inconsistent with the definition of this term found in the chapeau of Article 2.1(a) of the SCM Agreement, as well as the ordinary meaning of the terms within that definition. Korea's attempt to conflate concepts of "benefit" and specificity is equally improper. There is no basis for the suggestion that Article 2.2 is restricted to the location in which an enterprise happens to receive the "benefit" of a subsidy (which may or may not correspond to the location of that enterprise's "legal personality").

211. Korea's interpretation also would have profound implications. Under Korea's theory, the following types of subsidies would fall outside Article 2.2:

- Any subsidies – regardless of regional limitations on access – that are provided by Members whose laws provide that the "legal personality" of an enterprise either has no geographic location or is deemed to exist with respect to the entirety of the Member's territory (e.g., all enterprises are incorporated at the federal/central level, and not at the level of particular regions);

- Subsidy programs that limit access to manufacturing facilities in a designated region, but permit recipients to maintain their headquarters outside the region.

- Subsidies that are limited to manufacturing facilities in a designated region, but for which payment of the subsidy is actually received at the entity's payment processing facility or bank account (which may be located elsewhere in the country).

212. The Appellate Body should reject this interpretation, which would severely limit the scope of Article 2.2 and permit ready circumvention of specificity disciplines.

#### a. Ordinary Meaning Of The Term "Enterprise"

213. Korea criticizes the Panel's analysis of the ordinary meaning of the term "enterprise." Korea asserts that the Panel improperly based its interpretation on the terms "business" and "commercial activity," which do not appear in Article 2.2.[258]

214. Yet the Panel drew these terms from the definition of the term "enterprise" – i.e., "a business or company."[259] As the Panel noted, this definition is consistent with the Appellate

[257] Panel Report, para. 7.288.
[258] Korea Other Appellant Submission, para. 253.
[259] Panel Report, para. 7.267 (citing dictionary definition).

Body's understanding of the term in *US – Anti-Dumping and Countervailing Duties (China)*.[260] The Panel then considered the meaning of the term "business," which "includes the notion of 'commercial activity.'"[261] The Panel correctly found that an "enterprise" may carry out "commercial activities" in its facilities. Thus, "there is no reason why the facilities in which an enterprise performs these 'commercial activities' should not be treated as part of that enterprise's business."[262]

215. Contrary to Korea's assertion,[263] the Panel did not equate an "enterprise" with its "commercial activities." Instead, the Panel stressed the fundamental linkage between these concepts; this militated against Korea's assertion that there was a sharp distinction between an "enterprise" and the "facilities" in which it carries out commercial activities. Drawing on this analysis, the Panel correctly rejected Korea's assertion that the term "enterprise" was solely concerned with the concept of "legal personality."[264]

#### b. Definition Of "Certain Enterprises"

216. Korea accuses the Panel of having "conflat[ed] the two distinct concepts" of "enterprise" and "industry."[265] This is incorrect, and misses the point of the Panel's analysis.[266]

217. The Panel observed that the term "certain enterprises" in Article 2.2 is defined in the chapeau of Article 2.1 as "an enterprise or industry or group of enterprises of industries."[267] The Panel evaluated the elements of this definition, reading them in context with one another consistent with Article 31 of the *Vienna Convention on the Law of Treaties*. In particular, the Panel considered that the other terms within this definition – "industry," "group of industries," and "group of enterprises" – provided context for interpreting the term "enterprise." An "industry," "group of industries," or "group of enterprises" could not have legal personality. Thus, the Panel considered that, "[v]iewed in this context, the term 'enterprise' must be interpreted more broadly than suggested by Korea"[268] – i.e., it cannot be limited to a business or company having legal personality.

218. This context makes clear that the compound term "certain enterprises" in Article 2.2 cannot be limited to concepts of legal personality. As the Panel observed, "[a]n industry is not a business or company with legal personality, and yet it can be a 'certain enterprise' within the

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[260] Panel Report, fn. 453 (citing *US – Anti-Dumping and Countervailing Duties (China)*, para. 373).
[261] Panel Report, para. 7.267 (citing dictionary definition).
[262] Panel Report, para. 7.267.
[263] Korea Other Appellant Submission, para. 253.
[264] Panel Report, para. 7.267.
[265] Korea Other Appellant Submission, para. 257.
[266] The Panel was well aware of the ordinary meaning of the terms "enterprise" and "industry." As noted above, the Panel defined the term "enterprise" as a "business or company." The Panel also cited to paragraph 373 of *US – Anti-Dumping and Countervailing Duties (China)*, where the Appellate Body defined the term "industry" as "[a] particular form or branch of productive labour; a trade, a manufacture." Panel Report, para. 7.267 & n.453.
[267] The term "certain enterprises" thus has a "special meaning," and falls within Article 31(4) of the *Vienna Convention on the Law of Treaties*.
[268] Panel Report, para. 7.268.

meaning of Article 2.2. In respect of an industry, therefore, the application of Article 2.2 cannot depend on the location of the business or company having legal personality."[269]

219. As the Panel's analysis suggests, the phrase "certain enterprises" is a much broader concept than an enterprise with legal personality, and encompasses a wide variety of economic structures and activities.[270] The breadth of this definition reflects the ability of WTO panels and investigating authorities to discern specificity and apply subsidy disciplines in light of the myriad ways in which Members may impose limitations on subsidies. This is consistent with the Appellate Body's observation in *US – Anti-Dumping and Countervailing Duties (China)* that "*a limitation on access to a subsidy may be established in many different ways* and that whatever the approach investigating authorities or panels adopt, they must ensure that the requisite limitation on access is clearly substantiated on the basis of positive evidence."[271]

### c. The "Constituent Parts" Of An "Industry"

220. Korea's criticism of the Panel's interpretation of the "constituent parts" of an "industry" also misses the mark. In its report, the Panel observed that an "industry" would fall within the term "certain enterprises." Thus, for purposes of Article 2.2 an "industry" may be "located within a designated geographical region" – language suggesting that "it is rather the location of the constituent parts of the industry that trigger the application of Article 2.2. *The industry is therefore located within a designated region if a constituent part of that industry, including, for example a manufacturing facility belonging to that industry, is located in that region*."[272]

221. Korea suggests that the location of an "industry" is a function of the location of individual producers with legal personality.[273] Korea invokes the statement of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that "the concept of an 'industry' relates to producers of certain products."[274] According to Korea, the Panel should not have "go[ne] below" the level of a "constituent entity" (such as an individual enterprise) – e.g., to the level of facilities.[275]

222. These arguments are riddled with legal and logical errors. There is no dispute that an "industry" may include individual producers, who may in turn have legal personality. But this does not mean that the "location" of an "industry" is determined by the legal personality of individual producers. As the Panel recognized, the verb "locate" is defined in relevant part as

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[269] Panel Report, para. 7.269.
[270] Korea asserts that the Panel's analysis was incorrect because "the factual situation in the present dispute relates to an 'enterprise.'" Korea Other Appellant Submission, para. 257. Korea confuses the interpretation of a legal provision and its application; yet both are entirely consistent in this case. The point of the Panel's analysis was to underscore the breadth of economic structures and activities encompassed by the phrase "certain enterprises," which is not limited to concepts of legal personality. Given the breadth of this definition, there is no basis for Korea's assertion that limitations of the kind at issue in this dispute – i.e., limitations on access to facilities located within a designated region – fall outside the scope of Article 2.2.
[271] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413 (emphasis supplied).
[272] Panel Report, para. 7.269 (emphasis supplied).
[273] Korea Other Appellant Submission, paras. 255, 261.
[274] Korea Other Appellant Submission, para. 259 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373).
[275] Korea Other Appellant Submission, para. 255.

"[e]stablish oneself or itself in a place; take up residence or business in a place . . . [f]ix or establish in a place . . . be situated."[276]

223. Legal personality is a fiction, and may not imply a particular fixed location. Under the laws of a Member, even an individual company may not have legal personality that is associated with a particular location or region. To the extent that any location for this personality can be inferred, it may reside at the place of incorporation, which may be at the national or central level. Under Korea's theory, such enterprises would not be "located" anywhere (or would, alternatively, be located in the entire territory of the Member), regardless of any regional limitations on access to subsidies. Alternatively, a Member may deem legal personality to reside at the place of business or headquarters. Or a Member may consider that legal personality applies to the entirety of an entity's operations and facilities, wherever located.

224. As with individual companies, there is no reason why an "industry" cannot be "located" in a manufacturing or other facility – as opposed to the "location" of an individual firm's legal personality.[277] The term "industry" is broadly defined as "[a] particular form or branch of productive labor; a trade, a manufacture."[278] The Panel correctly inferred that a constituent part of a "branch of productive labor," "a trade," or "a manufacture" may include a facility in which the relevant production takes place.[279] As the Appellate Body recognized, "the breadth of this concept of 'industry' may depend on several factors in a given case."[280]

225. All of this confirms that the even more expansively defined term "certain enterprises" in Article 2.2 – which includes enterprises, industries, groups of enterprises, and groups of industries – should not be read in the narrow, results-oriented way that Korea seeks.

### d. Enterprises May Have Multiple "Locations"

226. Korea purports to find a "fallacy" in the Panel's finding that an enterprise may have multiple locations. According to Korea, this would mean that – in the case of RSTA Article 26 – the subsidy "cannot be said to limit the geographical location of Samsung."[281] These arguments are groundless.

227. In its report, the Panel explained that, even if one considered a single business or company for purposes of Article 2.2, this entity "may be 'located' in a variety of places, including the site of its head office, branches, manufacturing facilities, or other assets or

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[276] Panel Report, para. 7.270 n.457 (quoting 1 *New Shorter Oxford English Dictionary* 1614 (1993) (Exhibit USA-48)).
[277] The Panel found that, in *EC – Large Civil Aircraft*, the panel "appears to have found specificity under Article 2.2 of the SCM Agreement on the basis of the recipient's physical presence in the designated regions," and "did not reject the application of Article 2.2 on the basis that the regional facilities were not businesses or companies have legal personality, as Korea's approach suggests it should have done." Panel Report, para. 7.271. Korea does not appeal this finding.
[278] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373 (quoting dictionary definition).
[279] Panel Report, para. 7.269.
[280] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.
[281] Korea Other Appellant Submission, para. 266.

investments."[282] The Panel gave the example of a company that is headquartered in London, but has its manufacturing facility in Liverpool. In this example, the company would have two "locations" – London and Liverpool.[283]

228. The Panel's analysis comports with the text of Article 2.2 and common sense. As the Panel noted, the verb "locate" includes "tak[ing] up business in a place," "establish[ing] oneself . . . in a place," and "being situated."[284] A company clearly "takes up business" at the facility in which it conducts manufacturing operations, and is both "situated" and "established" there. Equally, it "takes up business," and is situated and established, at its headquarters. Many, and perhaps most enterprises have more than one location. Korea offers no basis for privileging one form of "location" or another, for purposes of Article 2.2.

229. Korea asserts that, if one were to accept this common-sense notion of multiple locations, it would mean that "there is no basis to find regional specificity with respect to RSTA Article 26."[285] Korea points to Samsung, which has locations both within and without the designated region. According to Korea, RSTA Article 26 "cannot be said to limit the location of Samsung."[286]

230. There is no basis for Korea's all-or-nothing approach to regional specificity. The fact that an "enterprise" may receive subsidies based on one of its locations (which falls inside the designated geographical region), and not based on the location of its other facilities, is of no moment. This fact does not efface the regional limitation on access that the granting authority has set down. By design, such a scheme would channel resources and economic activity into the designated region – which, as the Panel observed, is precisely the dynamic that Article 2.2 was intended to address.[287]

231. Korea's theory would also yield troubling results, and create gaping loopholes in the disciplines. It is difficult to imagine any regional subsidy scheme that would fall within Article 2.2, under Korea's all-or-nothing logic. For virtually any scheme, it would be a simple matter to identify a recipient with multiple locations (such as Samsung), some of which would fall within regional boundaries, and some of which would fall outside.

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[282] Panel Report, para. 7.270.
[283] Panel Report, para. 7.270.
[284] Panel Report, para. 7.270.
[285] Korea Other Appellant Submission, para. 266.
[286] Korea Other Appellant Submission, para. 266.
[287] Panel Report, para. 7.273. Korea points to the definition of "enterprise" found in certain free trade agreements ("FTAs") signed by the United States, and suggests that this supports its emphasis on legal personality. Korea Other Appellant Submission, para. 267. This argument is frivolous. Korea fails to explain how these FTAs are relevant to an interpretation of Article 2.2 of the SCM Agreement. For instance, Korea does not suggest that these FTAs provide an interpretation of the term "certain enterprises" – much less the term "enterprise" within that definition – under the SCM Agreement agreed by all WTO Members. The Panel appropriately concluded that it was "bound to evaluate Korea's claim on the basis of the ordinary meaning of the text of Article 2.2, read in light of its context and object and purpose. We will therefore not evaluate Korea's claim on the basis of language that may be included by the United States in its free trade agreements." Panel Report, para. 7.266 n.452.

#### e. Korea's Attempt To Incorporate The Concept Of "Benefit" Into Article 2.2 Of The SCM Agreement Is Groundless

232. Korea attempts to shore up its argument by invoking the concept of "benefit" under Article 1.1(b) of the SCM Agreement. According to Korea, it is only a "legal person" who can receive a subsidy, and not "facilities."[288] Korea cites to the Appellate Body's observation in *US – Lead and Bismuth II* and *Canada – Aircraft* that, for purposes of Article 1.1(b), there must be a "benefit to the recipient," which is a natural or legal person.[289]

233. Korea's attempt to graft "benefit" concepts from Article 1.1(b) onto Article 2.2 is unavailing. As the Panel observed in *Korea – Commercial Vessels*, the concepts of "financial contribution," "benefit," and "specificity" in Articles 1 and 2 are "a set of *cumulative, and independent, elements* all of which must be present for a measure to be regulated by the SCM Agreement."[290]

234. The Appellate Body has faulted similar attempts to conflate these separate elements. For instance, in *Brazil – Aircraft*, the Appellate Body found that the Panel had "imported the notion of a 'benefit' into the definition of a 'financial contribution.' This was a mistake. We see the issues – and the respective definitions – . . . as two separate elements . . . which *together* determine whether a subsidy exists."[291]

235. Likewise, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body distinguished between the concepts of financial contribution and benefit within Article 1.1, on the one hand, and Article 2 specificity principles, on the other. As the Appellate Body observed, "the purpose of Article 2 of the SCM Agreement is not to identify the elements of the subsidy as set out in Article 1.1, but to establish whether the availability of the subsidy is limited inter alia by reason of the eligible recipients (Article 2.1(a)) or by reason of the geographical location of the beneficiaries (Article 2.2). We also consider that a limitation on access to a subsidy may be established in many different ways . . . ."[292] The Appellate Body rejected the argument that, under either Article 2.1(a) or 2.2, a limitation on access must exist with respect to "the subsidy" (i.e., both the financial contribution and benefit conferred).[293]

236. Korea's attempt to blur the distinction between the concepts of "benefit" and "specificity" warrants similar rejection. The requirement under Article 1.1(b) that a "benefit" be conferred on a recipient is a separate element in determining whether a subsidy may be subject to the disciplines of the SCM Agreement. As the Appellate Body has observed, specificity is concerned with "limitations on access" to the subsidy – a qualitatively different line of inquiry. Given the Appellate Body's observation that such limitations on access "may be established in

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[288] Korea Other Appellant Submission, para. 263.

[289] Korea Other Appellant Submission, para. 236 (quoting *US – Lead and Bismuth II (AB)*, para. 58, and *Canada – Aircraft (AB)*, para. 154).

[290] *Korea – Commercial Vessels (Panel)*, para. 7.411 (emphasis supplied); *see also US – Large Civil Aircraft (2d Complaint) (Panel)*, para. 7.32 (setting out the cumulative requirements that a complaint must establish to show that an actionable subsidy exists).

[291] *Brazil – Aircraft (AB)*, para. 157 (emphasis in original); *see also US – Export Restraints*, para. 8.20.

[292] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413 (emphasis supplied).

[293] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 378, 407-414.

many different ways,"[294] it is particularly difficult to credit Korea's attempt to narrow the scope of limitations that fall within Article 2.2, based on where the "benefit" is allegedly conferred.

237. Limiting Article 2.2 in the manner that Korea suggests could also yield absurd results. For instance, a company with facilities inside the designated region might nonetheless receive subsidies in a bank account or payment processing facility located outside the designated region; Korea's emphasis on the receipt of "benefit" implies that the subsidies would not be regionally specific. And if the subsidy is deemed to be "received" by the natural or legal person, then why would the benefit not be considered as having been conferred on the entity as a whole – including each of its facilities? As these examples illustrate, Korea's theory is unsound, and should be rejected.

### 2. Korea's "Hierarchy" Argument Under Article 2.1(b) Was Improperly Asserted, And Fails On The Merits

238. In its other appellant submission, Korea invokes Article 2.1(b) of the SCM Agreement.[295] Korea appears to be re-asserting its argument that there is a "hierarchy" between Articles 2.1(b) and 2.2 – an argument that the Panel considered and rejected. Yet Korea fails to cite or even address the Panel's findings concerning Article 2.1(b), in either its notice of appeal or other appellant submission. Korea does not provide a "precise statement of the grounds for appeal, including the specific allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel" with respect to Article 2.1(b), and has failed to comply with Rules 21(2) and 23(2) of the Working Procedures for Appellate Review.

239. But even aside from this issue falling outside the scope of this appeal, Korea's argument fails on the merits. Without addressing the Panel's findings, Korea asserts that a finding of non-specificity under Article 2.1(b) would "lend[ ] further support to the conclusion" that subsidies are not specific within the meaning of Article 2.2.[296] Korea argues that RSTA Article 26 subsidies follow objective criteria and conditions, and that the regional limitation in this program "should not be read to convert an Article 2.1(b) subsidy to an Article 2.2 subsidy."[297]

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[294] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413. Korea latches onto the Appellate Body's reference to "the geographical location of beneficiaries" of regionally specific subsidies, suggesting that the Appellate Body endorsed its attempt to graft "benefit" concepts onto Article 2.2. Korea Other Appellant Submission, para. 237 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 364). Korea's argument is implausible on its face, as the quoted language appears in the same section of the report in which the Appellate Body rejected China's attempt to import "benefit" concepts into Article 2.2. The Appellate Body was not using the term "beneficiary" in a way that would limit the scope of Article 2.2's application to the location where a recipient receives a "benefit." Instead, the Appellate Body referred generally to the "geographical location of beneficiaries." It did not limit in any way the type of "location" that would qualify for purposes of Article 2.2. To the contrary, the Appellate Body affirmed that regional limitations on access to subsidies under Article 2.2 "may be established in many different ways." *Id.*

[295] Korea Other Appellant Submission, para. 246.

[296] Korea Other Appellant Submission, para. 246.

[297] Korea Other Appellant Submission, para. 246 & n.183. Contrary to Korea's assertion that Seoul is the "lone overcrowding region in Korea," Korea's own submissions suggest that up to 16 cities in Korea qualify as "overcrowded." Korea First Written Submission, n.316.

240. Korea has failed to explain why the text of the SCM Agreement would support the assertion that a finding of non-specificity under Article 2.1(b) would exclude a finding of regional specificity under Article 2.2. Article 2.2 provides that subsidies limited to designated geographical region "shall be specific," in mandatory language. There is no suggestion that a finding under Article 2.2 is subordinate to some other finding under Article 2.

241. The Panel appropriately rejected Korea's argument that there was a "hierarchy" between these provisions, finding that Article 2.2 "operates independently of Article 2.1(b)."[298] The Panel agreed with the findings of the panel in *EC – Large Civil Aircraft* that "[t]here 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)."[299]

242. Moreover, Korea's interpretation would make Article 8.2(b) of the SCM Agreement 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). 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."[300]

### 3. The Panel Did Not Err In Its Interpretation And Application Of The Term "Designated Geographical Region"

243. Equally, there is no merit to Korea's criticism of the Panel's interpretation and application of the phrase "designated geographical region" in Article 2.2. Korea argues that the Panel erred by (1) "empt[ying]" the term "designate" of meaning; (2) declining to find that RSTA Article 26 did not "affirmatively" designate a geographical region; (3) refusing to endorse Korea's theory that large regions are "too diffuse" and may fall outside the scope of Article 2.2; and (4) failing to recognize that a region does not fall within Article 2.2 if it is the product of several regions.

244. These arguments are groundless. The Panel correctly observed, based on the text of Article 2.2, that if a measure indicates the designated geographical region in which subsidies are available, then that measure is regionally specific. Nothing in Article 2.2 would prevent this from being done by designating the eligible region as the area that falls outside the named region. Nor does Article 2.2 exclude a "large" region from being a "designated geographical region," or suggest that regions containing sub-parts which themselves could be considered regions fall outside the scope of this provision.

#### a. The Panel's Interpretation Of The Term "Designate"

245. Korea's criticism of the Panel's interpretation of the term "designate" is unavailing. Korea asserts that the Panel "emptied" this term of meaning, and "improperly substituted" the

[298] Panel Report, para. 7.261.
[299] Panel Report, para. 7.261 (quoting *EC – Large Civil Aircraft (Panel)*, para. 7.1233).
[300] *EC – Large Civil Aircraft (Panel)*, para. 7.1234.

term "indicate" for the term "designate."[301] According to Korea, the Panel's interpretation was at odds with its "acknowledge[ment] that the ordinary meaning of the term 'designate' suggests that 'the designation of the region must be affirmative.'"[302]

246. Korea misrepresents the Panel's findings. In its report, the Panel considered the ordinary meaning of the term "designate," by reference to the dictionary definition of the term: "[p]oint out, indicate, specify . . . [c]all by name or distinctive term; name, identify, describe, characterize."[303] The Panel found that: "While certain aspects of the definition – 'point out' and 'specify' – perhaps suggest that the designation of the region must be affirmative, the reference to 'indicate' suggests that the designation might also be accomplished through less direct means that nevertheless make the region known."[304]

247. Far from "emptying" the term "designate" of meaning, the Panel elucidated the ordinary meaning of the term through a standard method – i.e., first consulting the dictionary definition of the term. There is nothing novel about this approach, which is grounded in Article 31 of the *Vienna Convention on the Law of Treaties* and the long-standing practice of the Appellate Body.[305] The Panel considered the various elements of this definition, including the term "indicate," and noted that they did not all require or suggest an "affirmative" act, as long as the region is made known. Contrary to Korea's assertion, the Panel did not "substitute" a term in place of "designate."[306]

248. The Panel also observed that Article 2.2 does not require that a designation be made explicitly, as Korea suggests.[307] Article 2.2 does not contain the word "explicit." By contrast, this term does appear in Article 2.1(a). If the drafters of Article 2.1(a) had intended to impose such a requirement, they could easily have done so. Article 2.1 operates independently of Article 2.2.[308]

249. The panel in *US – Anti-Dumping and Countervailing Duties (China)* rejected a similar argument – i.e., that Article 2.2 is limited to situations of *de facto* specificity.[309] 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,

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[301] Korea Other Appellant Submission, paras. 280-281.
[302] Korea Other Appellant Submission, para. 280.
[303] Panel Report, para. 7.280 (quoting 1 *New Shorter Oxford English Dictionary* 645 (4th ed. 1993) (Exhibit USA-31)).
[304] Panel Report, para. 7.280 (emphasis supplied).
[305] *See, e.g.*, *China – Publications and Audiovisual Products (AB)*, para. 348 (dictionaries are "important guides" to the ordinary meaning of treaty terms, although not dispositive); *EC – Chicken Cuts (AB)*, para. 175 (dictionaries are "useful starting point" for analysis of ordinary meaning of treaty terms).
[306] Korea asserts that, "had the drafters not intended to require an affirmative identification of the geographical region where the recipient enterprises must be located, they could have simply omitted the term "designated" from Article 2.2. However, they chose to include that term and therefore that term must be given effect." Korea Other Appellant Submission, para. 280. But this argument merely assumes that the ordinary meaning of the term "designate" "require[s] an affirmative identification." As the Panel explained, this is simply untrue. Korea fails to explain why, based on the definition of the term "designate," this term requires such affirmative identification.
[307] Panel Report, para. 7.279.
[308] Panel Report, para. 7.279.
[309] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.134.

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 "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."[310]

250. Thus, the Panel did not "empty" the term "designate" of meaning, and appropriately considered the ordinary meaning of this term. Here, again, Korea seeks to read limitations into the text of Article 2.2 that do not exist.

#### b. The Panel's Application Of The Term "Designate" To The RSTA Article 26 Program Was Not In Error

251. For many of the same reasons, there is no merit to Korea's assertion that the Panel erred in applying the term "designate" to the RSTA Article 26 subsidy program. Korea argues that RSTA Article 26 merely "identifies the area in which investments do not qualify for subsidies."[311] According to Korea, the identification of an excluded area does not "affirmatively identif[y]" a region.[312]

252. As discussed above, the term "designate" does not require "affirmative" identification of a designated region. But here, the limitation of subsidies to a designated region (i.e., the territory outside the Seoul overcrowding area) is express and unambiguous. As the Panel found, Article 23 of the Enforcement Decree "makes it known that RSTA Article 26 tax credit subsidies are only available for investments outside of the Seoul Metropolitan Area. In making this known, Article 23 of the RSTA Enforcement Decree effectively designates the geographical region in which the relevant investments will be eligible for subsidization."[313]

253. 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 a specific type of form (a geographic region that is identified by name) over another type of form or substance (a geographic region that is identified as a territory excluding a named region). Indeed, the Panel observed that "Article 23 of the RSTA Enforcement Decree makes it clear where enterprises should direct their resources in order to benefit from RSTA Article 26 tax credits."[314] Thus, the measure did indeed "designate" the geographical region," and the Panel made no error in so finding.[315]

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[310] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.134.
[311] Korea Other Appellant Submission, para. 282.
[312] Korea Other Appellant Submission, para. 282.
[313] Panel Report, para. 7.280.
[314] Panel Report, para. 7.281.
[315] Panel Report, para. 7.281.

### c. The Panel Appropriately Rejected Korea's "Large Region" Defense

254. Korea attempts to graft a series of limitations onto the concept of "geographical region," to buttress its argument that large regions should be excluded from the scope of Article 2.2. Korea asserts that a "geographical region" must be "sufficiently defined to be discernible and distinguishable from the overall territory."[316] Korea suggests that the Panel should have recognized that a large region such as the one at issue here – which covers 98% of Korea's territory – is "too diffuse" and "indistinguishable from the broader jurisdiction of the granting authority."[317]

255. The text of Article 2.2 does not exclude "large" regions from its scope. 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."[318] These terms suggest that a "geographical region" is an "area of more or less definite extent or character," and is framed in terms of the earth's surface or other features. The ordinary meaning of the phrase "geographical region" does not carry a size limitation.

256. As the Panel observed, "the phrase 'geographical region' is not qualified in any way. This suggests that the designation of *any* geographical region – no matter how small or large – would suffice to trigger the application of Article 2.2."[319] The Panel drew support from the findings of the panel in *US – Anti-Dumping and Countervailing Duties (China)*, which affirmed that "any identified tract of land within the jurisdiction of a granting authority" may qualify as a "designated geographical region."[320]

257. Korea attempts to distinguish the report in *US – Anti-Dumping and Countervailing Duties (China)*, on the grounds that the dispute involved an industrial park.[321] But the different facts in a different dispute do not in themselves provide a basis to think that a different legal interpretation must be reached. In *US – Anti-Dumping and Countervailing Duties (China)*, the panel provided a legal interpretation of Article 2.2,[322] and there is nothing in that analysis that

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[316] Korea Other Appellant Submission, paras. 214, 282.
[317] Korea Other Appellant Submission, para. 284.
[318] *New Shorter Oxford English Dictionary*, vol. 1, p. 1079, vol. 2, pp. 2527-2528 (4th ed. 1993) (Exhibit USA-31).
[319] Panel Report, para. 7.282.
[320] Panel Report, para. 7.282 (quoting from *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 9.140, 9.144).
[321] Korea Other Appellant Submission, para. 285.
[322] In *US – Anti-Dumping and Countervailing Duties (China)*, the panel's observation appears as the conclusion to a discrete section of its report entitled, "'Designated geographical region' in Article 2.2 of the SCM Agreement." The panel described the issue addressed in that section as a "question of legal interpretation" – specifically, China's argument that "a 'designated geographical region' in the sense of Article 2.2 of the SCM Agreement must necessarily have some sort of formal administrative or economic identity." The panel rejected this argument, observing that it could find in the text of Article 2.2 "no limitation of the kind advanced by China." The panel also rejected China's argument based on Article 8 of the SCM Agreement. The panel concluded by finding that "a 'designated geographic region' in the sense of Article 2.2 of the SCM Agreement can encompass any identified tract

would suggest a different interpretation on the facts of this case. As the Panel found – "there is no reason why that interpretation should not afford guidance whenever that text is considered in subsequent WTO dispute settlement proceedings."[323]

258. In an apparent attempt to bolster its argument concerning regions that are too "diffuse," Korea cites the second sentence of Article 2.2, which provides that "[i]t is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement." Korea asserts that the reference to "levels of government" in the second sentence of Article 2.2 "strongly suggests that the 'designated geographical regions' that the drafters had in mind in the first sentence are administrative subdivisions of the Member concerned or that, at the very least, are demarcated territories that have a degree of cohesion that makes them into a territorial unit and distinguishes them sufficiently from the broader jurisdiction of the granting authority."[324]

259. This argument is groundless. The second sentence of Article 2.2 relates to a particular situation involving "generally applicable tax rates," and there is no textual or logical basis for inferring that its reference to "levels of government" is intended to limit the broader phrase "designated geographical region" in the first sentence. Moreover, the drafters of the first sentence of Article 2.2 could have easily written "designated administrative subdivision" in the first sentence of Article 2.2, but declined to do so. As discussed above, the ordinary meaning of "designated geographical region" is much broader than this, and includes any identified tract of land. The panel in *US – Anti-Dumping and Countervailing Duties (China)* rejected a similar argument – i.e., that a designated geographical region must have a "formal economic or administrative identity" – and its reasoning is persuasive.[325]

260. Again, large or small, once a region has been designated for purposes of limiting the scope of a subsidy program, that program "*shall be specific*."[326] 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.[327] Instead, Article 2.2 is a "particular case of specificity" based on geographic limitations.[328]

261. Yet even on Korea's logic, large regions should not be excluded from the scope of Article 2.2. The fact that a region is large does not make it "indistinguishable from the broader jurisdiction of the granting authority," as Korea suggests. If a geographical region has been designated, and falls within the jurisdiction of the granting authority, it meets the requirements of Article 2.2.

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of land within the jurisdiction of a granting authority." *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 9.140-9.144.

[323] Panel Report, para. 7.283.

[324] Korea Other Appellant Submission, para. 216.

[325] *US – Anti-Dumping and Countervailing Duties (China)*, paras. 9.140-9.144.

[326] SCM Agreement, Article 2.2 (emphasis supplied).

[327] *See* Washers Final CVD I&D Memo, p. 46 (Exhibit KOR-77) ("This percentage of landmass bears no relationship to regional specificity.").

[328] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.134.

262. Nor is there any basis for impugning the Panel's finding that the "large" region at issue in the RSTA Article 26 subsidy program constituted a "geographical region." Korea complains that this region is "too unbounded" and "diffuse," and asserts that there is "almost total overlap with the jurisdiction of the granting authority."[329] Korea also dismisses RSTA Article 26's geographic limitation as simply "provid[ing] an exception" by identifying the Seoul overcrowding region.[330]

263. But there is nothing "diffuse" about the region fixed by the RSTA Enforcement Decree. As the Panel observed, that decree "makes it known" that subsidies are only available outside of the Seoul overcrowding region, and "makes it clear where enterprises should direct their resources in order to benefit from RSTA Article 26 tax credits."[331] There is no dispute or ambiguity over the boundaries of the area falling outside the Seoul overcrowding region.[332] They are clearly distinguishable from the jurisdiction of the granting authority, which covers the entire territory of Korea. Ironically, one meaning of the term "region" is "the parts of the country outside the capital or chief seat of government"[333] – the exact situation presented by RSTA Article 26.

264. Nor is it appropriate to overlook the geographic limitation here on the grounds that it sets out an "exception." 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 the 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 subsidy disciplines of the SCM Agreement.

265. And here, it would have been particularly inappropriate to "round up" from 98 percent to 100 percent, and conclude that all of Korea's territory was effectively covered, as Korea suggests. The alleged "exception" here – the Seoul overcrowding region – is hardly a negligible exclusion that should be overlooked for specificity purposes. As the USDOC stated, this region "constitutes *a significant portion of the Korean capital region and the Korean population*."[334] Korea has admitted that this is "the most densely populated area of Korea."[335] Despite accounting for approximately two percent of the nation's territory, it is undisputed that Seoul is the economic engine of Korea, accounting for a substantial portion of Korea's population and industry.[336] By designating a region that did not include Seoul, Korea limited access to the RSTA Article 26 subsidy program in a fundamental way.

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[329] Korea Other Appellant Submission, paras. 242, 284.
[330] Korea Other Appellant Submission, para. 207.
[331] Panel Report, paras. 7.280-7.281.
[332] Samsung Washers Verification Report, Ex. 6, pp. 10-11 (Exhibit KOR-79) (BCI) (identifying boundaries of Seoul overcrowding region).
[333] 2 *New Shorter Oxford English Dictionary*, vol. 2, pp. 2527-2528 (4th ed. 1993) (Exhibit USA-31).
[334] Washers Final CVD I&D Memo, p. 46 (Exhibit KOR-77) (emphasis supplied).
[335] Washers CVD GOK Case Brief, pp. 7-8 (Exhibit KOR-82) (BCI).
[336] *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"). Of the total revenue reported by all Korean companies in 2010 (KRW 3,892,362,244 million),

#### d. Korea's "Aggregation" Theory Is Frivolous

266. Korea makes an argument – never made to the Panel – that because the text of Article 2.2 refers to "region" in the singular, a broad "aggregation of regions" such as allegedly occurred with respect to RSTA Article 26 would fall outside the scope of this provision.[337] This argument is frivolous. Under Article 2.2, the inquiry is whether a geographical region has been designated within the jurisdiction of the granting authority, and that limits access to subsidies. As noted above, the measure at issue does so limit access. Moreover, even if the territory outside the greater Seoul region could be considered an "aggregation" of regions, the ordinary meaning of the term "region" encompasses an aggregation of what may also be regions, as a state or province may be made up of localities, counties, or municipalities.

267. Korea's aggregation theory would also vitiate the disciplines in Article 2.2. In virtually every case, a "region" will have constituent parts – which themselves could be considered "regions." For instance, a province may be subdivided into counties, which may contain municipalities, and so on. The possibility of further subdivision does not mean that the province would fail to qualify as a "region."

268. Equally, the fact that the region designated by the RSTA Enforcement Decree could itself contain subdivisions that might qualify as "regions" is of no moment. The Enforcement Decree makes clear the geographical region in which subsidies are available; that is all that Article 2.2 requires.

### 4. Korea's Arguments Based On The Purpose Of Article 2.2 Are Groundless

269. In its other appellant submission, Korea challenges certain statements of the Panel with respect to the purpose of Article 2 of the SCM Agreement. Korea criticizes the Panel for observing that Article 2.2 applies to subsidies that are "contingent on considerations regarding geographical location."[338] Although Korea appears to accept certain aspects of the Panel's findings with respect to the purpose of Article 2.2, it complains about its application to RSTA Article 26.[339] Korea urges the adoption of a "flexible" interpretation of Article 2.2 under which regional specificity would be determined by calibrating the amount of trade distortion associated with a particular geographical limitation.[340] Korea asserts that the Panel's failure to adopt a "flexible" approach with respect to RSTA Article 26 was contrary to "the object and purpose" of Article 2.2.[341] These arguments are groundless.

270. At the outset, it is important to clarify that – contrary to Korea's assertion – an individual provision such as Article 2.2 does not have an "object and purpose" for purposes of interpreting

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approximately 63% (KRW 2,432,944,982 million) was earned by companies in Seoul. GOK May 30, 2014 QR, Ex. R-1 (Exhibit KOR-125).

[337] Korea Other Appellant Submission, para. 278.

[338] Korea Other Appellant Submission, paras. 271-272; Panel Report, para. 7.273.

[339] Korea Other Appellant Submission, paras. 279.

[340] Korea Other Appellant Submission, paras. 220-224.

[341] Korea Other Appellant Submission, para. 284.

the provision. Under Article 31(1) of the *Vienna Convention on the Law of Treaties*, "[a] Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of treaty in their context and in the light of its object and purpose" (emphasis supplied). Thus, interpretation of an individual provision must be considered in light of the object and purpose of the agreement as a whole. The provision does not itself have an "object and purpose," within the meaning of Article 31(1).

271. Nonetheless, it may be useful for an interpreter to consider the operation, structure, and function of a particular provision – which could be characterized as the rationale or aim of that provision – as it relates to the treaty as a whole. This flows from the treaty interpreter's obligation to consider terms "in their context."

272. With respect to the SCM Agreement, as the Appellate Body observed in *US – Softwood Lumber IV*, the provisions of the SCM Agreement have as their rationales or aims "disciplining the use of subsidies and countervailing measures while, at the same time enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies."[342]

273. Likewise, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that "the purpose of Article of 2 of the SCM Agreement is . . . to establish whether the availability of the subsidy is limited inter alia by reason of the eligible recipients (Article 2.1(a)) or by reason of the geographical location of beneficiaries (Article 2.2)."[343] As the Appellate Body observed, a "limitation on access to a subsidy may be established in many different ways."[344]

274. Contrary to Korea's assertion, the Panel's comment with respect to subsidies that are "contingent on considerations regarding geographical location" does not seek to alter the language of Article 2.2, or invite "result-oriented analysis."[345] The Panel made this observation as part of its consideration of the "broader purpose of the specificity provisions" in the SCM Agreement,[346] and evoked the Appellate Body's guidance regarding the purpose of Article 2.2 – i.e., to address situations in which the "availability of the subsidy is limited . . . by reason of the geographical location of beneficiaries."[347] Later in the same paragraph, the Panel referred to "geographic contingency," which the surrounding text makes clear is intended as a short-hand reference to situations in which access is limited based on geographic location.[348] These statements do not reflect an error of law.

[342] *US – Softwood Lumber IV (AB)*, para. 95.
[343] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413.
[344] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413.
[345] Korea Other Appellant Submission, paras. 271, 273; *see also id.*, para. 279.
[346] Panel Report, para. 7.273.
[347] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413 (emphasis supplied); *see also US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.157 ("[S]pecificity in the sense of Article 2.2 of the SCM Agreement refers to limitations of access to a subsidy on the basis of geographic location alone . . . .")
[348] Panel Report, para. 7.273 ("[T]he fact that the Article 26 subsidy is contingent on an enterprise becoming 'located within' a designated geographical region provides sufficient geographic contingency to render that subsidy specific under Article 2.2 of the SCM Agreement."). There can be little doubt that RSTA Article 26 exhibits

275. Korea does not challenge the Panel's statement that Article 2.2 "cover[s] subsidy programmes whereby governments and public bodies encourage particular enterprises to direct their resources to certain geographic regions, thereby interfering with the market's allocation of resources within the territory of the Member."[349] Indeed, there can be little doubt that, by limiting subsidies to a designated geographical region, a Member would encourage "certain enterprises" to direct resources toward those regions.

276. But Korea appears to take issue with the Panel's finding that "the underlying rationale of the [RSTA Article 26] scheme is to direct resources towards the development of particular geographical regions other than the Seoul overcrowding region."[350] According to Korea, "RSTA Article 26 subsidies do not encourage enterprises to direct their resources to certain geographic regions. Instead, RSTA discourages enterprises from investing in [the Seoul overcrowding region]."[351]

277. Korea's assertion is remarkable on two levels. First, it fails as a matter of logic. Even if one were to characterize a geographic limitation as "discouraging" investment in an excluded region, the flip side of this limitation is to "encourage" investment in the included region. Thus, Korea's position validates the Panel's finding.

278. Second, Korea's assertion contradicts its previous representations to the Panel. In its opening statement at the first Panel meeting, Korea stated that "it is precisely the concentration of population in the Seoul Overcrowding Control Area that RSTA Article 26 is intended to address by <u>encouraging investments in the other 98 percent of Korea's territory</u>."[352] Charitably, one might say Korea's position now is consistent with its previous position only if one understands Korea's assertion as another way of expressing, and agreeing with, the Panel's finding.

279. In any event, the Panel's observation concerning the "underlying rationale of the [RSTA Article 26] scheme" is a factual finding, given the text and other relevant facts brought forward by the parties, and has not been appealed under DSU Article 11. The Panel explained that it made this finding based, *inter alia*, on Korea's own statements – i.e., that RSTA Article 26 was intended to alleviate "serious geographical imbalances" and addresses "developmental concerns."[353]

280. Finally, there is no basis for Korea's assertion that the Article 2.2 inquiry depends on the amount of trade distortion that is likely to flow from a particular geographic limitation.[354] Korea attempts to incorporate concepts from Article 2.1 of the SCM Agreement, citing to the Appellate Body's observation in *US – Anti-Dumping and Countervailing Duties (China)* that "the concept

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"geographic contingency" – i.e., access is limited based on the location of investments falling within a designated geographical region.

[349] Panel Report, para. 7.273.

[350] Panel Report, para. 7.273; *see* Korea Other Appellant Submission, para. 274.

[351] Korea Other Appellant Submission, para. 274 (citations and quotations omitted).

[352] Korea Opening Statement at the First Panel Meeting, para. 90 (emphasis supplied).

[353] Panel Report, para. 7.273.

[354] Korea Other Appellant Submission, paras. 220-224, 284.

of 'certain enterprises' involves a certain amount of indeterminacy at the edges."[355] As Korea points out, the Appellate Body agreed with the panel in *US – Upland Cotton* that "any determination of whether a number of enterprises or industries constitute 'certain enterprises' can only be made on a case-by-case basis."[356] Korea asserts that specificity is a "flexible" concept, and that "targeted subsidies create more trade distortions than subsidies that are broadly available."[357] According to Korea, because RSTA Article 26 covers 98 percent of Korean territory, "any impact of the RSTA Article 26 subsidies could only be spread out and shallow."[358]

281. Korea's theory has no grounding in Article 2.2 of the SCM Agreement. As discussed above, Article 2.2 provides that, 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 by the designated region. Instead, Article 2.2 is a "particular case of specificity" based on geographic limitations.[359]

282. The text of Article 2.2 does not remotely suggest that its application hinges on a "case-by-case" inquiry into the possible amount of trade distortion caused by a particular geographic limitation. The term "designated geographical region" is not qualified in any way, and can encompass "*any* identified tract of land within the jurisdiction of the granting authority."[360] The drafters could have employed the phrase "designated geographical region that is likely to cause trade distortion," but declined to do so. Indeed, the concepts of adverse effects and injury are addressed in separate provisions of the SCM Agreement.[361]

283. Although Korea suggests that "more closely targeted" subsidies have a greater potential for trade distortion,[362] this is a *non sequitur*. Article 2.2 reflects the judgment of the Members that geographically limited subsidies are "more closely targeted" than subsidies without such limitations. This is why Article 2.2 declares that such geographically limited subsidies "shall be specific." This provision does not call for a further inquiry into which among these geographically limited programs is more likely to cause trade distortion.

284. Nor is there merit to Korea's attempt to import concepts from Article 2.1 of the SCM Agreement into the regional specificity inquiry. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that that "the concept of 'certain enterprises' involves a certain amount of indeterminacy at the edges."[363] But it made this finding with respect to the

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[355] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373; *see* Korea Other Appellant Submission, para. 222.
[356] *US – Anti-Dumping and Countervailing Duties (China)(AB)*, para. 373; *see* Korea Other Appellant Submission, para. 222.
[357] Korea Other Appellant Submission, paras. 222-224.
[358] Korea Other Appellant Submission, para. 284.
[359] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.134.
[360] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.140, 9.144 (emphasis supplied).
[361] SCM Agreement, Articles 5, 15.
[362] Korea Other Appellant Submission, paras. 275-276 (citing Panel Report, para. 7.273 n.465 (quoting 1996 *World Trade Report*, p. 198)).
[363] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373; *see* Korea Other Appellant Submission, para. 222.

concept of "certain enterprises" set out in Article 2.1(a) – not with respect to the analysis of whether subsidies are limited to a designated geographical region under Article 2.2. In the same report, the Appellate Body confirmed the distinction between specificity under Articles 2.1 and 2.2:

> [T]he purpose of Article 2 of the SCM Agreement is . . . to establish whether the availability of the subsidy is limited inter alia by reason of the eligible recipients (Article 2.1(a)) or by reason of the geographical location of beneficiaries (Article 2.2).[364]

285. Equally, there is no basis for Korea's assertion that "any impact of the RSTA Article 26 subsidies could only be spread out and shallow."[365] Not only is this statement irrelevant for purposes of Article 2.2, but it is also unsupported. Korea does not base its assertion on the results of an inquiry by a panel or investigating authority regarding adverse effects or injury.[366] To the extent that Korea is suggesting that the Appellate Body should undertake its own factual inquiry regarding the likely effects of RSTA Article 26, this would fall outside the scope of appellate review.

### 5. Korea's "Policy" Arguments Are Without Merit

286. Korea falls back on "policy" arguments, and criticizes certain statements of the Panel that allegedly betray an anti-subsidy bias. These arguments are groundless.

287. First, Korea takes issue with the Panel's "overly expansive interpretation" of Article 2.2, which Korea argues would "improperly constrain Members' ability to take corrective measures" with respect to overcrowding and urban sprawl.[367] As discussed above, there is nothing "expansive" about the Panel's interpretation, which simply applies the requirements of Article 2.2. To the extent that Korea suggests that Members should be free to subsidize without a finding of specificity under Article 2.2, in cases where they seek to address overcrowding and urban sprawl in certain regions, this would require an amendment of the SCM Agreement.

288. Indeed, before the Panel, Korea essentially conceded that RSTA Article 26 is a regional assistance program. As Korea explained to the Panel, "it is precisely the concentration of population in the Seoul Overcrowding Control Area that RSTA Article 26 is intended to address by encouraging investments in the other 98 percent of Korea's territory."[368] Korea argued that RSTA Article 26 was a "zoning measure" that was intended "to curb urban sprawl" and thereby address the "geographical imbalances in the country's development."[369]

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[364] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413 (emphasis supplied).
[365] Korea Other Appellant Submission, para. 276.
[366] 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.
[367] Korea Other Appellant Submission, para. 288.
[368] Korea Opening Statement at the First Panel Meeting, para. 90 (emphasis supplied).
[369] Korea First Written Submission, paras. 317, 318, 321.

289. 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.[370]

290. Korea offers hypothetical examples of situations which it claims would fall within Article 2.2 under the Panel's findings – such as subsidies with exclusions for national parks.[371] The Panel appropriately declined to rule on hypothetical scenarios, stating that "[w]e shall focus on evaluating Korea's claim, in light of the applicable facts, rather than dwell on policy considerations that may or may not arise in future cases."[372] Indeed, there can be no comparison between Seoul, the capital of Korea, and a national park.[373]

291. Finally, Korea criticizes the Panel for its observation regarding Members' freedom to apply zoning regulations.[374] Korea asserts that this statement reflects an "aversion to the use of subsidies," and accuses the Panel of "impos[ing] its own preferences on Members."[375]

292. This argument by Korea does not itself establish any error by the Panel but may be intended to amount to a charge of bias. As mentioned, Korea has not raised this issue under Article 11 of the DSU. In any event, there was no error, much less bias, by the Panel in making the cited statements. The Panel observed as follows:

> [T]he WTO Agreement does not infringe on a Member's right to pursue any particular zoning policy. (Indeed, Korea might have chosen to address the abovementioned 'serious geographical imbalances' by prohibiting new facility investments in the Seoul overcrowding area.) However, when a Member chooses to pursue that policy through the bestowal of subsidies, the disciplines of the SCM Agreement will apply if those subsidies are specific pursuant to Article 2 of the SCM Agreement.[376]

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[370] *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.").

[371] Korea Other Appellant Submission, para. 289. Korea also offers the example of a subsidy scheme that would "encourage more uniform growth and distribution of wealth, investment and resources throughout the whole of its territories for the sake of its general population and ensuring equal treatment and opportunity." *Id.* The details of this hypothetical scenario are unclear, but appear to suggest a regional assistance scheme. As noted above, Article 8.2(b) of the SCM Agreement was intended to render such programs non-actionable, if certain criteria were met, but has lapsed.

[372] Panel Report, para. 7.282 n.479.

[373] The facts associated with Korea's national park scenario are unclear; for instance, it is not even clear that this scenario involves a designated geographical region. In any event, we note that development in a national park presumably would be prohibited under the laws of the Member, regardless of the subsidy program.

[374] Korea Other Appellant Submission, paras. 290-293.

[375] Korea Other Appellant Submission, para. 293 & n.219.

[376] Panel Report, para. 7.274.

The Panel also observed, in response to Korea's national park hypothetical, that "Members enjoy broad policy space under the WTO Agreement, and need not necessarily pursue policy objectives through subsidization."[377]

293. What is striking about the Panel's statements is that they are demonstrably true. Members do, in fact, enjoy broad policy space under the WTO Agreement, and are free to undertake zoning and other measures. But when they employ subsidies – for whatever policy reason – they must take into account the rules set out in the SCM Agreement. Members may decide to confer subsidies even if they are specific under Article 2 (although they run the risk that those subsidies could cause adverse effects to the interests of another Member).

294. The Panel noted one example of a policy alternative available to Korea – i.e., to prohibit development within the Seoul overcrowding region – as an illustration of the policy flexibility that Members have. This statement in no way suggests the Panel's "preference" for a particular policy.[378] Indeed, the Panel found in favor of Korea with respect to the issue of whether RSTA Article 10(1)(3) subsidies were *de facto* specific[379] – an issue that is not the subject of this appeal – disproving any suggestion of anti-subsidy bias.

295. Thus, there is no error in the Panel's findings, and no basis for Korea's policy arguments.

#### 6. The Panel Did Not Act Inconsistently With Article 11 of the DSU

296. Korea appends to its regional specificity arguments two claims under Article 11 of the DSU. Korea asserts, first, that the Panel "did not develop a positive, coherent interpretation of Article 2.2 [of the SCM Agreement]."[380] Korea then asserts that the Panel "never reviewed" the USDOC's determination on regional specificity, or assess whether that determination was reasoned and adequate, and based on positive evidence.[381] Neither assertion has merit.

297. The Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation," one that "goes to the very core of the integrity of the WTO dispute settlement process itself."[382] For Korea's Article 11 claims to succeed, Korea must demonstrate that the Panel committed "an egregious error that calls into question the [Panel's] good faith."[383] The Appellate Body also has emphasized that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the

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[377] Panel Report, para. 7.282 n.479.
[378] For this reason, Korea's criticism of this policy option – which it contends would "reduce investment" and be "contrary to the objectives of the WTO Agreement" – are misplaced. Korea Other Appellant Submission, para. 291. Once again, the issue here is whether the RSTA Article 26 subsidies fall within Article 2.2 of the SCM Agreement, not the relative merits of various policy options.
[379] Panel Report, paras. 7.231-7.255.
[380] Korea Other Appellant Submission, para. 228.
[381] Korea Other Appellant Submission, paras. 229-230.
[382] *EC – Poultry (AB)*, para. 133.
[383] *EC – Hormones (AB)*, para. 133.

covered agreements."[384] In addition, the Appellate Body has stated unequivocally that it is "unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim."[385] The Appellate Body has further explained that the weighing of evidence is within the discretion of the panel,[386] and that it is not an error under Article 11 of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."[387]

298. As explained below, Korea has failed to meet the high standard for establishing that the Panel acted inconsistently with Article 11 of the DSU.

299. Korea's first argument – i.e., that the Panel's interpretation was not "positive" or "coherent" – is unsupported and without basis in Article 11. The Appellate Body has explained that an appellant "must identify specific errors regarding the objectivity of the panel's assessment," and "explain *why* the alleged error *meets* the standard of review under that provision."[388] Korea fails to explain precisely which aspects of the Panel's legal interpretation are insufficiently "coherent," and even if it were to establish an erroneous interpretation, this only would provide a basis for reversal on the merits under Article 2.2, not a claim of error under Article 11.[389] An error in the interpretation or application of a provision of the covered agreement does not establish that a panel failed to make an "objective assessment," much less an "egregious" error that calls into the question a panel's good faith.[390] The Appellate Body has rejected similar attempts to assert an Article 11 claim "as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreement."[391]

300. Korea's second argument fares no better. According to Korea, there was a "complete failure to examine the challenged measure."[392] Korea asserts that "there is not a single reference to the USDOC's determination," and thus "no indication that the Panel actually reviewed the USDOC's determination."[393]

301. This assertion is frivolous. The suggestion here is that, despite having devoted 33 paragraphs to Korea's challenge of the USDOC's regional specificity determination, the Panel

[384] *EC – Fasteners (China) (AB)*, para. 442.
[385] *EC – Fasteners (China) (AB)*, para. 442.
[386] *Korea – Dairy (AB)*, para. 137.
[387] *Korea – Alcoholic Beverages (AB)*, para. 164.
[388] *EC – Fasteners (China) (AB)*, para. 442 (emphasis in original).
[389] *See, e.g., EC – Seal Products (AB)*, para. 5.150 (observing that "it is insufficient for an appellant simply to disagree with a statement or to assert that it is not supported by the evidence," as the appellant "bears the onus of explaining why the alleged error meets the standard of review under Article 11").
[390] *EC – Hormones (AB)*, para. 133. Korea complains that the Panel was "overly preoccupied with rebutting the arguments raised by Korea as it understood them," leading to a "disjointed" and "negative" approach. Korea Other Appellant Submission, para. 228. The United States disagrees with this unsupported assertion, which has no basis in Article 11 of the DSU. The Panel should not be criticized for structuring its analysis in response to the various arguments raised by Korea. As discussed above, the resulting analysis is consistent and well-reasoned, and leaves no doubt as to the Panel's interpretation of Article 2.2 of the SCM Agreement.
[391] *EC – Fasteners (China) (AB)*, para. 442.
[392] Korea Other Appellant Submission, para. 232 n.175.
[393] Korea Other Appellant Submission, paras. 229-230.

somehow overlooked the content of that determination. Yet the Panel's findings were directed to the very aspects of the USDOC's determination that Korea asserted were inconsistent with Article 2.2 of the SCM Agreement.[394]

302. This is evident from even a cursory examination of the Panel's findings. The Panel observed that:

> This claim concerns Article 26 of the RSTA, which is entitled Tax Deduction for Facilities Investment. RSTA Article 26 provides tax credits for investments in a variety of business assets outside of the Seoul 'overcrowding control region.' Korea challenges the USDOC's determination that the RSTA Article 26 tax credit scheme is regionally specific pursuant to Article 2.2 of the SCM Agreement. . . .[395]

303. The Panel observed that "Korea challenges various aspects of the USDOC's determination," including issues that – according to Korea – "the USDOC . . . failed to establish."[396] The Panel went on to evaluate the key piece of evidence on which the USDOC founded its regional specificity determination – Article 23 of the Enforcement Decree.[397] The Panel addressed Korea's various criticisms of the USDOC's reliance on this evidence (e.g., Korea's assertion that the large size of the designated region precluded a finding of regional specificity).[398] And the Panel concluded by stating that "we reject Korea's claim that the

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[394] *See, e.g.*, *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93 (finding that, in applying the appropriate standard of review, "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made").

[395] Panel Report, para. 7.256 (emphasis supplied).

[396] Panel Report, para. 7.257.

[397] *Compare, e.g.*, Washers Final CVD I&D Memo, p. 46 (Exhibit KOR-77) ("It is clear from the text of Article 23 of the Enforcement Decree that benefits provided under RSTA Article 26 are limited to a designated geographical region. That designated region is all parts of the Korean territory outside of the Overcrowding Control Region of the SMA."), *with* Panel Report, para. 7.280 ("Article 23 of the RSTA Enforcement Decree provides that the RSTA Article 26 scheme applies in respect of investments in 'business assets out of overcrowding control region of the Seoul Metropolitan Area.' Article 23 of the RSTA Enforcement Decree therefore makes it known that RSTA Article 26 tax credit subsidies are only available for investments outside of the Seoul Metropolitan Area. In making this known, Article 23 of the RSTA Enforcement Decree effectively designates the geographical region in which the relevant investments will be eligible for subsidization."). The Panel's analysis of this evidence belies Korea's suggestion that the Panel failed to assess whether positive evidence supported the USDOC's determination. Korea Other Appellant Submission, para. 230. In any event, we note that Korea did not assert a claim under Article 2.4 of the SCM Agreement, which requires an authority to substantiate its specificity determination with positive evidence. Korea Panel Request, pp. 5-6.

[398] *Compare, e.g.,* Washers Final CVD I&D Memo, p. 46 (Exhibit KOR-77) ("It is not relevant to the Department's determination that investments in 98 percent of the Korean territory are eligible to receive benefits under the program, so long as the GOK designates a geographical region that it intends to exclude from these benefits."), *with* Panel Report, paras. 7.282-7.283 (refuting Korea's argument that availability of a subsidy in 98 percent of its territory is "functionally equivalent" to availability in 100 percent of its territory, for purposes of Article 2.2 of the SCM Agreement). *See also* Panel Report, paras. 7.284, 7.286 (noting Korea's argument that "*the USDOC failed to show* that eligibility was limited to 'certain enterprises' in that designated region," and finding that "[w]e do not accept Korea's argument that specificity must be established on a double basis….") (emphasis supplied).

USDOC's determination that the RSTA Article 26 tax credit scheme is regionally specific is inconsistent with Article 2.2 of the SCM Agreement."[399]

304. Contrary to Korea's suggestion, Article 11 of the DSU does not require that the Panel include an explicit citation to the USDOC determination, or explicitly quote from its language, when it deals with Korea's main challenge to the USDOC's finding concerning Article 23 of the RSTA Enforcement Decree. Article 11 imposes no formalistic requirements of this kind.[400] Here, the Panel's analysis leaves no doubt that it reviewed the challenged measure. The Panel addressed the alleged deficiencies in the USDOC's reasoning that Korea founded its claims on, and applied the appropriate standard of review.[401]

305. In sum, there is nothing in the Panel's analysis that remotely suggests a failure to conduct an "objective assessment." Korea's Article 11 claims should be rejected.

### B. The Panel Did Not Err In Upholding The USDOC's Determination That RSTA Article 10(1)(3) And 26 Subsidies Were Not "Tied" To Particular Products

306. In this appeal, Korea re-asserts its criticism of the USDOC's calculation of the subsidy ratio for RSTA Articles 10(1)(3) and 26. Korea impugns the USDOC's decision to calculate these ratios in an "untied" manner.[402] According to Korea, the USDOC should have employed a novel variation of the "tied" approach to attribution. Under Korea's theory, the USDOC should have carved up both the numerator and denominator of the subsidy ratio, based on a forensic accounting analysis of R&D and facilities expenses previously incurred.[403] Korea complains that the USDOC's refusal to undertake this forensic exercise was inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.[404]

307. The Panel appropriately rejected Korea's novel theory. As the Panel found, Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require that approach.[405] Korea's theory is based on the alleged effect – which Korea misleadingly refers to as the

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[399] Panel Report, para. 7.289.
[400] *See, e.g.*, *US – Carbon Steel (India) (AB)*, para. 142 (finding that Article 11 of the DSU requires panels to take into account evidence put before them and forbids them to willfully disregard or distort such evidence; but observing that, within these parameters, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings," and on appeal "we will not interfere lightly with a panel's exercise of its discretion"); *EC – Hormones (AB)*, para. 138 (underscoring the discretion that panels exercise in choosing which evidence to rely on, and observing that a panel "cannot realistically refer to all statements made . . . and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly"); *Thailand – H-Beams (AB)*, para. 134 ("[A] panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case. Thus, the Panel did not err to the extent that it made no specific findings on whether Poland had met its burden of proof.").
[401] Korea's citations to the Appellate Body reports in *Japan – DRAMS*, *US – DRAMS*, and *Canada – Wheat* are thus inapposite. Korea Other Appellant Submission, para. 231 & n.175. As explained above, the Panel reviewed the challenged measure and applied the appropriate standard of review.
[402] Korea Other Appellant Submission, para. 310.
[403] Korea Other Appellant Submission, paras. 307, 351.
[404] Korea Other Appellant Submission, para. 351 (second bullet point).
[405] Panel Report, paras. 7.301-7.307.

"benefit"[406] – of expenses that were incurred and associated activities that were undertaken well before the subsidy was bestowed.[407] The Panel observed that the concept of an "expense" or "activity" conferring a "benefit" is alien to the SCM Agreement.[408]

308. As the Panel's findings and record demonstrate, the R&D and facilities subsidies at issue lacked a "tie" to particular products:

- The RSTA legislation did not specify any product-specific tie, and eligibility criteria were not limited by product type.[409] In particular, the legislation did not require that the recipient use subsidies in connection with a particular product.[410]

- 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."[411] Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on formulas that related to *aggregate* and *average* expenses for the company's entire domestic operations – and not to particular products.[412]

- Samsung's tax return did not indicate any product-specific use of RSTA subsidies, and the granting authority (the GOK) did not acknowledge any such product-specific use at the time of bestowal.[413]

309. Korea's remaining assertions – including its reliance on cost accounting materials from separate antidumping proceedings – are equally deficient. As the Panel explained, there is no basis for importing cost accounting principles into this countervailing duty proceeding. Nor did the Panel fail to conduct an objective assessment under Article 11 of the DSU, as Korea asserts.

#### 1. Korea Fails To Establish That Article VI:3 Of The GATT 1994 And Article 19.4 Of The SCM Agreement Require The Application Of Korea's "Tying" Methodology

310. Korea asserts that the Panel "failed to apply the correct tying test" with respect to Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.[414] But Korea failed to explain or establish – either before the Panel or in this appeal – how these provisions compel the novel "tying" approach that it seeks in this dispute.

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[406] Korea Other Appellant Submission, paras. 319 (second and third bullets), 334-335, 351 (second, fourth, fifth, ninth, tenth, and sixteenth bullets).
[407] Korea Other Appellant Submission, paras. 301-306.
[408] Panel Report, paras. 7.304-7.305 & n.518.
[409] Washers Final CVD I&D Memo, pp. 11-12, 41-42 (Exhibit KOR-77).
[410] 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).
[411] Panel Report, para. 7.303.
[412] Washers Final CVD I&D Memo, pp. 41-42 (Exhibit KOR-77).
[413] Panel Report, para. 7.303.
[414] Korea Other Appellant Submission, paras. 318-319 & n.252.

311. Korea argued before the Panel that, under Article VI:3 of the GATT 1994, a countervailing duty may not be "'in excess of an amount equal to the estimated bounty or subsidy' granted on 'such product.'"[415] According to Korea, this means that countervailing duties "cannot be taken against a subsidy or bounty that has not been conferred on the imported product that is subject to the investigation, but rather, has been conferred on some other product that is not subject to the investigation."[416] Korea drew further support from the quantitative ceiling in Article 19.4 of the SCM Agreement, which it argued "drew a direct link between the subsidy that may be countervailed and the subsidization received by the exported product."[417]

312. Korea has never been able to identify a single provision that sets out specific methodologies for calculating subsidy rates, and in particular, methodologies related to whether subsidies are "tied" or "untied." Korea's preferred approach, in addition to being unsound for purposes of considering a tie to a specific product, is not required by the SCM Agreement or the GATT 1994.

#### a. Legal Framework

313. To recall, 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.[418] 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.

314. 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:

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[415] Korea First Written Submission, para. 281.
[416] Korea First Written Submission, para. 281.
[417] Korea First Written Submission, para. 282.
[418] 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."

> 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.

315. 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.[419] 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.

316. 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:[420]

> 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.[421]

317. 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.'"[422] 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.[423] For instance, a Member cannot collect duties on subsidies alleged but not demonstrated, or levy punitive duties.

318. Likewise, the second clause of Article 19.4 calls for a calculation "in terms of subsidization per unit of the subsidized and exported product." The "subsidization" – in this context, the "amount of subsidy found to exist" by the investigating authority – would be

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[419] *US – Softwood Lumber IV (AB)*, para. 140.

[420] *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.").

[421] Footnote 51 of the SCM Agreement provides that "'levy' shall mean the definitive or final legal assessment or collection of a duty or tax."

[422] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 552 (quoting 1 *Shorter Oxford English Dictionary* 71 (6th ed. 2007)).

[423] *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.").

expressed as a ratio, reflecting the amount of subsidy attributed to each "unit" of product.[424] 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. As a consequence, the second clause reinforces the quantitative ceiling articulated in the first clause.

319. Thus, if a subsidy does not exist and the product is not "subsidized," a Member does not have the right to impose a countervailing duty. Before the Panel, the parties never disputed these basic principles.

#### b. Article VI:3 Of The GATT 1994 And Article 19.4 Of The SCM Agreement Do Not Dictate Precise Methodologies For Calculating Subsidy Ratios

320. As the preceding suggests, Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement do not dictate precisely how an investigating authority should allocate the numerator and denominator when calculating CVD ratios. 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 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.

321. Absent such specific guidance, an administering authority will therefore need to examine and determine the appropriate methodology for a given case. 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 Members to decide*."[425]

322. As the United States explained before the Panel,[426] 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.[427]

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[424] *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.'").

[425] *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).

[426] *See, e.g.*, U.S. First Written Submission, paras. 445-462.

[427] *See, e.g.*, *US – Softwood Lumber IV (Panel)*, para. 7.116 (money is fungible).

323. The reference in Article VI:3 of the GATT 1994 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.

324. 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.

325. 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.[428] 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.[429] 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."[430]

326. Annex IV:2 provides the general rule that, for <u>untied</u> subsidies, the *ad valorem* subsidization rate is based on the total value of the recipient firm's sales. Paragraph 2 provides:

> 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).

327. 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."[431]

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[428] *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).
[429] 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."
[430] *US – Upland Cotton (Panel)*, para. 7.1187.
[431] *US – Upland Cotton (Panel)*, para. 7.1187.

(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."[432])

328. 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.

329. Of interest, the Informal Group of Experts ("IGE") established by the Committee on Subsidies and Countervailing Measures[433] 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.[434]

330. 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* . . . ."[435] The IGE recommended the following test:

> 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.[436]

The IGE also considered that other approaches were possible.[437]

[432] 19 C.F.R. § 351.525(b)(5) (Exhibit USA-24) (emphasis supplied).
[433] 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).
[434] 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").
[435] IGE Report, para. 62 (Exhibit USA-29) (emphasis supplied).
[436] IGE Report, Recommendation 6, para. 10 (Exhibit USA-29) (emphasis supplied).
[437] 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

331. 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."[438]

332. The absence of specific provisions setting forth rules on how to attribute 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.[439] 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.

333. 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.[440] Footnote 4 explains, in turn, that a subsidy is contingent "in fact" on export performance when "the facts demonstrate 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).

334. 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."[441] Likewise, the relevant meaning of the word "tie" is to "limit or restrict as to . . . conditions."[442] *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."[443]

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USDOC will examine the loan or grant approval documents. Washers Final CVD I&D Memo, p. 41 (Exhibit KOR-77).

[438] IGE Report, Recommendation 20, para. 2 (Exhibit USA-29).

[439] 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 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 . . . .").

[440] 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.

[441] *Canada – Aircraft (AB)*, para. 170 (emphasis in original).

[442] *Canada – Aircraft (AB)*, para. 171.

[443] *EC – Large Civil Aircraft (AB)*, para. 1056.

335. 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*.[444]

336. 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."[445] 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.

337. The USDOC's determination here was entirely consistent with the provisions discussed above. The USDOC appropriately found that subsidies conferred under RSTA Articles 10(1)(3) and 26 were not tied to a particular product, and instead attributed the benefit of the subsidies to the sales of all products manufactured by the recipient, Samsung. Consistent with Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement, this approach takes into account the nature of the bestowal of these subsidies with respect to the manufacture, production, or export of a product. As noted above, the decision to treat subsidies as "untied" also is consistent with Annex IV of the SCM Agreement and the IGE report.

338. As discussed in further detail below, Korea fails to identify a single textual source that would preclude the USDOC's approach, or require the application of Korea's novel variation on the "tied" attribution method in this context.

### c. Korea Relies On Inapposite Reports

339. To support its theory, Korea attempts to draw support from certain previous reports, but these are inapposite. As it did before the Panel, Korea invokes certain WTO panel and Appellate Body reports that have interpreted these provisions. Korea asserts that "[t]he Dispute Settlement Body has considered the tying issue in only a few cases," which "confirmed" its understanding of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.[446]

340. But these reports do not even address the issue of whether to apply a tying methodology – much less the novel tying approach that Korea seeks here. The reports relied on by Korea

[444] *EC – Large Civil Aircraft (AB)*, para. 1049 (emphasis supplied).
[445] *EC – Large Civil Aircraft (AB)*, para. 1049.
[446] Korea Other Appellant Submission, para. 313.

involve privatizations and the pass-through of subsidies.[447] 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.[448] These reports do not reflect an approach that Members must attribute subsidies on a tied basis, or articulate a threshold for determining when a subsidy is tied to a particular product.

341. 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."[449] 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,[450] it relied primarily on Article 21.2 of the SCM Agreement.[451] Under that provision, because a full privatization at arm's length may extinguish a benefit, an investigating authority must determine whether that benefit continues to exist and whether the continued imposition of countervailing duties is warranted.[452]

342. 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.

343. Korea's citation to *China – Broiler Products* is particularly inapt.[453] This is yet another pass-through case, in which the investigating authority knowingly used erroneous data in its subsidy calculation.[454] The authority calculated the amount of benefit attributable to inputs used in the production of <u>all merchandise</u>, but then divided this by the sales volume of only a subset of

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[447] 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)*); Korea Other Appellant Submission, paras. 313-316 (same).

[448] *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).

[449] Korea Other Appellant Submission, para. 313 (quoting *US – Countervailing Measures on Certain EC Products (AB)*, para. 139).

[450] *US – Countervailing Measures on Certain EC Products (AB)*, para. 139.

[451] 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."

[452] *US – Countervailing Measures on Certain EC Products (AB)*, paras. 127, 144.

[453] Korea Other Appellant Submission, para. 315; Korea First Written Submission, paras. 286, 296.

[454] *China – Broiler Products*, paras. 7.237-7.242, 7.262, 7.266.

that merchandise – i.e., the subject products.[455] As a result, the authority failed to "match" the elements in the numerator and denominator, yielding a mathematically incoherent result.[456] Like the other pass-through reports cited by Korea, *China – Broiler Products* did not address, and sheds no light on, the relative merits of a tied attribution model.

### 2. The Panel Appropriately Rejected Korea's Expense-Based Attribution Theory

344. Notwithstanding these deficiencies, Korea continues to advocate for an attribution methodology that has no grounding in the "bestowal" of subsidies. According to Korea, the Panel should have found that subsidy ratios for RSTA Articles 10(1)(3) and 26 must be calculated based on Samsung's alleged "ability to tie" tax credits to its Digital Appliances Division, based on its internal expense records (which were never provided to the granting authority, Korea).[457] Korea complains that the Panel failed to address applicable legal provisions, and "provided no meaningful consideration of any of the contentions that Korea made."[458]

345. These arguments mischaracterize the Panel's reasoning, and are predicated on a flawed theory.

346. *First*, the Panel appropriately rejected the legal and factual basis for Korea's theory, which hinges on expenditures and associated R&D activities that were incurred by the subsidy recipient before the subsidy was granted. The Panel observed that Korea's argument – i.e., that tax credits "retroactively reduce the cost of the R&D activities that gave rise to the tax credits" – was inherently flawed, and at odds with the "nature of the subsidy."[459] The Panel pointed to the principles of "financial contribution" and "benefit" in Article 1.1 of the SCM Agreement, finding that:

> Tax credits constitute subsidies because government revenue is foregone or not collected. The benefit is the amount of revenue that is foregone or not collected. That revenue foregone or not collected is equivalent to cash that Samsung can keep in its account, rather than spending on its tax bill.[460]

347. 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."[461] Indeed, when underlying activities were undertaken and expenditures incurred, no "subsidy" yet existed, within the meaning of Article 1.1 of the SCM Agreement. At

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[455] *China – Broiler Products*, paras. 7.237-7.242, 7.262, 7.266.
[456] *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).
[457] Korea Other Appellant Submission, paras. 318-319 & n.252.
[458] Korea Other Appellant Submission, para. 318.
[459] Panel Report, para. 7.303.
[460] Panel Report, para. 7.303.
[461] Panel Report, para. 7.304 (emphasis supplied).

this point, no subsidy had been "provided" (the Panel's term) or "bestowed" (to use the language of Article VI:3 of the GATT 1994). It would thus be impossible to reconcile Korea's theory with the purpose of countervailing duties – i.e., to offset the "bestowal" of subsidies.[462]

348. *Second*, for many of the same reasons, the Panel found that the existence of underlying expense records – under which connected certain expenses and activities to one of Samsung's divisions – has no bearing on the attribution of these subsidies. As the Panel found, "[t]he fact that these tax credit subsidies were provided as a result of eligible R&D activity does not mean that those subsidies are tied to that R&D activity, or the products in respect of which that R&D was undertaken."[463]

349. The Panel's analysis affirms that the attribution of subsidies is not a function of the effect of expenses or activities, but rather the bestowal of subsidies. So the internal records of those expenses would not provide a basis for calculating subsidy ratios. This confirms that there is no obligation to conduct an *ex post* forensic investigation based on those records.

350. *Third*, the Panel found that it would be particularly inappropriate to apply such an approach here. In describing the "nature of the subsidies" at issue, the Panel found that "[t]he tax credit subsidies are provided after the underlying R&D activities have been undertaken, in an amount determined by reference to total R&D activities."[464] As the Panel's observation indicates, RSTA Article 10(1)(3) is an undifferentiated, broadly applicable R&D tax credit program. Credits were calculated based on aggregate expenses incurred by the entire company with respect to the sum of all eligible activities, not broken down by product. Thus, neither the eligibility criteria nor method of calculating subsidies betray any nexus to a particular product.

351. On appeal, Korea argues that "the USDOC was able to tie the R&D expenses of the Digital Appliance business unit to digital appliances," so "it necessarily (and logically) follows that the resulting Article 10(1)(3) (and Article 26) tax credits generated by those very same R&D expenses could also be tied to the Digital Appliance business unit," as "the credits were a direct result of the expenditures themselves."[465]

352. The Panel's analysis confirms the flaws in Korea's reasoning. Even if one could isolate expenses incurred by a particular division, this would have no bearing on the amount of subsidy ultimately bestowed on the company in connection with products manufactured by that division. As the Panel found, "[t]he fact that Samsung may be able to identify the R&D activities undertaken in respect of Digital Appliance products is irrelevant, since there is no necessary correlation between those R&D expenditure and the amount of the tax credit cash (if any) used by Samsung for the production of Digital Appliance products."[466]

[462] *See* SCM Agreement, Article 10 n.36.
[463] Panel Report, para. 7.303 (emphasis supplied).
[464] Panel Report, para. 7.303 (emphasis supplied).
[465] Korea Other Appellant Submission, para. 319 (emphasis supplied).
[466] Panel Report, para. 7.304.

353. And even under Korea's theory, there is no factual basis for viewing a given KRW of expense in any given time period as a proxy for a KRW of subsidy received during the period of investigation (2011). For instance, as the United States observed before the Panel, Samsung received RSTA Article 10(1)(3) subsidies in 2011 based on 40% of the difference between the aggregate expenses incurred in the 2010 tax year and the average annual amount of qualifying expenses incurred in the previous four years.[467] Samsung's subsidies also reflected a substantial carry-forward of credits earned in 2009, and deferral of credits earned in 2010 until the 2011 tax year.[468] Thus, Korea's assertion that "there is an exact correlation between the R&D expenditure amounts and the resulting tax credits" has no basis in the record and is simply incorrect.[469]

354. *Fourth*, given the legal irrelevance of this line of inquiry, there is equally no basis for the various factual arguments that Korea asserts on appeal with respect to Korean record-keeping requirements (which, in any event, fall outside the scope of appellate review). For instance, Korea relies on "the record-keeping requirements of Korean law," which allowed the Korean tax authorities to audit records that Samsung maintained in the ordinary course of business.[470] This is an apparent reference 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."[471] But this is a cross-cutting requirement, applicable to all taxpayers in all contexts. It is not a part of the RSTA legislation, and thus sheds no light on the structure of that program or the basis of the bestowal of the subsidies. And even under the Basic Act, taxpayers are not required to collect and identify which expenses relate to particular *products*; the requirement is only to maintain records of *transactions*, for use in case an audit is conducted.

355. Indeed, RSTA Articles 10(1)(3) and 26 do not require recipients to maintain records that would show a nexus to any particular product, or to submit a product-specific breakdown with their tax return. Before the Panel, Korea admitted that "companies are not required to file a form or report as part of their tax return that shows how its R&D expenses that are eligible for Article 10(1)(3) tax credits are tied to or associated with particular merchandise."[472] The fact that the granting authority, the GOK, did not require recipients to submit this kind of product-specific breakdown is evidence that it did not bestow the subsidies under RSTA Articles 10(1)(3) and 26 in a way that is "tied" to a particular product.

356. *Fifth*, reflecting the absence of any product-specific records requirements, Samsung did not submit any records – internal or otherwise – to the granting authority, the GOK, that would have shown which expenses were allegedly spent in connection with a particular product. As the Panel observed, Korea admitted on the record of the investigation that its "*tax return did not*

[467] U.S. Responses to the First Set of Panel Questions, para. 131; U.S. Second Written Submission, para. 314.
[468] U.S. Responses to the First Set of Panel Questions, para. 131; U.S. Second Written Submission, para. 314.
[469] Korea Other Appellant Submission, para. 344 n.271.
[470] Korea Other Appellant Submission, para. 319.
[471] Korea Responses to the First Set of Panel Questions, para. 203 (quoting Korea Basic Act on National Taxes, Article 85-3).
[472] Korea Responses to the First Set of Panel Questions, para. 204.

*specify the merchandise for which this reduction was to be provided*."[473] Korea does not dispute the accuracy of the Panel's finding.

357. Nonetheless, in support of its tying argument, Korea points to Exhibit 25 to its April 9, 2012 response to the USDOC's initial questionnaire, which it claims provided a "detailed, business-unit specific listing of the eligible investments that each business unit made."[474] But this one-page summary of business unit totals was never presented to the GOK.[475] As Korea stated before the Panel, this document was only "prepared for the USDOC's investigation."[476]

358. Likewise, it is undisputed that the "200 pages of [ ] documentation" (which Korea says the USDOC should have reviewed) were never submitted to the GOK, and did not inform the bestowal of the subsidies.[477] Before the Panel, Korea characterized this 200-page document as the "information that Samsung was required to maintain for the Korean tax authorities"[478] – presumably a reference to the generic requirement in the Basic Act to maintain transaction-level records.

359. Yet the requirement to maintain records for a hypothetical audit says nothing about the bestowal of subsidies under the RSTA programs. Thus, contrary to Korea's assertion,[479] the USDOC did not have an obligation to review this document. The USDOC cannot be criticized for not reviewing a document that was irrelevant on its face and that the GOK – the granting authority – never saw.[480] Nor was this document part of the administrative record in this proceeding.[481] Korea's attempt to introduce this material as an exhibit to the Panel could in no way undermine the USDOC's review based on the record evidence.[482]

360. At most, the "200 page document" would allow verification of the "detailed breakdown" by business unit already on the record of the USDOC investigation as Exhibit 25. It would not contribute additional detail that would permit anyone to discern which expenses could be traced specifically to washers. As Korea stated to the Panel: "Samsung collected and maintained its R&D expense records at the Digital Appliance Division level, not at the product specific level."[483]

361. *Sixth*, based on its records, even Korea is unable to show that Samsung was able to present the kind of product-specific breakdown of expenses that its arguments suggest would be necessary for tying to be established under Article VI:3 of the GATT 1994 and Article 19.4 of

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[473] Panel Report, para. 7.303 (Samsung April 9, 2012 QR, Ex. 24, p. 2 (Exhibit KOR-72)) (emphasis supplied).
[474] Korea Other Appellant Submission, para. 303.
[475] Korea Responses to the First Set of Panel Questions, para. 192.
[476] Korea Responses to the First Set of Panel Questions, para. 192.
[477] Korea Other Appellant Submission, para. 305.
[478] Korea Responses to the First Set of Panel Questions, para. 201.
[479] Korea Other Appellant Submission, para. 319.
[480] U.S. Opening Statement at the First Panel Meeting, para. 61.
[481] *See, e.g.*, Korea Responses to the First Set of Panel Questions, para. 216 (describing how Korea has submitted "representative excerpts" from this document as Exhibit KOR-115).
[482] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 175 ("*A panel must [ ] limit its examination to the facts that the agency should have discerned from the evidence on record*.") (emphasis supplied).
[483] Korea Responses to the First Set of Panel Questions, para. 220 (emphasis supplied).

the SCM Agreement. Before the Panel, Korea admitted that, "[d]ue to the complexity of R&D finance and accounting," a product-specific breakdown of R&D expenses would not be possible at all, because of the way Samsung does business.[484] That is, Korea would concede that for purposes of this subsidy, it is impossible to produce the records that would permit – in Korea's words – "countervailing duties [to] be limited to the amount of subsidies provided on the production and sale of LRW."[485] To avoid this outcome, at least in this context, Korea appears to endorse an attribution approach that is not product-specific and that is "untied" with respect to all digital appliances manufactured by Samsung. But this fatally undermines its assertion that an administering authority breaches its obligations when it fails to conduct a particular type of analysis, as Korea itself supports *not* conducting the necessary analysis here but rather using a sort of approximation.

362. *Finally*, Korea criticizes the USDOC for applying a "presumption" with respect to the "200-page document," and argues that the Panel failed to address the basis for this presumption.[486] Korea appears to be referencing the argument that it made before the Panel that the USDOC had applied an "irrebuttable presumption."[487] Korea argued that the USDOC had "chose[n] to remain passive" in the face of this documentation "based on, in essence, an irrebuttable presumption that the tax credits could not be tied to a particular product category unless the intended uses of the tax credits 'were known to the subsidy giver (in this case, the GOK) and so acknowledged prior to or concurrent with the bestowal of the subsidy.'"[488]

363. This argument was not only subsidiary to Korea's broader argument, but it was also frivolous. By making this observation regarding the "intended use" of subsidies, the USDOC was not articulating a presumption. Instead, the USDOC focused its analysis on evidence related to the "bestowal" of the subsidy,[489] which is consistent with Article VI:3 of GATT 1994 and footnote 36 of the SCM Agreement. The USDOC's approach did not presume that the subsidies were tied or untied; it simply provided a means of classifying the programs based on the nature of the programs themselves.

364. The Panel expressly referenced and acknowledged Korea's "irrebuttable presumption" argument, with respect to tax returns, in a footnote to its report. The Panel noted Korea's argument that, given this "irrebuttable presumption," "Samsung should not be penalized 'because the government of Korea chose not to require taxpayers to identify in their tax returns the amount of any particular expenditure that pertained to any particular product.'"[490]

365. Korea (incorrectly) suggested that had the government required Samsung to list product-specific expenses in its tax return, this would have been sufficient to establish tying under the USDOC's "intended use" language. Although the USDOC will review the content of the

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[484] Korea Responses to the First Set of Panel Questions, para. 221.
[485] Korea First Written Submission, para. 288.
[486] Korea Other Appellant Submission, para. 319.
[487] Korea Second Written Submission, para. 285; *see also* Korea Other Appellant Submission, para. 351 (referencing Korea's "irrebuttable presumption" argument).
[488] Korea Second Written Submission, para. 285 (quoting Washers Final CVD I&D Memorandum, p. 41 (KOR-77)).
[489] Washers Final CVD I&D Memo, at 41 (Exhibit KOR-77).
[490] Panel Report, para. 7.304 n.517 (quoting Korea Second Written Submission, para. 286).

instrument by which a subsidy is granted (here, the tax return and any associated documents submitted by the recipient to the government), it will only do so to evaluate the extent to which the intended use of the subsidy would have a nexus to a particular product. Evidence of what is included in the tax return would be considered along with other relevant facts, including the applicable legislation, structure, and operation of the subsidy program. Here, RSTA Articles 10(1)(3) and 26 do not require any breakdown whatsoever – nor was such a breakdown provided in Samsung's return. This aspect of the structure, architecture, and design of the subsidies further supports the USDOC's determination that subsidies conferred under this program were not "tied" to particular products.

366. In any event, the Panel viewed Korea's "irrebuttable presumption" argument as "miss[ing] the point," as "even if expenditures had been assigned to particular products in the tax returns, this still leaves open the question of whether the Government of Korea would have required recipients to use the tax credits for the production of particular products."[491] The Panel suggests that a recipient's product-specific breakdown of expenses in a return would be insufficient to require a finding that the subsidy is tied to any particular product. One "open question" would be whether the GOK intended to require the use of those subsidies in connection with particular products.

367. Korea criticizes the Panel for not specifically addressing the "intended use" language that Korea alleged was the cause of the "irrebuttable presumption," and thus the alleged cause of the USDOC declining to review the "200-page document."[492] But, as the Appellate Body has confirmed, a panel "has discretion to address only those arguments it deems necessary to resolve a particular claim," and "the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that the panel has" acted inconsistently with its obligations under Article 11 of the DSU.[493] The Panel was not obliged to specifically expressly address this component of Korea's argument, given that it already disposed of Korea's broader theory. As discussed above, under the Panel's previous findings regarding Korea's expense-based theory, the documentation in question was already deemed legally irrelevant.[494]

### 3. Korea's Arguments Concerning The "Availability" Of RSTA Article 10(1)(3) Subsidies Are Groundless

368. In its other appellant submission, Korea renews an argument that it developed late in the Panel proceedings, in the context of its responses to the Panel's questions after the second meeting.[495] Before the Panel, Korea asserted that the "effect" of the RSTA Article 10(1)(3) tax credits was to "spur[ ] the particular investment that results in the earning of the credit."[496]

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[491] Panel Report, para. 7.304 n.517.
[492] Korea Other Appellant Submission, para. 319.
[493] *EC – Fasteners (China) (AB)*, para. 511.
[494] *See, e.g.*, *US – Carbon Steel (India) (AB)*, paras. 4.134-4.135 (Panel was not required to expressly address arguments premised on legal interpretation that the Panel correctly rejected).
[495] Korea Other Appellant Submission, paras. 334-339.
[496] Korea's Responses To the Second Set of Panel Questions – CVD Issues, para. 5 (Question No. 5.2).

Korea argued that the "effect" of the availability of the tax credit supported the attribution of subsidies, because any qualifying investment was the "effect" of the tax credit.[497]

369. On appeal, Korea criticizes the Panel for not accepting this theory. Korea asserts that "[n]o rational company with multiple and highly varied product lines decides that it will expend R&D funds without regard to the nature of the products that will benefit from those expenditures."[498] Korea asserts – without any evidentiary support – that "R&D engineers must first justify their planned expenditures in order for management to approve them, and this cannot be done in a vacuum or without regard to their intended effects and benefits."[499] According to Korea, "the undeniable conclusion is that Samsung received the R&D tax credit subsidy because, and only to the extent that, it had already incurred R&D expenses *that it knew would be reduced by the amount of available tax credits*."[500]

370. The Panel appropriately rejected Korea's "availability" theory. The Panel noted Korea's arguments with respect to this theory,[501] but observed that when underlying activities were undertaken, no subsidy yet existed. The Panel explained that "[i]t is the proceeds of the tax credit – rather than the underlying activity – that constitute the subsidy," and affirmed that "[t]he fact that Samsung may be able to identify the R&D activities undertaken in respect of the Digital Appliance business unit is irrelevant."[502]

371. Here, again, Korea's effects-based theories miss the mark. As noted above, the purpose of countervailing duties is to offset the bestowal of subsidies.[503] Korea's approach would blur the distinction between determining the amount of the subsidy and the separate injury analysis called for under Article 15 of the SCM Agreement. And Korea's "availability" theory is even further removed from the SCM Agreement by virtue of being grounded in the effect of the possible availability of a subsidy on certain activities – and not the effect of the subsidy that has actually been granted.

372. A "subsidy" within the meaning of Article 1.1 of the SCM Agreement (i.e., a financial contribution that confers a "benefit" on a recipient) cannot have an effect unless and until it is bestowed. Once bestowed, the subsidy does not retroactively "spur" the making of any past investment (which has already occurred).

373. An investigating authority is not legally or logically required to calculate subsidy ratios based on speculation regarding whether the *possibility* of eventually receiving a subsidy had an effect *ex ante*. Such an endeavor would be fraught with uncertainty, as it is virtually impossible to determine whether and to what extent the potential "availability" of a tax credit actually "spurred" particular research and human resource development activity. A company undertakes

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[497] Korea's Responses To the Second Set of Panel Questions – CVD Issues, para. 5.
[498] Korea Other Appellant Submission, para. 335.
[499] Korea Other Appellant Submission, para. 339.
[500] Korea Other Appellant Submission, para. 339.
[501] Panel Report, para. 7.304.
[502] Panel Report, para. 7.304.
[503] *See* SCM Agreement, Article 10 n.36.

research and human resource development activities to secure a business outcome, for reasons of corporate strategy. The possibility of receiving a tax credit may or may not affect this decision.

374. Contrary to Korea's assertion,[504] when undertaking a particular research or human resources development activity, a company does not know whether it will later receive any RSTA Article 10(1)(3) credit in connection with associated expenditures. For instance, a company may eventually receive no tax credits at all if it suffers a tax loss for the year. Moreover, a large company's aggregate research and human resources development expenditures in a given year may not exceed the average amount over the past four years. As a consequence, it would at most qualify for the six per cent tax credit available under the alternative formula.[505] The possibility of receiving this much smaller percentage may not be sufficient to "spur" R&D investment, particularly in comparison with other market-driven factors.[506]

375. Critically, Korea fails to point to any record evidence establishing that the possibility of receiving RSTA Article 10(1)(3) tax credits actually "spur[red]" or caused Samsung to undertake R&D activities in Korea with respect to a particular product – much less subject large residential washers. Nor is there any evidence to this effect. This reflects the structure, design, and operation of this untied subsidy program, which in the case of Samsung conferred an aggregate pool of subsidies based on a percentage of the difference between the aggregate of all qualifying expenditures incurred within Korea – regardless of product – in a given tax year and the historic average over the preceding four years.

376. Thus, contrary to Korea's assertion, there is no basis for equating the effect of a subsidy with the effect of the *potential availability* of a subsidy. And there is no basis for using the potential availability of RSTA Article 10(1)(3) subsidies as the basis for calculating subsidy ratios.

#### 4. The Panel Did Not Act Inconsistently With Article 11 Of The DSU With Respect To Its Findings Concerning RSTA Article 10(1)(3) Subsidies

377. Korea impugns the Panel for having stated that RSTA Article 10(1)(3) subsidies are "not R&D subsidies."[507] Notwithstanding the Panel's explanation of the intended meaning of this phrase, Korea accuses the Panel of having breached Article 11 of the DSU. According to Korea, because the USDOC had already found that RSTA Article 10(1)(3) "provided a subsidy for

[504] Korea Other Appellant Submission, para. 339.
[505] U.S. Responses to the First Set of Panel Questions, para. 129; U.S. First Written Submission, para. 344.
[506] Korea asserts that there is no difference between tying an "R&D tax credit" and an "R&D grant." Korea Other Appellant Submission, para. 340. Korea argues that "[i]n both the grant situation and the tax credit situation, the availability of the benefit is known in advance." *Id.* But as discussed above, the company does not know when it undertakes certain activity or expenditures that it will actually be in a position to receive those subsidies at some point in the future. In any event, the potential "availability" of a tax credit does not address how these subsidies ultimately relate to a given product when and if they are conferred.
[507] Korea Other Appellant Submission, paras. 331-333.

engaging in eligible R&D activities," the Panel "lacked an objective basis for finding to the contrary."[508]

378. As a preliminary matter, the Appellate Body need not address this claim because Korea has not even alleged that any conclusion by the Panel turns on this issue. That is, Korea has not explained how this alleged erroneous finding is so material to a claim by Korea that the alleged error by the Panel would constitute an error under Article 11.[509]

379. Once again, Korea has failed to meet the high standard for sustaining an Article 11 claim. As noted above, "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation," one that "goes to the very core of the integrity of the WTO dispute settlement process itself."[510] For Korea's Article 11 claims to succeed, Korea must demonstrate that the Panel committed "an egregious error that calls into question the [Panel's] good faith."[511] The Appellate Body has further explained that the weighing of evidence is within the discretion of the panel,[512] and that it is not an error under Article 11 of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."[513]

380. Here, Korea egregiously distorts the Panel's reasoning. The Panel observed that "[t]he relevant subsidies in the present case are the tax credits. Those tax credit subsidies are not R&D subsidies."[514] The Panel went on to explain:

> The fact that these tax credit subsidies were provided as a result of eligible R&D activity does not mean that those subsidies are tied to that R&D activity, or the products in respect of which that R&D activity was undertaken. The tax credit subsidies are provided after the underlying R&D activities have been undertaken, in an amount determined by reference to total R&D activities.[515]

381. The Panel made these observations in the course of rejecting Korea's attribution theory, which was not based on bestowal of subsidies, but instead rested on underlying R&D expenses and associated activities. The Panel observed that the subsidies were provided "as a result of" R&D activity and after underlying R&D activity was undertaken. But the Panel reasoned that the subsidies themselves were not, as a consequence, "tied to that R&D activity" or to any products that might be connected in some way to that activity. As noted above, the Panel pointed out that the subsidies did not even exist at the time these R&D activities took place, and

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[508] Korea Other Appellant Submission, paras. 331-332 (citing Washers Final CVD I&D Memo, p. 11 (Exhibit KOR-77)).
[509] *See, e.g.*, *US – Carbon Steel (India) (AB)*, para. 4.79 (emphasizing that "not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU, but only those that are so material that, taken together or singly, they undermine the objectivity of the panel's assessment of the matter before it") (citations and quotations omitted).
[510] *EC – Poultry (AB)*, para. 133.
[511] *EC – Hormones (AB)*, para. 133.
[512] *Korea – Dairy (AB)*, para. 137.
[513] *Korea – Alcoholic Beverages (AB)*, para. 164.
[514] Panel Report, para. 7.303.
[515] Panel Report, para. 7.303.

once the subsidies were received, there were no restrictions on how the recipient might uses them. As a consequence, there was no obligation on the USDOC to conduct attribution based on underlying R&D expenses.[516]

382. It is in this sense that the Panel rejected the characterization of RSTA Article 10(1)(3) subsidies as "R&D subsidies." The Panel did not deny that the subsidies were calculated based on underlying R&D expenditures – and indeed, expressly recognized this fact. Thus, there is no inconsistency between the Panel's statement and the USDOC's finding concerning the formula for calculating RSTA Article 10(1)(3) subsidies.[517]

#### 5. The Panel Did Not Err In Finding That Korea Did Not Require That Tax Credits Be Used In Connection With Particular Products

383. Korea heavily criticizes the Panel for recognizing that "the cash acquired by Samsung as a result of the tax credit subsidy may be spent by Samsung on any product."[518] Korea asserts an array of arguments, including claims under Article 11 of the DSU, in an attempt to undermine this finding. None is persuasive.

384. *First*, Korea accuses the Panel of having embraced the theory that all money is fungible, which Korea argues is contrary to the requirement in Article 19.4 of the SCM Agreement that a subsidy must be "found to exist."[519] According to Korea, the Panel "made no finding" regarding whether a subsidy existed.[520]

385. Korea's reliance on Article 19.4 of the SCM Agreement is inapt, and its reasoning unclear. There was never any dispute – either before the USDOC or the Panel – that a subsidy "existed." Korea challenged only the method by which the USDOC calculated the subsidy ratio.

386. In any event, the Panel did not embrace the theory that money is fungible, as the sole basis for attribution. Had the Panel done so, it would have made clear that tying was never permissible. Indeed, on a pure fungibility theory, even the recipient's discretion to use a subsidy would be irrelevant, as all subsidies would be deemed untied.

387. Instead, the Panel made this observation in the course of rejecting Korea's attribution claims – in particular, Korea's argument that tying was appropriate because "tax credits retroactively reduce the cost of the R&D activities that gave rise to those tax credits."[521] As discussed above, the Panel considered Korea's argument to be inconsistent with the "nature of the subsidy at issue" in this dispute.[522]

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[516] Panel Report, para. 7.303.
[517] As the preceding discussion confirms, the Panel's reference to "R&D subsidies" was not a commentary on the alleged purpose of the subsidy program. Korea's comments at paragraph 333 of its other appellant submission are thus misplaced.
[518] Korea Other Appellant Submission, paras. 318-330, 344-347.
[519] Korea Other Appellant Submission, para. 321.
[520] Korea Other Appellant Submission, para. 321.
[521] Panel Report, para. 7.303.
[522] Panel Report, para. 7.303.

388. In the course of its analysis, the Panel noted several considerations relating to the nature of the subsidy, including the fact that:

- subsidies were conferred after underlying expenses were incurred and R&D activities undertaken;
- eligible expenses were calculated based on "total R&D activities" for the entire company;
- the tax return did not specify the merchandise for which the tax credits were to be provided; and that
- there is no necessary correlation between R&D expenditures and the amounts of tax credit (if any) used by Samsung for the production of Digital Appliance products.[523]

389. The Panel's observation regarding Samsung's discretion in how it uses the funds was entirely consistent with its analysis of the nature of these subsidies, and how they were "bestowed" on Samsung. In rejecting Korea's argument, the Panel observed that "Samsung was not required to spend the proportion of benefit generated by Digital Appliance R&D expenditures on the future production of Digital Appliance products. It could have spent none of it on those products. Or it could have spent all of it on those products."[524]

390. In other words, the granting Member – the GOK – did not impose a product-specific requirement in connection with the bestowal of the subsidies. If the GOK had done so, this would have been decisive evidence in favor of a product-specific tie. But absent such evidence, on these facts, "the USDOC was not required to find that the subsidy was tied to the products in respect of which the underlying R&D activities were undertaken."[525]

391. *Second*, contrary to Korea's assertion, the Panel did not declare an all-purpose rule that a subsidy "can never be tied . . . merely because the cash proceeds of the subsidy may be used in any way that the recipient sees fit."[526] As the preceding discussion confirms, the Panel made its observation with respect to the "nature of the subsidies" at issue in this dispute.[527]

392. *Finally*, the Panel's observation did not "contradict the USDOC's position" that, in its practice, it would not adopt a pure "money is fungible" approach.[528] Korea once again asserts

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[523] Panel Report, para. 7.303-7.304.
[524] Panel Report, para. 7.303.
[525] Panel Report, para. 7.303. For this reason, Korea is wrong when it asserts the recipient's discretion is "unrelated" to the tying inquiry. Korea Other Appellant Submission, para. 321.
[526] Korea Other Appellant Submission, para. 321.
[527] Equally, there is no basis for Korea's assertion that the Panel's observation means that "a tax credit subsidy could never, under any circumstances, be tied to a particular product . . . regardless of the evidence that the respondent may have submitted showing how that tax credit was calculated." Korea Other Appellant Submission, para. 345. Again, the Panel made its comment with respect to the "nature of the subsidies" at issue in this dispute.
[528] Korea Other Appellant Submission, para. 330.

that the Panel committed an Article 11 breach, on the basis of this alleged contradiction.[529] Korea cites the preamble to the USDOC's final countervailing duty regulations, which affirms the USDOC's refusal to trace the actual use of subsidies through a firm's books and records.[530] The quoted language from the preamble notes that, at one level, money is fungible; but it also indicates that in some cases subsidies may be viewed as tied.

393. Of course, the preamble to the USDOC's countervailing duty regulations was not a measure before the Panel. In any event, there is no contradiction. As discussed above, the Panel did not embrace a pure fungibility theory. Nor did it suggest that an authority must trace the actual use of subsidies in the books and records of a company – a position that is entirely consistent with that of the USDOC.[531]

#### 6. The Panel Appropriately Found That Korea's Reliance On Separate Antidumping Investigations Was Improper, And Does Not Support A "Tied" Attribution Approach With Respect To RSTA Article 10(1)(3) Subsidies

394. Korea criticizes the Panel's refusal to rely on findings and materials from separate antidumping investigations in its evaluation of the USDOC countervailing duty investigation. During the Panel proceedings, Korea sought to buttress its expense-driven tying theory by adducing materials from the antidumping investigation in Bottom Mount Refrigerator-Freezers from Korea ("BMRF Korea") and the washers AD investigation.[532] The Panel rejected Korea's arguments based on these materials.[533]

395. On appeal, Korea asserts that the Panel rested its decision on a "narrow factual distinction" regarding the differences between anti-dumping and subsidy disciplines.[534] Korea asserts that documents from separate antidumping proceedings show that "Samsung tied the R&D expenditures of its Digital Appliance business unit in the normal course of business to the products that the unit developed and produced."[535]

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[529] Korea Other Appellant Submission, paras. 326-330, 343-344.

[530] Korea Other Appellant Submission, paras. 323-325 (quoting Countervailing Duties; Final Rule, 63 Fed. Reg. 65348, at 65402). Korea points out that, when reviewing certain R&D grants, the USDOC did not "trac[e] the R&D grant funds that Samsung received." Korea Other Appellant Submission, para. 343. But the Panel never suggested with respect to the tax credit subsidies at issue here that it would be necessary to trace the actual "use" of subsidies through the books and records of a company.

[531] Korea asserts that "the use of the proceeds of a subsidy is irrelevant to the tying inquiry." Korea Other Appellant Submission, para. 317. This assertion stands in tension with Korea's statement before the Panel that "it is Korea's position that, even in the case of a grant or loan for which the approval documents do not state the intended use, *the administering authority has the obligation to investigate the actual use of the subsidy*." Korea First Written Submission, para. 300 n.295 (emphasis supplied).

[532] Korea Responses to the First Set of Panel Questions, paras. 205-214 (and accompany exhibits, KOR-98 and KOR-99).

[533] Panel Report, para. 7.305.

[534] Korea Other Appellant Submission, para. 311.

[535] Korea Other Appellant Submission, para. 310; *see also id.*, para. 319 (asserting that Exhibits KOR-98 and KOR-99 from separate investigations demonstrate that "Samsung could readily identify the research and development expenses that it incurred to produce digital appliances . . . .").

396. These criticisms miss the mark. The Panel appropriately declined Korea's invitation to rely on these separate investigations, or to inject cost accounting principles from the antidumping context into the issue of subsidy attribution.

397. *First*, the Panel made clear that the USDOC's verification of R&D costs in antidumping investigation had no bearing on subsidy attribution. The Panel described the *sui generis* nature of this cost accounting exercise:

> In an antidumping investigation, an authority may need to construct a normal value on the basis of certain cost inputs. Certain costs that are incurred generally will need to be allocated to the product under investigation on a pro rata basis. Other costs, which are incurred specifically in respect of the product under investigation, are allocated directly to that product.[536]

398. The Panel sharply distinguished the cost accounting exercise with subsidy attribution. As the Panel explained:

> [T]his costing exercise has nothing to do with the amount – and destination – a of benefit conferred by tax credit subsidies conferred after those costs have been incurred. Even if the R&D costs incurred in the production of LRWs may be determined precisely for the purpose of constructing a normal value, this says nothing about the amount (if any) of the benefit conferred by the tax credit subsidies that is ultimately directed towards the future production of LRWs.[537]

399. Far from resting on a "narrow factual distinction," as Korea suggests, the Panel made clear that this entire line of inquiry was legally irrelevant. Indeed, Article 2 of the AD Agreement sets out detailed criteria governing whether costs are "associated with" a product, and confirms that this determination is based presumptively on a company's books and records. The analysis called for under the countervailing duty provisions of Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement entails a qualitatively different line of inquiry, addressing whether and how a Member has "bestowed" a subsidy on products.

400. *Second*, as the United States explained in its submissions to the Panel,[538] the verification reports and verification exhibits that Korea submitted from these antidumping proceedings were never a part of the washers CVD record.[539] In *US – Countervailing Duty Investigation on*

[536] Panel Report, para. 7.305.
[537] Panel Report, para. 7.305 (emphasis supplied).
[538] U.S. Second Written Submission, paras. 331-334.
[539] Exhibit KOR-98 appears to contain the following: (1) the Issues and Decision Memorandum in the BMRF Korea AD investigation ("BMRF Korea AD I&D Memo"); (2) the redacted, public version of the verification report in the BMRF Korea AD investigation; and (3) excerpts from verification exhibits containing business proprietary information, which were attached to the verification report in the BMRF Korea AD investigation. Of these documents, only the BMRF Korea AD I&D Memo was noted on the record of the washers CVD investigation – as a cite in the Samsung case brief, which was filed two months after the record had closed. Samsung Case Brief at 50 (Exhibit KOR-90). Exhibit KOR-99 appears to contain: (1) the redacted, public version of the verification report in the washers AD investigation and (2) excerpts from verification exhibits attached to the verification report in the

*DRAMS*, the Appellate Body made clear that panels are to limit their consideration of investigating authority action to evidence on the administrative record:

> The Appellate Body has stated previously that, when assessing an investigating authority's determination, a panel may not fault the agency for failing to take into account facts that it could not reasonably have known. *A panel must therefore limit its examination to the facts that the agency should have discerned from the evidence on record*. Where a panel reads evidence with the "benefit of hindsight," it fails to consider how the evidence should have fairly been understood at the time of the investigation, and thereby fails to make an "objective assessment" in accordance with Article 11 of the DSU.[540]

401. Likewise, in *Japan – DRAMS*, the panel refused to consider non-record evidence submitted by Korea. The panel affirmed that it "*should refrain from considering non-record evidence when reviewing the [investigating authority's] determination*."[541]

402. And although Korea attempts to blur the distinctions between the various CVD and AD investigations, they are separate proceedings with distinct administrative records. The USDOC maintains strict evidentiary barriers in its proceedings to ensure transparency, requiring that parties are served with all documents in their respective proceedings while protecting the business confidential information submitted in each.[542] Consequently, a document filed in one proceeding (*e.g.*, a CVD investigation) is not served on parties outside of that proceeding (*e.g.*, a companion AD investigation). The parties involved may overlap to some extent, but because the USDOC only evaluates evidence properly filed on the record and served on all parties to that proceeding, the USDOC does not take into account extra-record documents when making its determinations.

403. Thus, the Panel appropriately refrained from considering this evidence, which was not seen or commented on by the parties to the washers CVD investigation, and was not reviewed or considered by the USDOC in that investigation.

404. *Third*, even aside from their not forming part of the record to be examined by the Panel in reviewing Korea's claims, these materials have no bearing on the subsidy program at issue. Exhibits KOR-98 and KOR-99, which Korea sought to rely on, do not refer to or address the RSTA Article 10(1)(3) subsidy program. Instead, they set out the USDOC's cost accounting verification for purposes of determining whether certain goods (refrigerators and washers) were sold at less than fair value.

405. *Fourth*, Korea attempts to rely on these documents to support a legal theory that the Panel rejected. Samsung's records were not submitted to the GOK, and do not form the basis of the

washers AD investigation. None of the documents in Exhibit KOR-99 is part of the record in the washers CVD investigation.

[540] *US –Countervailing Duty Investigation on DRAMS (AB)*, para. 175 (emphasis supplied).

[541] *Japan – DRAMS (Panel)*, para. 7.152 (emphasis supplied).

[542] *See* 19 C.F.R. §§ 351.103, 351.104 (Exhibit USA-80), 19 C.F.R. § 351.303 (Exhibit USA-81), and 19 C.F.R. § 351.306 (Exhibit USA-82).

bestowal of the subsidies. The attribution of subsidies is not a function of whether *expenses* "benefit" or affect a product – much less how the recipient happens to account for those expenses.

406. *Fifth*, there is a fundamental mismatch between the time periods and methods used to carry out R&D cost accounting in the washers and BMRF AD investigations, and the calculation of subsidies in RSTA Article 10(1)(3). In the washers AD investigation, the USDOC calculated cost of production based on R&D expenses accrued in the Digital Appliances Unit between October 1, 2010 and September 30, 2011, the period of investigation.[543] Likewise, in the BMRF Korea AD investigation, the USDOC grounded its cost of production analysis in R&D expenses from the Digital Appliances Unit incurred between January 1, 2010 and December 31, 2010.[544]

407. By contrast, as the United States explained in its submissions to the Panel, the RSTA Article 10(1)(3) subsidies were conferred on Samsung at a different time period (2011) than R&D expenses were incurred.[545] Samsung's subsidies were calculated based on a comparison between the aggregate of all research and human resource development expenses incurred by the company in fiscal year 2010 and the annual average of those expenses in the preceding four years.[546] This amount was further adjusted by carry-forwards of subsidy earned in fiscal year 2009 and deferral of subsidies to future years, to comply with Korea's Minimum Tax Law.[547] Given these differences, it would not be useful or appropriate to graft the analysis from the washers and BMRF AD investigations onto the attribution of these subsidies.

408. *Finally*, contrary to Korea's assertion, these antidumping materials do not contain "express" findings that "Samsung tied the R&D expenditures" from its Digital Appliances unit to "the products that the unit developed and produced."[548] They do not establish a "tie" of any kind, much less the attribution of subsidies to particular products. Consistent with Article 2 of the AD Agreement, the USDOC presumptively follows the investigated company's books and records in carrying out this calculation.[549] Indeed, U.S. courts have imposed a substantial evidentiary hurdle and strict requirements for departing from an investigated company's books and records.[550] In compliance with these requirements, the USDOC followed Samsung's books and records, and calculated the R&D ratio based solely on expenses from the Digital Appliance unit, which it divided over the consolidated cost of all sales from the various production entities within the Digital Appliance unit.[551]

409. Again, there is no "tying" here. And whether certain activities can be viewed as having an effect on the Digital Appliance Unit for purposes of cost accounting does not have any bearing on how and in what amounts subsidies were bestowed. The Panel appropriately rejected Korea's arguments concerning these cost accounting materials; there is no error here.

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[543] *See, e.g.*, Washers AD I&D Memo at 2 (Exhibit KOR-18).
[544] BMRF Korea AD I&D Memo at 3 (Exhibit KOR-69).
[545] U.S. Responses to the First Set of Panel Questions, para. 199.
[546] U.S. Responses to the First Set of Panel Questions, para. 199.
[547] U.S. Responses to the First Set of Panel Questions, para. 199.
[548] Korea Other Appellant Submission, para. 310.
[549] BMRF Korea AD I&D Memo at 124 (Exhibit KOR-98).
[550] BMRF Korea AD I&D Memo at 125-126 (Exhibit KOR-98).
[551] BMRF Korea AD I&D Memo at 126-127 (Exhibit KOR-98).

### 7. Korea's Request For Completion Of The Analysis Is Improper

410. After setting out its substantive claims, Korea includes a request that the Appellate Body "complete the analysis."[552] But it does so by referring to the various written submissions that it made before the Panel.[553] Korea argues that "the factual and legal recitations in these submissions and the exhibits referenced provide a basis" for the Appellate Body to complete the analysis.[554] Korea then "briefly summarizes" these factual and legal "recitations" in twenty-six bullet points.[555]

411. This is plainly inadequate. First, there would be no basis to complete the analysis if the Appellate Body does not reverse the Panel's conclusion that Korea failed to make out a breach of Article VI:3 of the GATT 1994 or Article 19.4 of the SCM Agreement. As explained above, the Panel's conclusion is sound, and Korea's appeal should be rejected. Thus, the necessary predicate to consider Korea's request for completion of the analysis is absent.

412. Second, Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." This precludes any fact finding by the Appellate Body. Accordingly, "[i]n previous disputes, the Appellate Body has emphasized that it can complete the analysis 'only if the factual findings of the panel or the undisputed facts in the panel record' provide a sufficient basis for the Appellate Body to do so."[556] The Appellate Body has further explained that it will "complete the analysis" only in cases where the panel has addressed a claim and made a legal interpretation, finding, or conclusion,[557] where there are "sufficient factual findings,"[558] or where there are "sufficient uncontested facts on the record."[559] The Appellate Body has recognized that its ability to complete the analysis is subject to "important limitation" and has adopted a "cautious approach" in the past.[560]

413. Korea has not identified the precise factual findings of the Panel or undisputed facts on the record that would permit completion of the analysis. Instead, Korea's request would force the Appellate Body to sift through its pleadings and a lengthy list of "factual and legal recitations" to complete the analysis. This is at odds with the targeted, "cautious approach" that the Appellate Body has adopted in previous disputes.

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[552] Korea Other Appellant Submission, paras. 349-353.
[553] Korea Other Appellant Submission, para. 350.
[554] Korea Other Appellant Submission, para. 351.
[555] Korea Other Appellant Submission, para. 351.
[556] *EC – Large Civil Aircraft (AB)*, para. 1140 (citing numerous Appellate Body reports in prior disputes).
[557] *EC – Poultry (AB)*, para. 107; *EC – Asbestos (AB)*, paras. 79, 82.
[558] *US – Section 211 Appropriations Act (AB)*, para. 343; *EC – Large Civil Aircraft (AB)* paras. 735, 1101, 1417; *Australia – Salmon (AB)*, para. 118.
[559] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 157 ("Canada, as the complaining party, must persuade us that there are sufficient uncontested facts on the record to enable us to complete the analysis by stepping into the shoes of the Panel.").
[560] *US – Continued Zeroing (AB)*, para. 195 ("We recognise the important limitation on our ability to complete the analysis.").

414. Thus, Korea's request was improperly asserted; its lengthy list of submissions and recitations should be disregarded.

### C. The Panel Did Not Err In Finding That The USDOC Was Not Required To Attribute RSTA Article 10(1)(3) Subsidies To Sales Of Products Manufactured Outside Korea

415. Equally, there is no merit to Korea's claim with respect to overseas manufacturing. Korea criticizes the Panel for upholding the USDOC's decision not to include overseas sales in the denominator of the ratio for RSTA Article 10(1)(3) subsidies. Korea portrays this as a failure to "match" the elements in the numerator and denominator.[561]

416. But like Korea's "tying" theory, this claim has no grounding in the bestowal of subsidies. This theory would require the attribution of subsidies based on the indirect overseas effect of R&D activity.[562] The Panel appropriately rejected this theory. Korea's arguments on appeal are unavailing.

417. *First*, as a threshold matter, Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement do not require Members to take into account products manufactured outside the territory of the subsidizing Member when calculating subsidy rates. As discussed above, these provisions confirm that the subsidy must have been "bestowed," directly or indirectly, on the manufacture, production, or export of the imported product and, within these parameters, do not dictate precisely how an investigating authority must calculate the rate of subsidization. Nor would they require incorporation of overseas manufacturing into subsidy ratios.

418. To the contrary, the language of these provisions suggests a focus on production activity occurring within the territory of the granting Member. As the United States explained in its submissions,[563] 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*."

419. 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.

420. *Second*, as the Panel explained, Korea's effects-based attribution theory has no grounding in the granting of subsidies. The Panel "disagree[d] that the 'real issue'" was the "effects of the R&D activities that gave rise to those subsidies."[564] The "benefit" of the Article 10(1)(3) tax

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[561] Korea Other Appellant Submission, paras. 354-356.
[562] Korea Other Appellant Submission, paras. 357, 363.
[563] U.S. First Written Submission, paras. 487-488.
[564] Panel Report, para. 7.318.

credit "is not tied to the R&D activities that gave rise to the tax credits, since Samsung is free to dispose of the tax credit cash as it sees fit."[565] As the Panel explained, "[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."[566]

421. Korea dismisses the Panel's findings, on the grounds that the Panel "improperly substituted a different rationale" from the USDOC's.[567] But it was entirely appropriate for the Panel to respond to Korea's claim in these proceedings, and assess its consistency with the SCM Agreement.[568] As noted above, Korea's effects-based theories are fundamentally inconsistent with the SCM Agreement.

422. *Third*, as with its tying claim, Korea relies heavily on cost verification documents from separate antidumping proceedings – the USDOC antidumping investigation of Bottom Mount Refrigerator-Freezers from Mexico and the washers AD investigation. Korea argues that the USDOC's determinations in these investigations supports the view that R&D conducted in Korea "benefitted" overseas production.[569] Korea argues that "[i]f the R&D activities and related expenditures benefitted the products manufactured in both Korean and overseas facilities, then the tax credits that those activities and expenditures generated necessarily benefitted the same overseas facilities."[570]

423. Korea's assertions are groundless. Neither of these antidumping proceedings has any bearing on the subsidy attribution issue here. Neither proceeding addressed the RSTA Article 10(1)(3) subsidy program, and the Mexican proceeding involved a different product and different jurisdiction. Moreover, as discussed above, the cost accounting exercise is grounded in principles that are unique to the antidumping context and that are particularly inapplicable here, given the structure of RSTA Article 10(1)(3).

424. We note that Korea continues to refer to the "benefit" of expenses, in a manner that has no grounding in Article 1 of the SCM Agreement. In its report, the Panel cited Korea's admission that it was not using the term "benefit" in the sense of Article 1 of the SCM Agreement – a "clarification that is consistent with our own view that the allocation of R&D costs for the purpose of constructing normal value is not determinative of the treatment of the 'benefit' (in the sense of Article 1.1(b) of the SCM Agreement) conferred by tax credit subsidies."[571]

425. With respect to Korea's overseas manufacturing theory, the Panel explained that "[t]he benefit conferred by the tax credit subsidies does not . . . have to be allocated across revenue

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[565] Panel Report, para. 7.318.
[566] Panel Report, para. 7.318 (emphasis supplied).
[567] Korea Other Appellant Submission, para. 360.
[568] *See, e.g.*, *EC – Hormones (AB)*, para. 156 ("[N]othing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration."); *Canada – Renewable Energy (AB)*, para. 5.215 (same).
[569] Korea Other Appellant Submission, para. 358.
[570] Korea Other Appellant Submission, para. 357 (final bullet point).
[571] Panel Report, n.518.

from Samsung's overseas production operations simply because such operations – to use Korea's terminology – 'benefitted' from the underlying R&D activities."[572] So even if R&D expenses or activities could be said to "benefit" or affect an overseas subsidiary for cost accounting purposes, this would not mean that subsidies should be attributed to overseas production. One does not follow from the other.

426. In this appeal, Korea fails to address the troubling implications of its theory. Investigating authorities would be required to conduct a jurisdiction-by-jurisdiction inquiry into how R&D activities affect production across the globe. As the United States has observed,[573] tracing these effects is particularly challenging, given the differing legal, tax, and other regulations applicable to overseas operations; complexities in how companies structure their overseas and domestic operations; and the time lag between R&D activities and their effects. As Korea is undoubtedly aware, this task would be even more onerous with respect to large multinational companies such as Samsung, which has a presence in many countries across the globe.[574]

427. *Fourth*, Korea does not appeal the Panel's finding that "[i]n these circumstances, we consider that the rebuttable presumption applied by the USDOC is not inconsistent with Article 19.4 of the SCM Agreement or Article VI:3 of the GATT 1994."[575] The USDOC presumed (rebuttably) that a Member grants a subsidy to benefit domestic production.[576]

428. Instead, Korea challenges the Panel's finding that the USDOC was entitled to conclude that this presumption was not rebutted on these facts. Here, again, Korea relies on separate antidumping proceedings, arguing that the USDOC "rebutted its own presumption" through the cost verification findings.[577] For the reasons discussed above, the findings in a cost accounting exercise in an antidumping proceeding have no bearing on the attribution of subsidies. They

[572] Panel Report, para. 7.318.
[573] U.S. Opening Statement at the First Panel Meeting, para. 68; U.S. First Written Submission, paras. 500-501.
[574] More broadly, Korea's approach would inject an overseas dimension into subsidy attribution, with potentially far-reaching consequences. On Korea's logic, a Member could countervail products manufactured in country A based on subsidies conferred in country B – as long as the effects of underlying R&D activities carried out in country B are not proven to be limited to country B. This would represent a radical change in Members' understanding of the reach of the subsidies disciplines and countervailing duties under Article VI of the GATT 1994 and the SCM Agreement.
[575] Panel Report, para. 7.319. In its notice of appeal, Korea described as one indicative finding subject to this appeal that "[t]he USDOC was entitled to rely on its presumption that Korea granted the Article 10(1)(3) tax credits to benefit only domestic production." Korea Notice of Appeal, para. 18 (fourth bullet). Yet Korea's other appellant submission does not contain any analysis of the Panel's finding that application of a rebuttable presumption was appropriate. Korea did not address the prior reports that the Panel examined when endorsing the use of this presumption, or its analysis that it was warranted here, *inter alia*, because "the recipients of the subsidies only produced in the territory of the subsidizing Member." Panel Report, para. 7.319. With respect to these findings, Korea did not provide a "precise statement of the grounds for appeal, including the specific allegations or errors in the issues of law covered in the panel report and legal interpretations developed by the panel, and the legal arguments in support thereof." Working Procedures for Appellate Review, Rules 21(2), 23(3). Instead, Korea argued that this presumption had been rebutted on the facts of this dispute.
[576] Panel Report, para. 7.319.
[577] Korea Other Appellant Submission, paras. 363-64.

cannot rebut a presumption with respect to the attribution of the "benefit" of a subsidy to overseas manufacturing.[578] The Panel appropriately declined to accept this line of reasoning.[579]

429. *Finally*, Korea falls back on a series of factual arguments, which it labels "undisputed facts" and enlists in support of its theory.[580] Korea's apparent request to have the Appellate Body render factual findings is improper, and falls outside the scope of appellate review. Issues of fact – including the relative weight to be ascribed to factual evidence – fall within the domain of WTO panels.[581]

430. In any event, Korea's factual assertions are inaccurate and misleading, and do not support its position:

- Korea argues that, while Samsung carried out all R&D in Korea, "Samsung produced products in numerous facilities worldwide."[582] But, as the Panel observed, "the recipients of the tax credit subsidies (i.e. Samsung and its Korean affiliates) only produced in the territory of the subsidizing Member."[583] It is only Samsung's overseas affiliates – who did not conduct the R&D or receive subsidies themselves – who conducted the overseas manufacturing.[584]

- Korea asserts that "[t]he benefits of R&D activities, by their very nature, are not confined to products that are produced within the geographical borders of the country where the R&D subsidy is conferred."[585] Korea – like Samsung before the USDOC – fails to support this conclusory assertion with any evidence. The effects of R&D activities, particularly overseas, are notoriously difficult to trace, and may not materialize for years (if ever).

- Korea purports to find an inconsistency in the USDOC's calculation of the denominator in the Bottom Mount Refrigerators CVD proceeding, and its calculation in the washers CVD proceeding.[586] But, as the United States explained at length before the Panel,[587] the reason that the USDOC attributed certain subsidies to Samsung's global production in the Bottom Mount Refrigerators CVD investigation was that Samsung reported the wrong data. In that investigation, Commerce explicitly instructed Samsung "not to include the volume and value of merchandise produced outside of Korea" in its reported

[578] Korea complains that the Panel "did not address" certain arguments that it made, but fails to identify the particular arguments that were allegedly not addressed, or provide any explanation. Korea Other Appellant Submission, para. 365. Korea simply provides a bulk cite to its submissions before the Panel, and thus fails to substantiate its claim.
[579] Panel Report, para. 7.319.
[580] Korea Other Appellant Submission, para. 357.
[581] *See, e.g.*, *Korea – Alcoholic Beverages (AB)*, paras. 161-162.
[582] Korea Other Appellant Submission, para. 357 (first bullet).
[583] Panel Report, para. 7.319.
[584] Panel Report, paras. 7.318 n.539, 7.319.
[585] Korea Other Appellant Submission, para. 357 (second bullet).
[586] Korea Other Appellant Submission, para. 357 (third and fourth bullets).
[587] U.S. Opening Statement at the Second Panel Meeting, paras. 71-73.

sales data.[588] Samsung claimed to respond with the "requested quantities and sales values."[589] Accordingly, the USDOC relied on that data as the denominator for Samsung's subsidy ratio. Thus, contrary to Korea's assertion, the USDOC did not "determine that these R&D related grants benefited the worldwide sales" of Samsung.[590] In any event, as the Panel observed, the calculation undertaken in the Bottom Mount Refrigerators CVD investigation has no bearing on this dispute.[591]

- Korea relies on royalty payments made by Samsung's overseas subsidiaries, which it argues show that R&D activities "extended to overseas production."[592] In fact, Korea's reliance on these payments undercuts its overseas attribution theory. As the United States explained in its submissions, if a subsidiary is paying its parent for the value of the R&D work carried out, then it is difficult to see how the subsidies conferred on the Korean parent would "pass through" to that overseas affiliate.[593] Indeed, presumably Korea would agree that Korean corporations would normally make these payments on an arms-length basis at fair market value, given the requirements with respect to such intra-corporate transfers.[594] All of this confirms the distinction between the R&D activity and expenses, on the one hand, and the subsidies, on the other.

431. Further, Korea neglects other facts, which strongly militate against its theory:

- The laws creating the RSTA Article 10(1)(3) tax credit scheme, which limit eligibility to Korean companies and only confer subsidies in connection with research and human resources development activities that occur *within Korea*.[595]

- Korea's statement on the record of the investigation 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 all sectors."[596]

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[588] Samsung June 30, 2011 QR, p. III-5 (Exhibit USA-86).
[589] Samsung June 30, 2011 QR, pp. III-5-III-6 (Exhibit USA-86).
[590] Korea Other Appellant Submission, para. 357 (third bullet).
[591] Panel Report, para. 7.317 n.537 ("Since this case is concerned with the USDOC's actions in the *Washers* countervailing investigation, we shall confine our analysis to that case.")
[592] Korea Other Appellant Submission, para. 357 (fifth bullet).
[593] U.S. Responses to the First Set of Panel Questions, para. 200; U.S. Second Written Submission, para. 358.
[594] *See, e.g.*, Korea Act for the Coordination of International Tax Affairs, Article 4 (permitting tax authorities to adjust transaction values between a party and a related foreign party on the basis of an "arm's length price") (Exhibit USA-83); International Financial Reporting Standards (IFRS), IAS 18 ("Revenue shall be measured at fair value . . . Fair value is the amount for which an asset could be exchanged, or a liability settled, between knowledgeable parties in an arm's length transaction") (Exhibit USA-84).
[595] U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77).
[596] GOK April 9, 2012 QR at App. Vol. 108 (emphasis supplied) (Exhibit KOR-75); U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77). Korea asserts that the reference to "boosting 'general national economic activities' is properly construed to encompass all of the activities that ultimately redound to the benefit of Korea companies," which "necessarily include the operations of overseas subsidiaries." Korea Other Appellant Submission, para. 369. Korea's assertion is unsupported, and facially implausible. The statement in Korea's questionnaire does not remotely suggest an intent to "boost" overseas production.

- The tax returns, which do not identify or include any qualifying R&D expenses incurred outside Korea, or otherwise indicate any intent by Korea to subsidize overseas production.[597]

432. In sum, Korea's arguments on appeal with respect to its overseas effects theory do not withstand scrutiny. The Panel appropriately declined to accept this theory. Therefore, the Appellate Body should reject Korea's assertion that the Panel erred in finding that the USDOC did not breach Article VI:3 of the GATT 1994 or Article 19.4 of the SCM Agreement, when it determined not to incorporate overseas sales in the denominator of the ratio for RSTA Article 10(1)(3) subsidies.

## IV. CONCLUSION

433. For the foregoing reasons, the United States respectfully requests the Appellate Body to reject Korea's claims on appeal, and uphold the Panel's findings.

[597] U.S. First Written Submission, para. 490; Washers Final CVD I&D Memo at 52 (Exhibit KOR-77).