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

REPORT OF THE PANEL

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Argentina – Import Measures	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
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Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R, DSR 2010:VI, p. 2371
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
China – Autos (US)	Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – Rare Earths	Panel Reports, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/R and Add.1 / WT/DS432/R and Add.1 / WT/DS433/R and Add.1, adopted 29 August 2014, upheld by Appellate Body Reports WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R
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EC – Bananas III (Mexico)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Mexico*, WT/DS27/R/MEX, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, p. 803
EC – Bed Linen	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
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EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Hormones (Canada)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada*, WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, p. 235
EC – Hormones (US)	Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States*, WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, p. 699
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3

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EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III, p. 1009
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R, DSR 2011:II, p. 685
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
European Communities – Selected Customs Matters	Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX, p. 3915
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
Peru – Agricultural Products	Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R
Philippines – Distilled Spirits	Panel Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/R / WT/DS403/R, adopted 20 January 2012, as modified by Appellate Body Reports WT/DS396/AB/R / WT/DS403/AB/R, DSR 2012:VIII, p. 4271
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151
US – 1916 Act (EC)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Anti-dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
US – Anti-dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-dumping Methodologies (China)	*United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WT/ DS471, panel composed on 28 August 2014
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Continued Suspension	Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Measures (China)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R

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US – Countervailing Measures on Certain EC Products	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by Appellate Body Report WT/DS212/AB/R, DSR 2003:I, p. 73
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, p. 5
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, p. 5797
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
US – Shrimp (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS404/R, adopted 2 September 2011, DSR 2011:X, p. 5301
US – Shrimp and Sawblades	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/R and Add.1, adopted 23 July 2012, DSR 2012:XIII, p. 7109
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
US – Shrimp II (Viet Nam)	Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/R and Add.1, adopted 22 April 2015, upheld by Appellate Body Report WT/DS429/AB/R
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 [of the DSU]*, WT/DS257/RW, adopted 20 December 2005, upheld by Appellate Body Report WT/DS257/AB/RW, DSR 2005:XXIII, p. 11401
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
US – Softwood Lumber V (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
US – Softwood Lumber VI (Article 21.5 – Canada),	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, p. 599
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

Short Title	Full Case Title and Citation
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (EC)	Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R, adopted 9 May 2006, as modified by Appellate Body Report WT/DS294/AB/R, DSR 2006:II, p. 521
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3
US – Zeroing (Japan)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, p. 97
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
BCI Procedures	Additional working procedures of the Panel concerning Business Confidential Information
CONNUM	Control number
DPM	Differential Pricing Methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ERDF	European Regional Development Fund
GATT 1994	General Agreement on Tariffs and Trade 1994
LRWs/Washers	Large Residential Washers
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization
OECD	Organization for Economic Cooperation and Development
R&D	Research and Development
RSTA	Restriction of Special Taxation Act
SCM Agreement	Agreement on Subsidies and Countervailing Measures
T-T	Transaction-to-Transaction Comparison Methodology
USDOC	United States Department of Commerce
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
W-T	Weighted Average-to-Transaction Comparison Methodology
WTO	World Trade Organization
W-W	Weighted Average-to-Weighted Average Methodology

1 INTRODUCTION

1.1 Complaint by Korea

1.1. On 29 August 2013, Korea requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade (GATT 1994), Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with regard to the anti-dumping and countervailing measures applied by the United States on Large Residential Washers (LRWs) from the Republic of Korea.[1]

1.2. Consultations were held on 3 October 2013, but failed to resolve the dispute. On 5 December 2013, Korea requested the establishment of a panel.[2]

1.2 Panel establishment and composition

1.3. At its meeting on 22 January 2014, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Korea in document WT/DS464/4, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Korea in document WT/DS464/4 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 10 June 2014, Korea requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.6. On 20 June 2014, the Director-General accordingly composed the Panel as follows:

Chairperson:	Ms Claudia Orozco
Members:	Mr Mazhar Bangash
	Mr Hanspeter Tschaeni

1.7. Brazil, Canada, China, the European Union, India, Japan, Norway, Saudi Arabia, Thailand, Turkey and Viet Nam reserved their rights to participate in the Panel proceedings as third parties.

[1] See WT/DS464/1.
[2] See WT/DS464/4.
[3] See WT/DSB/M/341.
[4] See WT/DS464/5.

1.3 Panel proceedings

1.3.1 General

1.8. After consultations with the parties, the Panel adopted its Working Procedures[5] and timetable on 3 September 2014. The Panel revised its Working Procedures on 8 October 2014 and the timetable on 12 December 2014.

1.9. The Panel held a first substantive meeting with the parties on 10 and 11 March 2015. A session with the third parties took place on 11 March 2015. The Panel held a second substantive meeting with the parties on 20 and 21 May 2015. On 3 July 2015, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 14 October 2015. The Panel issued its Final Report to the parties on 13 November 2015.

1.3.2 Working Procedures on BCI

1.10. After consultations with the parties, the Panel adopted, on 3 September 2014, additional procedures for the protection of Business Confidential Information (BCI).[6]

1.3.3 China's request for enhanced third party rights

1.11. By letter dated 25 June 2014, China indicated that it is a party to a parallel panel proceeding[7], and requested enhanced third party rights to: (a) receive all submissions of the parties at the time they are submitted to the Panel; (b) have access to any other information submitted to the Panel; (c) be present during the entirety of all meetings of the parties; (d) ask questions of the parties at meetings; and (e) make a short statement at all meetings of the parties. China repeated its request by letter dated 26 November 2014 to the Panel.

1.12. On 12 December 2014, the Panel rejected China's request for enhanced third party rights in the following terms:

> Article 10.2 of the DSU provides that Members may participate in panel proceedings as third parties if they have a "substantial" interest in the matter before the panel. It is well established that panels may grant a third party enhanced rights, provided that such third party's interest in the proceeding extends beyond the "substantial" interest referred to in Article 10.2 of the DSU.
>
> The Panel observes that previous panels have granted enhanced third party rights on the basis of, *inter alia*, the significant economic effect of the measures at issue on certain third parties[8], the importance of trade in the product at issue to certain third parties[9], the significant trade policy impact that the outcome of the case could have on third parties maintaining measures similar to the measures at issue[10], at least one of the parties agreeing that enhanced third party rights should be granted[11], claims that the measures at issue derived from an international treaty to which certain third parties were parties[12], third parties having previously been granted enhanced

[5] See the Panel's Working Procedures, Annex A-1.
[6] See Additional Working Procedures on BCI, Annex A-2.
[7] DS471 *United States – Certain Anti-Dumping Methodologies (China)*. That panel was established on 26 March 2014 and was composed on 28 August 2014.
[8] Panel Reports, *EC – Bananas III*, para. 7.8; and *EC – Tariff Preferences*, Annex A, para. 7. See, also, Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5. (footnote original). "Footnote original" means footnotes to the quoted original text. However, to avoid any confusion, the sequential numbering of these "footnotes original" will follow the numerical order in this Report, rather than the original text.
[9] Panel Report, *EC – Export Subsidies on Sugar*, para. 2.5. (footnote original)
[10] Panel Report, *EC – Tariff Preferences*, Annex A, para. 7. (footnote original)
[11] Panel Report, *EC – Bananas III*, para. 7.8. (footnote original)
[12] Ibid.

rights in related panel proceedings[13], and certain practical considerations arising from a third party's involvement as a party in a parallel panel proceeding.[14]

China asserts that its interest in DS464 extends beyond being merely "substantial" because the DS464 and 471 proceedings are "parallel", or "significantly overlapped".[15] China also asserts that it has an "especially significant interest" in the United States Department of Commerce's (USDOC) use of the methodology at issue in the DS464 proceeding. China contends that it will be "disadvantaged", compared to the United States, in developing arguments in the DS471 proceeding if it cannot "properly appreciate the manner in which issues develop"[16] during the DS464 proceeding.

In citing World Trade Organization (WTO) case law where enhanced third party rights have been granted in the context of parallel proceedings, China refers to the two *EC – Hormones* cases.[17] These two cases were separate proceedings brought by Canada and the United States against the same European measure. Both cases were factually intense, were heard by the same panelists, and involved the use of the same scientific experts. Enhanced third party rights were granted in these parallel proceedings for "practical" reasons[18], to avoid undue duplication. Similar practical considerations do not arise in the present case, particularly since the panelists in DS464 are different from the panelists in DS471.

Regarding China's assertion that there is "significant overlap" between the issues that are likely to arise in DS464 and 471, the Panel notes that similarity of the legal issues between cases has not been a criterion to grant enhanced third party rights to a third party in one case that is also the complainant in another case. Moreover, the Panel notes that China did not request, pursuant to Article 9.3 of the DSU, that the same panelists should serve on both the DS464 and DS471 cases.[19] This would have ensured a harmonized timetable between the cases.

Regarding China's alleged "especially significant interest" in the USDOC's use of the methodology under review by the DS 464 Panel, China refers to the USDOC's use of this methodology in anti-dumping proceedings involving imports from China. China asserts that the USDOC's use of this methodology therefore has a "significant economic impact" on China. The Panel notes that the alleged economic impact of the USDOC's use of the relevant methodology against Chinese imports is what has caused China to bring its own proceeding against this methodology. China will have every right to pursue its own claims – and thereby protect its economic interest – in the DS471 proceeding. Since China is able to defend its interests by bringing its own case, there is no need for China to be granted enhanced third party rights to protect those interests in DS464.

In referring to its "especially significant interest", China seeks to rely on the grant of enhanced third party rights in *EC – Bananas III* and *EC – Tariff Preferences*.[20] Those disputes involved situations in which third parties were the beneficiaries of the EC programs that were being challenged. The third parties in those cases therefore had highly significant economic interests in the panel proceedings that could not be addressed by them bringing separate cases. This is in marked contrast to the circumstances surrounding China's request, given China's ability to defend its own economic interests by bringing its own case against the United States.

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[13] Panel Report, *EC – Bananas III*, para. 7.8. (footnote original)

[14] Panel Report, *EC – Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada* ("*EC – Hormones (Canada)*"), WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235, para. 8.17. (footnote original)

[15] China's 25 June 2014 request, paras. 3 and 4. (footnote original)

[16] Ibid. para. 10. (footnote original)

[17] Ibid. para. 2, footnote 4. (footnote original)

[18] Panel Report, *EC – Hormones (US)*, para. 8.15. (footnote original)

[19] China did not refer to Article 9.3 when requesting establishment of the DS471 panel. See WT/DSB/M/342 (pp. 23-24) and WT/DSB/M/343, p. 15). (footnote original)

[20] China's 25 June 2014 request, footnote 5. (footnote original)

China further suggests that it will be "disadvantaged", compared to the United States, in developing arguments in the DS471 proceeding if it cannot "properly appreciate the manner in which issues develop"[21] during the DS464 proceeding. This argument is not persuasive, since China's claims in DS471 will be assessed on their merits by panelists who have not participated in the DS464 proceeding. Those panelists will determine for themselves (through questions, and their conduct of the hearings, for example) how the issues in DS471 should be developed. The manner in which issues develop in DS464 is therefore of little consequence.[22] Furthermore, as a regular third party in DS464, China has already received the United States' first written submission in DS464, and therefore has an insight into the nature of the defence being raised by the United States.

Finally, the Panel observes that both parties have expressed their opposition to China's request for enhanced third party rights. The United States has expressed this opposition in two written communications. Korea expressed its opposition orally at the Panel's organizational meeting. China has not provided any reason for us to grant enhanced third party rights over the objections of both parties to the dispute.

1.3.4 The European Union's request concerning the Panel's Working Procedures and the BCI Procedures

1.13. In its third party submission dated 8 December 2014, the European Union requested the Panel to amend certain aspects of its Working Procedures, and raised a number of reservations regarding the Additional working procedures of the Panel concerning business confidential information (BCI Procedures).[23]

1.14. By communication dated 13 February 2015, the Panel rejected the European Union's requests in the following terms:

> 1.1 The European Union asks the Panel to amend its Working Procedures, in order to allow third parties to receive all communications submitted by the parties, be present throughout the hearings and respond to questions addressed to the parties or other third parties. The European Union also raises a number of reservations regarding the BCI Procedures adopted by the Panel.
>
> **1 The Panel's Working Procedures**
>
> **1.1 Introduction**
>
> 1.2 The European Union submits that the Working Procedures adopted by the Panel modify Appendix 3 of the DSU in a manner that risks to diminish the rights of third parties. The European Union requests modifications of the Working Procedures to preserve the rights of third parties as envisaged by the DSU.
>
> 1.3 The European Union submits[24] that the Working Procedures set forth in Appendix 3 of the DSU contemplate two distinguishable stages in a panel proceeding. The European Union states that the first stage involves the parties setting out their case in chief, including a full presentation of claims, facts, evidence and appropriate argument. The second stage involves rebuttals, and the refinement of argument and questions for soliciting explanations. The European Union contends that paragraph 6 of Appendix 3 grants third parties a right to be fully implicated in the first stage and that DSU Articles 10.1 and 10.2 require that third parties have a full view of the cases presented by the parties before presenting their written submissions and exercising

[21] China's 25 June 2014 request, para. 10. (footnote original)

[22] In its second request dated 26 November 2014, China refers to the possibility of the DS464 Panel Report being issued before the DS471 panel completes its work, and taken into account by that panel. To the extent that this Panel's Report is issued before the DS471 panel completes its work, we agree that it may be taken into account by the DS471 panel. However, that panel would still be required by Article 11 of the DSU to make its own objective assessment of the matter before it. (footnote original)

[23] European Union's third party submission, paras. 13 and 14.

[24] Ibid. paras. 3-12. (footnote original)

their right to be heard. The European Union asserts that paragraph 8 of the Panel's Working Procedures modifies the Appendix 3 Working Procedures "by admitting factual assertions and evidence (and associated argument) filed after the first hearing, notably in rebuttals or responses to questions".[25] According to the European Union, this modification "permits to some extent the shifting of fact, evidence and associated argument from the first stage to the second stage", thereby "diminish[ing]"[26] the rights of third parties.

1.4 The European Union requests three changes to the Panel's Working Procedures, so as to "fully preserve"[27] the rights of third parties. First, the European Union requests that third parties receive all submissions by the parties to the Panel, including first submissions, rebuttals, ruling requests and responses thereto, responses to questions and comments thereon and oral statements. Second, the European Union requests that third parties should be present during the entirety of the first and second substantive meetings. Third, the European Union requests that third parties have an opportunity to respond to questions from the Panel to the parties and other third parties. The European Union supports its requests by referring to prior WTO cases "in which appropriate steps"[28] have been taken in relation to third party rights.

1.5 Consistent with Article 12.1 of the DSU, the Panel consulted with the parties regarding the European Union's request. The parties provided written comments regarding this matter on 30 January 2015. Both parties asked the Panel to reject the European Union's request.

1.2 The nature of the European Union's request

1.6 We note that the European Union refers to WTO cases in which "appropriate steps" have been taken to protect third party rights. These are actually cases in which panels granted enhanced third party rights once satisfied that the interest of a third party extended beyond the "substantial" interest envisaged by Article 10.2 of the DSU. However, the European Union does not argue that its interest in the present proceeding extends beyond the "substantial" interest referred to in Article 10.2 of the DSU. Rather, the European Union argues that paragraph 8 of the Working Procedures risks to diminish the rights of third parties, and justifies the rights requested as necessary to preserve the rights of third parties as envisioned by the DSU.

1.3 The rights of third parties

1.7 Before addressing the argument by the European Union, we recall the rights of third parties established in the DSU and Appendix 3. Article 10 establishes a general obligation to fully take into account the interests of the parties to a dispute and those of other Members under a covered agreement. The specific rights of third parties are developed in paragraphs 2 and 3 of Article 10 and paragraph 6 of Appendix 3. Article 10.2 requires a panel to provide an opportunity for third parties to make submissions and present their views to the panel. In turn, the right to present views to the panel is developed in paragraph 6 of Appendix 3 which indicates that third parties shall be invited to a special session of the first substantive meeting of the panel with the parties. Article 10.3 of the DSU mandates that third parties receive the submissions of the parties to the first meeting of the panel.

1.8 These rights are included and developed in paragraphs 15, 16, 17, 18, 20, 21 and 25 (d) of the Panel's Working Procedures. In particular, parties are required to serve on all third parties their written submissions in advance of the first meeting with the Panel; third parties are invited to present written submissions prior to the first substantive meeting of the Panel; and third parties are invited to present their

[25] European Union's third party submission, para. 7. (footnote original)
[26] Ibid. para. 7. (footnote original)
[27] Ibid. para. 4. (footnote original)
[28] Ibid. para. 12. (footnote original)

views orally to the panel during a session of the first substantive meeting of the Panel with the parties.

1.4 The Panel's Working Procedures reflect standard panel practice

1.9 Before considering the European Union's arguments in detail, we note that there is nothing novel about the text of paragraph 8 of the Working Procedures. It is a standard provision of panels' Working Procedures. All Working Procedures publicly available[29] have an identical or virtually identical provision, except in one case.[30] We note that in all these cases, the European Union was either a party or a third party in the dispute. We also note that there is no record in any of these panel Reports of any concern being expressed by the European Union regarding the timeframe for the submission of factual evidence or the rights of third parties.

1.10 The language of paragraph 8 is included in panel Working Procedures in order to regulate the submission of factual evidence. Such discipline is necessary because, as explained below, there is no deadline for the submission of factual evidence provided for in the Working Procedures set forth in Appendix 3 of the DSU.

1.5 Alleged diminishment of third party rights

1.11 With regard to the European Union's assertion that paragraph 8 of the Panel's Working Procedures diminishes the rights of third parties, we recall that the first and second sentences of paragraph 8 provide:

> Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal and answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause.

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[29] Panels have not always attached their Working Procedures to their Reports. Panels only recently began to do so systematically. Working Procedures were attached in Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, page A-2; Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, page B-2; Panel Report, *European Communities – Selected Customs Matters*, WT/DS315/R, page E-2; Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, page A-11; Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, page H-2; Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R/Add.1, page A-4; Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R/Add.1, page A-4; Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, page A-10; Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R and WT/DS386/R, page E-3; *Panel Reports, Philippines – Taxes on Distilled Spirits, WT/DS396/R / WT/DS403/R, page G-8; Panel Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/R /Add.1 and WT/DS401/R /Add.1, page A-2; Panel Report, China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States, WT/DS427/R/Add.1, page C-2; Panel Report, United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam, WT/DS429/R/Add.1, page A-3; Panel Reports, China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, WT/DS431/R/Add.1, WT/DS432/R/Add.1* and *WT/DS433/R/Add.1, page A-2; Panel Report, United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India, WT/DS436/R/Add.1, page A-2; Panel Report, United States – Countervailing Duty Measures on Certain Products from China, WT/DS437/R/Add.1, page H-2; Reports of the Panel, Argentina – Measures Affecting the Importation of Goods, WT/DS438/R/Add.1, WT/DS444/R/Add.1 and WT/DS445/R/Add.1, page A-1; Panel Report, China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States, WT/DS440/R/Add.1, page A-2; Panel Report, United States – Countervailing and Anti-Dumping Measures on Certain Products from China, WT/DS449/R/Add.1, page A-2; and Panel Report, Peru – Additional Duty on Imports of Certain Agricultural Products, WT/DS457/R/Add.1, page A-1.* (footnote original)

[30] The Working Procedures in this case were based on an Agreement on Procedures between the parties (China and the United States). These Procedures did not include a provision governing the submission of factual evidence. See Panel Report, *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China*, WT/DS422/R/Add.1, p. D-3. (footnote original)

1.12 The European Union's concern arises in respect of the limited exception provided for in paragraph 8 of the Panel's Working Procedures, because it "admit[s] factual assertions and evidence (and associated argument) filed after the first hearing". The European Union considers that all factual evidence and associated argument should be set out in the first stage of the panel process. The European Union considers that third parties are "fully implicated"[31] in this first stage.

1.13 We note that the distinction between the first and second stages of the panel process was drawn by the Appellate Body in *Argentina – Textiles*. We consider it appropriate to be guided by the findings of the Appellate Body in that case. The Appellate Body was reviewing a decision by the panel to admit certain evidence presented by the United States, the complainant, after the deadline for rebuttal submissions. The panel had granted Argentina, the respondent, two weeks to comment on that evidence. The Appellate Body upheld the panel's decision. In doing so, the Appellate Body observed that:

> Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit "rebuttals" by each party of the arguments and evidence submitted by the other parties.[32]

1.14 With respect to the admissibility of factual evidence presented by the United States, the Appellate Body observed that "[t]he Working Procedures in Appendix 3 … do not establish precise deadlines for the presentation of evidence by a party to the dispute."[33] The Appellate Body emphasised that the Working Procedures set forth in Appendix 3 "do not constrain panels with hard and fast rules on deadlines for submitting evidence."[34] We agree. Since there are no rules in the Appendix 3 Working Procedures governing the submission of evidence, there is no basis for the European Union to suggest that the third party rights provided for in that Appendix are somehow tied to, or dependent on, any requirement that factual evidence should be provided by the parties in the first stage of the panel proceeding. Accordingly, there is no basis for the European Union to allege that paragraph 8 of the Panel's Working Procedures somehow "diminishes" the rights of third parties provided for in Appendix 3 of the DSU by allowing – in exceptional circumstances only – the submission of factual evidence by the parties after the first substantive meeting.

1.15 Furthermore, with respect to the European Union's concern that paragraph 8 of the Panel's Working Procedures allows "associated argument" to be submitted in the second stage of the Panel proceeding, we note that the Appellate Body in *Argentina – Textiles* stated that the panel might have considered granting Argentina more than two weeks "to respond to the additional evidence"[35] presented by the United States. Thus, the Appellate Body accepted that the United States could provide factual evidence after the first stage of the panel proceeding, and noted that Argentina should be afforded sufficient time to prepare comments and/or arguments in respect of that evidence. This due process requirement, which dictates that one party should always be entitled to adduce arguments in respect of factual evidence presented by the other party, no matter at what stage of the panel proceeding it is presented, is established in the last sentence of paragraph 8 of the Panel's Working Procedures.

1.16 In addition, we are not persuaded by the European Union's argument that third parties have a right to be "fully implicated" in the first stage of the panel process. We agree with the Appellate Body's statement in *Argentina – Textiles* that the first stage of the panel process includes the panel's first substantive meeting with

[31] European Union's third party submission, para. 5. (footnote original)
[32] Appellate Body Report, *Argentina – Textiles*, para. 79. (footnote original)
[33] Ibid. para. 79. (footnote original)
[34] Ibid. para. 80. (footnote original)
[35] Ibid.

the parties.[36] Paragraph 6 of Appendix 3 of the DSU establishes that third parties only attend a separate third party session of the Panel's first meeting with the parties. Third parties are not present when the complainant presents its case to the Panel (pursuant to Paragraph 5 of the Appendix 3 Working Procedures). It is entirely possible that the parties may present new factual evidence to the Panel at this juncture. For example, the complainant may present new factual evidence to the Panel in response to an argument made in the respondent's first written submission. Contrary to the view expressed by the European Union, the Appendix 3 Working Procedures do not provide for third parties to be "fully implicated" in this exchange.

1.6 Conclusion

For the above reasons, we reject the European Union's allegation that the Panel's Working Procedures risk to "diminish" the rights of third parties. Accordingly, we reject the European Union's request to modify our Working Procedures to provide for fuller third party participation in these panel proceedings.

2 The Panel's BCI Procedures

2.1 Introduction

2.1 The European Union expresses a number of "reservations"[37] regarding the BCI Procedures adopted by the Panel. First, the European Union considers that a Member's right to submit BCI to the Panel should not be conditioned on the provision of an authorising letter from the entity that submitted that information to the investigating authority in the underlying investigation. Second, the European Union considers that a Member may not be required to follow the designation for confidential information used in the underlying investigation. Third, the European Union considers that the designation of information as BCI in panel proceedings is ultimately a matter for the Panel, and may not be absolutely delegated to the investigating authority or any interested party. Accordingly, the European Union considers that the BCI Procedures should contain a challenge clause by which the designation proposed by the party providing the relevant information may be challenged by the other party and third parties.

2.2 Consistent with Article 12.1 of the DSU, the Panel consulted with the parties regarding the issues raised by the European Union. The parties provided written comments regarding this matter on 30 January 2015. Neither party shared the reservations expressed by the European Union.

2.2 Absence of any third party interest, or support from the parties

2.3 The European Union has not argued that the Panel's BCI Procedures have any specific implications for the rights and interests of third parties. Nor has the European Union identified any respect in which the Panel's BCI Procedures have impacted on its participation in the present proceeding.

2.4 Furthermore, in accordance with Article 12.1 of the DSU, the Panel's BCI Procedures were adopted in consultation with the parties. Neither party expressed any concern with the proposed BCI Procedures during those consultations. In the absence

[36] Appellate Body Report, *Argentina – Textiles*, para. 79. There is uncertainty regarding the European Union's understanding of the scope of the first stage of panel proceedings. In para. 5 of its third party submission, the European Union suggests that the first stage of the panel proceeding is limited to the parties' first written submissions: "In the first stage, parties are required to set out their case in chief, including a full presentation of claims, facts, evidence and appropriate argument, in their first written submissions." At para. 7 of its written submission, though, the European Union suggests that the first stage extends to the Panel's first substantive meeting with the parties. Specifically, the European Union complains that the Panel's Working Procedures admit factual assertions, evidence and associated argument "after the first hearing", thereby "shifting … fact, evidence and associated argument from the first stage to the second stage". (footnote original)

[37] European Union's third party submission, paras. 13 and 14. (footnote original)

of any support from the parties for the reservations expressed by the European Union, we see no basis on which we should amend the BCI Procedures at this juncture.

2.3 Conclusion

2.5 For the above reasons, we do not consider that there is any need for us to modify our BCI Procedures in light of the "reservations" raised by the European Union.

2 FACTUAL ASPECTS

2.1. This dispute concerns the definitive anti-dumping and countervailing duties applied by the United States as a result of anti-dumping and countervailing duty investigations conducted by the USDOC concerning imports of LRWs from Korea.

2.2. Korea's claims under the Anti-Dumping Agreement concern certain aspects of the USDOC's approach to the comparison methodology provided for in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement (weighted average to individual export transactions – W-T comparison methodology). Korea challenges certain aspects of the methodologies used by the USDOC to determine whether the conditions for the application of the W-T comparison methodology are met. Specifically, Korea challenges (i) the methodology used to apply the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation (the *Nails II* methodology); (ii) the methodology that replaced the *Nails II* methodology (the Differential Pricing Methodology or the DPM) "as such"; (iii) the DPM "as applied" in the first administrative review of the *Washers* anti-dumping order; and (iv) the ongoing and future application of the DPM in the context of the USDOC's *Washers* anti-dumping proceeding. Korea also challenges the USDOC's use of zeroing in the context of the W-T comparison methodology. Specifically, Korea challenges (i) "as such" the rule or norm pursuant to which the USDOC engages in zeroing; and (ii) zeroing "as applied" in the *Washers* anti-dumping investigation.

2.3. Korea's claims under the SCM Agreement concern the USDOC's determinations that two tax credit subsidy programmes are specific. Korea also raises claims under the SCM Agreement and the GATT 1994 challenging the manner in which the USDOC calculated the amount of subsidy conferred on Samsung under those programmes.

2.1 The measures at issue

2.4. Korea has challenged the following alleged measures:

- Anti-Dumping Measures

  a. Final Determination of Sales at Less Than Fair Value – Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea, *United States Federal Register*, Vol. 77 (26 December 2012), p. 75988.

  b. Issues and Decision Memorandum for the Antidumping Investigation of Large Residential Washers From the Republic of Korea (18 December 2012).

  c. Anti-Dumping Duty Order – Large Residential Washers From Mexico and the Republic of Korea: Antidumping Duty Orders, *United States Federal Register*, Vol. 78 (15 February 2013), p. 11148.

  d. Any determination in the anti-dumping proceeding entitled Large Residential Washers from the Republic of Korea, including but not limited to the original investigation, preliminary and final determinations in administrative reviews, new shipper reviews, sunset reviews, changed circumstances reviews, and other segments of that proceeding.

  e. The so-called "zeroing" methodology used in anti-dumping proceedings that use the weighted average-to-transaction methodology (W-T) to calculate margins of dumping, and the *Nails II* methodology and DPM used to determine the applicability of Article 2.4.2 of the Anti-Dumping Agreement, which are used pursuant to, *inter alia*, the following United States laws, regulations, administrative procedures and measures:

i. The Tariff Act of 1930, as amended, including in particular, Sections 771(35)(A) and (B) (i.e. 19 U.S.C. Sections 1677(35)(A) and (B)), and 777A(c) and (d) (i.e. 19 U.S.C. Sections 1677f-1(c) and (d)).

ii. The Statement of Administrative Action that accompanied the Uruguay Round Agreements Act, *United States House of Representatives*, Vol. I, No. 103-316.

iii. The implementing regulations of the USDOC, *United States Code of Federal Regulations*, Vol. 19, Part 351, including in particular Sections 351.212 and 351.414.

iv. The predecessor versions of these regulations, including the version found at *United States Code of Federal Regulations*, Vol. 19 (2008), Section 351.414, that the USDOC attempted to withdraw (*United States Federal Register*, Vol. 73 (10 December 2008), p. 74930), but that the U.S. courts have found to still be in effect in US Court of International Trade, Gold East Paper (Jiangsu) Co., Ltd. v. United States, (2013), 918 F. Supp. 2d 1317.

v. The USDOC Import Administration Antidumping Manual, including any amended versions, and including the computer programme(s) to which it refers.

vi. Any other closely connected, subsequent measures that enable or permit the use of zeroing, targeted dumping or differential pricing in anti-dumping investigations, administrative reviews and other segments of anti-dumping proceedings, including the collection of cash deposits and the assessment and liquidation of anti-dumping duties.

- Countervailing Measures

f. Final Countervailing Duty Determination – Large Residential Washers From the Republic of Korea: Final Affirmative Countervailing Duty Determination, *United States Federal Register*, Vol. 77 (26 December 2012), p. 75975.

g. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers From the Republic of Korea (18 December 2012).

h. Countervailing Duty Order – Large Residential Washers From the Republic of Korea: Countervailing Duty Order, *United States Federal Register*, Vol. 78 (15 February 2013), p. 11154.

i. Any determination in the countervailing duty proceeding entitled Large Residential Washers from the Republic of Korea, including but not limited to other determinations issued in the initial investigation, preliminary and final determinations in administrative reviews, new shipper reviews, sunset reviews, changed circumstances reviews, and other segments of that proceeding.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. With respect to the anti-dumping measures, Korea requests that the Panel finds that[38]:

a. The USDOC's use of "zeroing" under the W-T comparison methodology in anti-dumping investigations, administrative reviews and other segments of anti-dumping proceedings involving the second sentence of Article 2.4.2 is inconsistent, "as such", with the Anti-Dumping Agreement and the GATT 1994 in the following respects:

i. The use of zeroing invariably results in the USDOC disregarding or artificially setting to zero the results of W-T comparisons when aggregating those results for the purposes of calculating the margin of dumping for the product as a whole and for each individual exporter or foreign producer. For this reason, it is "as such"

[38] See Korea's first written submission, paras. 346-354.

inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, and as a consequence, also "as such" inconsistent with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT;

ii. The use of the zeroing methodology invariably results in the results of intermediate W-T comparisons being disregarded or artificially set to zero, thus increasing the resulting margins of dumping and making an affirmative dumping determination more likely. For this reason, the use of zeroing is "as such" inconsistent with Article 2.4 of the Anti-Dumping Agreement; and

iii. The USDOC systematically levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement. For this reason, the use of zeroing in administrative reviews is "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

b. The USDOC's use of "zeroing" in the original *Washers* determination and in subsequent connected stages of *Washers* is inconsistent with the following provisions of the Anti-Dumping Agreement and the GATT 1994:

i. Article 2.4 and Article 2.4.2 of the Anti-Dumping Agreement, which require that investigating authorities fully take into account the results of intermediate W-T comparisons when calculating the margin of dumping for the product under consideration and for each investigated exporter or foreign producer;

ii. Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, which require that investigating authorities determine the dumping margin for the product as a whole; and

iii. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, which require that investigating authorities levy anti-dumping duties not in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement.

c. The USDOC's methodologies for invoking the second sentence of Article 2.4.2 of the Anti-Dumping Agreement are inconsistent with the obligations set forth in that provision "as applied" in the *Washers* anti-dumping investigation, as ongoing conduct in subsequent connected stages of the *Washers* proceedings, and "as such" in respect of the DPM, in the following respects:

i. Both under the methodology used in the *Washers* anti-dumping investigation and the DPM that has replaced it, the USDOC applies fixed numerical criteria to determine whether there is a "pattern of export prices which differ significantly" among customers, regions or time periods, and categorically rejects the relevance to its inquiry of the commercial context in which the alleged pattern of significant pricing differences arise;

ii. Both under the methodology used in the *Washers* anti-dumping investigation and the DPM that has replaced it, the USDOC provides no explanation as to why the price differences it found cannot be taken into account appropriately by resort to either the average-to-average or transaction-to-transaction methodology; and

iii. Both under the methodology used in the *Washers* anti-dumping investigation and the DPM that has replaced it, the USDOC applies the exception provided for in the second sentence of Article 2.4.2 to transactions that even the USDOC agrees do not meet its own criteria for determining "targeted dumping" or "differential pricing" rather than limiting the exception to those transactions that are found to be targeted or differentially priced.

d. The USDOC's DPM is also inconsistent "as such" with the obligations in Article 2.4.2, because the USDOC does not effectively identify or analyse a "pattern" of prices charged by the exporter to any purchaser, or in any region or time period, as required by both

the second sentence of Article 2.4.2 and the U.S. statute. Rather, the USDOC simply compares each individual price separately with the exporter's other U.S. prices.

e. Furthermore, the USDOC's use of "systemic disregarding" in the calculation of the dumping margin in the DPM is inconsistent with the Anti-Dumping Agreement and the GATT 1994.

f. The United States' measures discussed above are also inconsistent with Article 1 of the Anti-Dumping Agreement.

3.2. With respect to the countervailing measures, Korea requests that the Panel finds that the USDOC acted inconsistently with certain of the United States' obligations under the GATT 1994 and the SCM Agreement in the countervailing duty proceeding entitled *LRWs from the Republic of Korea*, including:

With Respect to RSTA Article 10(1)(3)

a. Article 1.2 and Article 2.1(c) of the SCM Agreement because:

   i. the USDOC erred when it determined that the respondent Samsung received a *de facto* specific subsidy under Article 10(1)(3) of Korea's RSTA, which automatically provided tax credits to all Korean corporate taxpayers that made certain specified types of investments;

   ii. the USDOC incorrectly determined that Samsung received a disproportionately large amount of the tax credits available under Article 10(1)(3) of RSTA; and

   iii. the USDOC failed to take into account the extent of diversification of economic activities within Korea, as well as the length of time during which Article 10(1)(3) of RSTA had been in effect before determining that Samsung had received a disproportionately large amount of the tax credits provided under the Article.

b. Article VI:3 of the GATT 1994 because the USDOC imposed countervailing duties on Samsung attributable to tax credits that it received for investments it made under Article 10(1)(3) of RSTA pertaining to products other than the products subject to investigation, i.e. products other than LRW.

c. Article 1.1 and Article 14 of the SCM Agreement because:

   i. the USDOC erroneously overstated the amount of the financial contribution that the Government of Korea provided and the resulting benefit that it conferred on Samsung when it failed to recognize that the tax credits provided under Article 10(1)(3) of RSTA benefitted products that Samsung manufactured in locations outside Korea; and

   ii. the USDOC did not provide a reasoned and adequate explanation of why it failed to take into account in its benefit calculation the fact that the investments that generated the tax credits provided under Article 10(1)(3) of RSTA benefitted products that Samsung manufactured in locations outside Korea.

d. Article 19.4 of the SCM Agreement because the USDOC levied countervailing duties on imported products in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

With Respect to RSTA Article 26

e. Article 1.2 and Article 2.2 of the SCM Agreement because the USDOC erroneously found that Article 26 of RSTA provided a specific subsidy because it was limited to certain enterprises located within a designated geographical region notwithstanding that the tax credits under Article 26 were generally available throughout Korea.

f. Article VI:3 of the GATT 1994 because the USDOC imposed countervailing duties on Samsung attributable to tax credits that it received for investments it made under Article 26 of RSTA pertaining to products other than the products subject to investigation, i.e. products other than LRW.

g. Article 19.4 of the SCM Agreement because, *inter alia*, the USDOC levied countervailing duties on 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.

h. The United States' measures discussed above are also inconsistent with Article 10 and Article 32.1 of the SCM Agreement.

3.3. The United States requests that the Panel reject all of Korea's claims in this dispute in their entirety.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B and C).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, Canada, China, the European Union, Japan, Norway, Thailand, Turkey, and Viet Nam are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annex D). India and Saudi Arabia did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 14 October 2015, the Panel submitted its Interim Report to the parties. On 28 October 2015, Korea and the United States each submitted written requests for the review of precise aspects of the Interim Report. On 4 November 2015, both parties submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. Due to changes as a result of our review, certain numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

6.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including those identified by the parties. The Panel is grateful for the assistance of the parties in this regard.

6.1 Anti-dumping claims

6.1.1 Korea's requests for review of precise aspects of the Interim Report

6.1.1.1 Paragraph 7.9 and Paragraph [7.188][39] (paragraphs 7.9 and 7.188 of the Final Report)

6.4. Korea requests the Panel to change the reference to "anti-dumping investigation" in these paragraphs to "anti-dumping proceeding", so as to avoid any confusion about the applicability of Article 2.4.2 to both original investigations and administrative reviews in this dispute.

[39] Korea's request for review of precise aspects of the Interim Report of the Panel referred to paragraph 7.118, which we understand to be a typo on the part of Korea.

6.5. The United States does not object to this request.

6.6. We have decided to make certain editorial changes to paragraphs 7.9 and 7.188 of the Interim Report to avoid possibly prejudging whether or not the second sentence of Article 2.4.2 would apply to administrative reviews.

6.1.1.2 Paragraph 7.11 (paragraph 7.11 of the Final Report)

6.7. Korea requests the Panel to add a footnote to identify the evidentiary basis for its factual statement that the USDOC applied the W-T comparison methodology to all export transactions.

6.8. The United States does not support this request. The United States argues that the proposed footnote does not contain any reference to the record evidence. Moreover, the United States disagrees with Korea that the United States "concedes" that the USDOC applied the W-T comparison methodology to all export transactions.

6.9. We consider it appropriate to include the evidentiary basis for this factual statement. However, we agree with the United States that the footnote proposed by Korea does not identify evidence to support the fact that the USDOC applied the W-T comparison methodology to all export transactions. Accordingly, we refer in a footnote to the Issues and Decision Memorandum in the *Washers* anti-dumping investigation (Exhibit KOR-18, pp. 33-34.) instead.

6.1.1.3 Paragraph 7.12 (paragraph 7.12 of the Final Report)

6.10. Korea requests the Panel to supplement its summary of Korea's arguments on the term "such differences".

6.11. The United States does not support this request. The United States points out that Korea has not proposed a revision to the paragraph. Moreover, according to the United States, the argument Korea seeks to add is presented in Korea's second written submission and not one of Korea's main arguments.

6.12. We have decided to accommodate Korea's request, despite Korea's failure to propose specific text. Furthermore, we do not agree with the United States that arguments presented in the second written submission may not form part of a party's main arguments.

6.1.1.4 Paragraph 7.33 (paragraph 7.33 of the Final Report)

6.13. Korea requests the Panel to clarify in this paragraph that Korea does not argue that an investigating authority must consider the intent of the exporter under the pattern clause.

6.14. The United States does not object to this request. However, to the extent that the Panel agrees to Korea's request, the United States requests the Panel to modify paragraph 7.37 to clarify that the United States' argument was not limited only to the intent of the exporter. According to the United States, it argued, more broadly, that an investigating authority need not consider the *reasons* why export prices differ significantly among different purchasers, regions, or time periods.

6.15. We have decided to accommodate Korea's request. Concerning the counter-request of the United States to modify paragraph 7.37 of the Interim Report, we note that the current text is essentially a verbatim reproduction of the United States' argument to the Panel. Accordingly, there is no reason to make the modification proposed by the United States.

6.1.1.5 Paragraph 7.71 (paragraph 7.71 of the Final Report)

6.16. Korea requests the Panel to include discussion of the context of the term "appropriately" under the explanation clause before turning to the object and purpose of the second sentence of Article 2.4.2, in order to reinforce the Panel's interpretation of the explanation clause.

6.17. The United States does not support Korea's request. The United States notes first that Korea has failed to propose a revision. In addition, the United States does not agree that Korea's proposed addition of further contextual discussion would enhance the clarity of the

paragraph or the Panel's interpretation generally. The United States argues that paragraphs 140-148 of Korea's second written submission do not explain how the terms "explanation" and "cannot" could or should inform, as context, the interpretation of the term "appropriately".

6.18. We have decided not to accommodate Korea's request. In the absence of a proposed revision from Korea, it is not clear to us how Korea's proposed additional discussion of the context of the term "appropriately" would enhance the clarity of our interpretation of that term.

6.1.1.6 Paragraph 7.76 and footnote 130 (paragraph 7.76 and footnote 134 of the Final Report)

6.19. Korea requests the Panel to modify a footnote to supplement the factual support for the fact that the USDOC did not consider the alternative explanations provided by the interested parties in the *Washers* anti-dumping investigation.

6.20. The United States does not support Korea's request, because the proposed footnote, which relates to the USDOC's application of the pattern clause, is not relevant to the discussion of the explanation clause in this paragraph and footnote.

6.21. We have decided not to accommodate Korea's request. As the United States correctly observes, the specific passage from the *Washers* I&D Memorandum which Korea refers to in its request concerns the USDOC's refusal to consider the reasons for the price differences in the context of its application of the pattern clause. It does not concern the USDOC's application of the explanation clause.

6.1.1.7 Paragraph 7.99 (paragraph 7.99 of the Final Report)

6.22. Korea requests the Panel to add a footnote to identify the USDOC documents referred to by the Panel.

6.23. The United States does not object to this request. However, the United States notes that the parenthetical descriptions proposed by Korea do not appear to be neutral.

6.24. We have decided to accommodate Korea's request, taking into account the United States' concern over the neutrality of the description used.

6.1.1.8 Paragraph 7.100 (paragraph 7.100 of the Final Report)

6.25. Korea requests the Panel to correct a factual inaccuracy with regard to the *Xanthan Gum* document discussed in this paragraph and in footnote 190.

6.26. The United States makes a similar request.

6.27. We have corrected the inaccuracy identified by the parties.

6.1.1.9 Paragraph 7.102 (paragraph 7.102 of the Final Report)

6.28. Korea requests the Panel to insert a footnote to clarify the relationship between Exhibits KOR-33 and KOR-67.

6.29. The United States makes no comment on this request.

6.30. We have inserted the footnote as requested by Korea.

6.1.1.10 Paragraph 7.106 (paragraph 7.106 of the Final Report)

6.31. Korea requests the Panel to address the distinction between changes that can be made to the DPM in theory and changes that have been made in fact.

6.32. The United States does not support Korea's request. The United States argues that the points raised by Korea have been addressed by the Panel at, *inter alia*, paragraphs 7.111-7.112 and 7.115 of the Interim Report, and that it would not improve the Report to repeat those discussions at this paragraph.

6.33. We have decided not to accommodate Korea's request. The points raised by Korea are already addressed by the Panel at, *inter alia*, paragraphs 7.111-7.112 and 7.115 of the Interim Report.

6.1.1.11 Paragraph 7.111 (paragraph 7.111 of the Final Report)

6.34. Korea requests the Panel to expand the discussion on the evidentiary issues concerning the DPM.

6.35. The United States does not support Korea's request, because Korea's proposed addition is already addressed in paragraphs 7.115 and 7.106 of the Interim Report.

6.36. We have decided not to accommodate this request. As Korea itself acknowledges in its request, the matter raised by Korea is already addressed by the Panel later on in paragraph 7.115 of the Interim Report.

6.1.1.12 Paragraph 7.112 (paragraph 7.112 of the Final Report)

6.37. Korea suggests that the Panel appears to be addressing Exhibit USA-21 in this paragraph. On this basis, Korea requests the Panel to state clearly that the Panel's discussion in this paragraph relates to the points made by the United States in Exhibit USA-21.

6.38. The United States does not support Korea's request, because the United States submitted Exhibit USA-21 to support a different proposition from the Panel's discussion at this paragraph.

6.39. We have decided not to accommodate Korea's request. In paragraph 7.112 of the Interim Report, we addressed the issue of whether the DPM is of general and prospective application. On the contrary, Exhibit USA-21 relates to the United States' argument that the DPM cannot be found to be inconsistent with Article 2.4.2 "as such" because it does not result in the application of the W-T comparison methodology in all cases. We addressed the latter argument of the United States at paragraphs 7.145 and 7.146 of the Interim Report.

6.1.1.13 Paragraph 7.113 (paragraph 7.113 of the Final Report)

6.40. Korea requests the Panel to add a cross-reference to the point made at paragraph 7.105 of the Interim Report that the actual SAS code in four proceedings over two years is identical. Korea argues that this fact also supports the general and prospective application of the DPM.

6.41. The United States does not support Korea's request. The United States argues that adding the cross-reference would not improve the clarity given that the first sentence of paragraph 7.113 of the Interim Report already refers to the Naschak affidavit and describes Korea's reliance on it.

6.42. We have decided not to accommodate Korea's request, because the first sentence of paragraph 7.113 already refers to the conclusion of the Naschak affidavit on the consistent application of the DPM as enshrined in the SAS code without any material changes.

6.1.1.14 Paragraphs 7.118 and 7.119 (paragraphs 7.118 and 7.119 of the Final Report)

6.43. Korea requests the Panel to clarify the evidentiary basis for its factual statements about the DPM.

6.44. The United States does not support Korea's request, because paragraph 7.118 of the Interim Report does not appear to contain any factual statements or factual findings made by the Panel.

6.45. We do not consider it necessary to make the changes requested by Korea. As Korea itself recognises, the evidentiary basis of our factual statements is discussed in detail in Section 7.4.1 of the Interim Report where we addressed the issue of whether the DPM can be challenged "as such".

6.1.1.15 Paragraph 7.138 and footnotes 256 and 257 (paragraph 7.138 and footnotes 268 and 269 of the Final Report)

6.46. Korea requests the Panel to include in these footnotes additional citations of various evidence supporting the factual statements of the Panel concerning the DPM.

6.47. The United States does not object to Korea's request. However, the United States notes that Korea's description of paragraphs 63-69 of the United States' second written submission is incorrect.

6.48. The evidentiary basis of our factual statements is already discussed in detail in Section 7.4.1 of the Interim Report where we addressed the issue of whether the DPM can be challenged "as such". Nevertheless, in the absence of any opposition from the United States, we have decided to accommodate Korea's request, with the exception of the reference to paragraphs 63-69 of the United States' second written submission.

6.1.1.16 Paragraph 7.149 (paragraph 7.149 of the Final Report)

6.49. Korea requests the Panel to add a citation for the factual statement that the DPM sets to zero any negative comparisons results from the W-W comparison. In addition, Korea requests the Panel to modify the fourth sentence of this paragraph to more accurately reflect Korea's arguments.

6.50. The United States does not support Korea's request, because this paragraph does not appear to set forth factual statements or factual findings made by the Panel.

6.51. This paragraph concerns the summary of Korea's arguments on "systemic disregarding"[40]. Although this paragraph does not set forth our factual finding, we have decided to accommodate Korea's request in order to complete the evidentiary record.

6.1.1.17 Paragraphs 7.171, 7.193 and 7.209 (paragraphs 7.171, 7.193 and 7.209 of the Final Report)

6.52. Concerning paragraph 7.171 of the Interim Report, Korea requests the Panel to make certain factual findings concerning the USDOC's application of the second sentence of Article 2.4.2 in the first administrative review of the *Washers* anti-dumping order. In particular, Korea requests the Panel to confirm that the DPM as applied in the first administrative review of the *Washers* anti-dumping order is the same DPM with the same features as described by the Panel.

6.53. Concerning paragraphs 7.193 and 7.209 of the Interim Report, Korea requests the Panel to make certain factual findings to confirm that the USDOC's application of zeroing in the context of the W-T comparison methodology in the first administrative review of the *Washers* anti-dumping order is the same as the Panel has found more generally.

6.54. The United States does not support Korea's requests. The United States argues that the Panel's decision not to review Korea's "as applied" claims concerning the first administrative review of the *Washers* anti-dumping order is sound. Moreover, since the Panel has determined that it is not necessary for it to address the procedural issue whether the first administrative review of the *Washers* anti-dumping order is within its term of reference, the United States argues that the Panel should not make the factual findings concerning claims or measures that have not been determined to be within its terms of reference. In addition, concerning Korea's proposed modification related to Exhibit KOR-141, the United States argues that since the Panel has determined it not necessary to make a ruling concerning the admissibility of Exhibit KOR-141, it would not be appropriate for the Panel to make factual findings on the basis of Exhibit KOR-141.

[40] We note that Korea originally used the phrase "*systemic* disregarding", rather than "*systematic* disregarding", except in its response to Panel question 4.19 vii, paragraph 132.

6.55. We have decided not to accommodate Korea's requests. There is no basis for us to make factual findings in respect of claims for which we have exercised judicial economy.

6.1.2 United States' requests for review of precise aspects of the Interim Report

6.1.2.1 Paragraphs 1.11 and 1.14 (paragraphs 1.11 and 1.14 of the Final Report)

6.56. The United States requests the Panel to modify these paragraphs in order to place greater weight on (i) the importance of the views of the parties to the dispute; (ii) the greater obligations that would be imposed on the parties than those set out in the DSU; and (iii) derogation from certain rights of the parties under the DSU, when considering third parties' requests for additional procedural rights. The United States argues that the fact that both Korea and the United States agreed that additional third party rights should not be granted provides sufficient basis to decline the request.

6.57. Korea makes no comment on this request.

6.58. We have decided not to accommodate the United States' request. We do not agree with the United States that the parties' objections necessarily provide sufficient basis for the Panel to reject requests for additional third party rights.

6.1.2.2 Paragraph 2.2 (paragraph 2.2 of the Final Report)

6.59. The United States requests the Panel to specify each proceeding by indicating its type, e.g. anti-dumping investigation or countervailing investigation.

6.60. Korea makes no comment on this request.

6.61. We have decided to accommodate this request of the United States by making the necessary changes to this paragraph and paragraphs 7.29, 7.30, 7.44, 7.65, 7.70, 7.74 and 7.173 of the Interim Report.

6.1.2.3 Paragraph 2.4 (paragraph 2.4 of the Final Report)

6.62. The United States requests the Panel to qualify the measures that Korea has challenged in this paragraph with the wording "alleged measures", because the United States disputed that the DPM is a measure challengeable "as such".

6.63. Korea makes no comment on this request.

6.64. We have decided to accommodate the United States' request.

6.1.2.4 Paragraph 7.10, footnote 48 (paragraph 7.10, footnote 54 of the Final Report)

6.65. The United States requests the Panel to make certain changes to the Panel's description of the operation of the *Nails II* methodology in footnote 48 to ensure the accuracy of the Report. In particular, the United States requests the Panel to use the term "standard deviation test" instead of "pattern test" to describe the first step of the *Nails II* methodology. Moreover, the United States requests the Panel to also clarify that the *Nails II* methodology only looks at export sales for which there is an allegation of targeted dumping and that the "gap test" only looks at export prices that pass the "standard deviation test".

6.66. Korea makes no comment on this request.

6.67. We note that in describing the first stage of the *Nails II* methodology, Korea has used the term "pattern test" in its written submissions.[41] On the contrary, the United States has referred the first stage of the *Nails II* methodology as the "standard deviation test" in its written submissions, its responses to the Panel's questions and the *Washers* Final AD I&D Memo (Exhibit KOR-18). In the absence of any comments from Korea, we have decided to accommodate

[41] See, for example, Korea's first written submission, para. 149.

the request of the United States in this respect. For the same reason, we have also changed the reference to "pattern test" under paragraph 7.18 of the Interim Report to "standard deviation test". We have also accommodated the United States' request to clarify other aspects of the description of the *Nails II* methodology.

6.1.2.5 Paragraph 7.14 (paragraph 7.14 of the Final Report)

6.68. The United States requests the Panel to modify the first sentence of this paragraph to accurately reflect the United States' arguments as set out in paragraphs 149 and 150 of its first written submission. The United States contends that it does not argue that the term "pattern of export prices" would necessarily include all export prices in all situations. The United States points out that in the context of the application of the *Nails II* methodology in the *Washers* anti-dumping investigation, all of the export prices examined constituted the "pattern". In certain situations where the DPM is applied, the pattern identified by the USDOC did not include all export prices.

6.69. Korea makes no comment on this request.

6.70. We have decided to partially accommodate the United States' request. As the heading of this section of the Interim Report indicates (i.e. "Claims concerning the USDOC's application of the W-T comparison methodology in the *Washers* investigation"), the Panel's summary of the United States' arguments and its analysis in this paragraph are precisely made in the context of the USDOC's application of the *Nails II* methodology in the *Washers* anti-dumping investigation, and do not concern the DPM. Therefore, it would be inaccurate to delete the reference to "all of the export prices examined" completely, as the United States requested. We have modified the first sentence of this paragraph in the following manner:

> The United States asserts that even if the W-T comparison methodology were only allowed to be applied to pattern transactions, the relevant "pattern of export prices" necessarily includes ~~all export prices, including~~ both lower and higher export prices that "differ significantly" *from each other*. The United States contends that an export price cannot "differ significantly" on its own. The United States asserts that because "difference" is a comparative or relative concept, for something to be different, it must differ from something else. The United States therefore contends that lower export prices, which likely do not differ significantly from one another, cannot form a "pattern of export prices which differ significantly" without reference within that pattern to the higher export prices from which they differ significantly. The United States argues that, in the *Washers* anti-dumping investigation, because the pattern identified by the USDOC comprised of all of the exporter's US sales, the USDOC's application of the W-T comparison methodology to all export sales is not at odds with the Appellate Body's statement in *US – Zeroing (Japan)* that an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.

6.1.2.6 Paragraph 7.28 (paragraph 7.28 of the Final Report)

6.71. For the same reasons given with respect to paragraph 7.14 above, the United States requests the Panel to modify its summary of the United States arguments in this paragraph.

6.72. Korea makes no comment on this request.

6.73. We have decided to accommodate this request of the United States.

6.1.2.7 Paragraph 7.32 (paragraph 7.32 of the Final Report)

6.74. The United States requests the Panel to change the word "exception" to "exceptional comparison methodology" in this paragraph to enhance clarity.

6.75. Korea makes no comment on this request.

6.76. We have decided to accommodate this request of the United States.

6.1.2.8 Paragraph 7.70 (paragraph 7.70 of the Final Report)

6.77. The United States requests the Panel to add the word "meaningfully" before the word "lower" in its summary of the USDOC's application of the explanation clause in the *Washers* anti-dumping investigation. The United States argues that the absence of the word "meaningfully" could be construed as suggesting that the USDOC was looking for *any* difference whereas the USDOC looked for a "meaningful" difference in the margins of dumping in the *Washers* anti-dumping investigation.

6.78. Korea disagrees with the request of the United States. Korea's first concern is that the USDOC used inconsistent terminology in the *Washers* anti-dumping investigation: "material difference" in the preliminary determination and "meaningful difference" in the final determination. Korea's second concern is that the USDOC does not explain what "meaningful" difference means. For this reason, Korea considers it more appropriate not to add the word "meaningful".

6.79. We have decided to accommodate the request of the United States, by adding the wording "'materially' or 'meaningfully'" before the word "lower" in this paragraph. We have also addressed Korea's concerns above by adding a footnote to the effect that in its preliminary and final determinations of the *Washers* anti-dumping investigation, the USDOC did not define or explain the meaning of the terms "material" or "meaningful".

6.1.2.9 Paragraph 7.76 (paragraph 7.76 of the Final Report)

6.80. The United States requests the Panel to insert a footnote to indicate the quoted statement from the United States' response to the Panel's question. The United States also requests the Panel to modify the quoted statement and the third sentence of this paragraph to more accurately reflect its arguments.

6.81. Korea makes no comment on these requests.

6.82. We have decided to accommodate the request of the United States concerning the quoted statement. Concerning the third sentence of this paragraph, we have decided to accommodate the United States' request, albeit not in the exact manner as suggested by the United States.

6.1.2.10 Paragraph 7.100 and footnote 190 (paragraph 7.100, footnote 195 of the Final Report)

6.83. Similar to Korea's request concerning this paragraph, the United States requests the Panel to make certain modification to enhance accuracy.

6.84. Korea makes no comment on this request.

6.85. We have decided to accommodate the United States' request.

6.1.2.11 Paragraph 7.101 (paragraph 7.101 of the Final Report)

6.86. The United States requests the Panel to modify this paragraph to accurately describe the DPM.

6.87. Korea makes no comment on this request.

6.88. We have decided not to accommodate the United States' request. This paragraph accurately reflects the USDOC's description of the DPM in the Post-Preliminary Analysis Memorandum in *Xanthan Gum*. The elements which the United States requests to add to this paragraph are not present in the USDOC's description of the DPM in the text quoted in paragraph 7.100 of the Interim Report.

6.1.2.12 Paragraph 7.130 (paragraph 7.130 of the Final Report)

6.89. The United States requests the Panel to modify the last sentence of this paragraph to enhance clarity.

6.90. Korea makes no comment on this request.

6.91. We have decided to accommodate the United States' request.

6.1.2.13 Paragraph 7.148 *et seq.* (paragraph 7.148 *et seq.* of the Final Report)

6.92. The United States notes that Korea used the term "systemic disregarding" rather than "systematic disregarding" in its submissions. Moreover, the United States requests the Panel to replace the term "systematic disregarding" used by the Panel in this paragraph and elsewhere in the Interim Report (except where reference is made to specific arguments made by Korea or third parties) with a more neutral term for describing the USDOC's approach of not providing any offsets when combining the results of mixed W-W and W-T comparison methodologies. The United States also disagrees that the USDOC's approach when combining the comparison results from mixed comparison methodologies can fairly be characterised as "disregarding".

6.93. Korea disagrees with the suggested change by the United States. Korea contends that the Panel has consistently referred to "systematic disregarding" with quotation marks to indicate that this term is a shorthand reference adopted by Korea. Moreover, Korea argues that this phrase is not unbalanced. Rather, the phrase is descriptive in that the negative results of certain comparisons are in fact being "disregarded" and replaced with something else. Korea further argues that the term "disregarding" and the phrase "systematically disregarding" have been used repeatedly by the Appellate Body in describing the USDOC refusal to consider negative comparison results in determining dumping margins.[42]

6.94. We have decided not to accommodate the United States' request to replace "systemic disregarding" with a more neutral term. First, it would not be unbalanced for us to use this term. We note that in addition to referring to this term with 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. Moreover, in the absence of a proposed more neutral term from the United States, it is not inappropriate for us to use the term "systemic disregarding" as a shorthand reference. However, we have decided to accommodate the United States request to use the term "systemic disregarding" rather than "systematic disregarding".

6.1.2.14 Paragraph 7.150 (paragraph 7.150 of the Final Report)

6.95. The United States requests the Panel to modify the wording of the first sentence of this paragraph to enhance clarity.

6.96. Korea makes no comment on this request.

6.97. We have decided to accommodate the United States' request.

6.1.2.15 Paragraph 7.178 and footnote 311 (paragraph 7.178 and footnote 319 of the Final Report)

6.98. The United States requests the Panel to modify the second sentence of this paragraph to accurately reflect its argument, and to supplement the summary of the United States' arguments related to Korea's zeroing claims.

6.99. Korea makes no comment on these requests.

6.100. We have decided to accommodate the United States' requests.

[42] See, for example, Appellate Body's reports, *US – Zeroing (Japan)*, para. 125; *US – Continued Zeroing*, paras. 286, 314; *US – Zeroing (EC)*, paras. 127, 158.

6.1.2.16 Paragraph 7.196 (paragraph 7.196 of the Final Report)

6.101. The United States requests the Panel to modify the wording in the first sentence of this paragraph to enhance accuracy. According to the United States, the use of zeroing does not artificially *reduce* intermediate W-T comparison results to zero, but in fact *raises* or changes negative margins to zero. The United States therefore requests the Panel to replace the word "reduced" with "raised" or "changed".

6.102. Korea makes no comment on this request.

6.103. While this paragraph reflects accurately Korea's arguments regarding zeroing in the context of the W-T comparison methodology[43], the United States is correct to state that the use of zeroing does not *reduce* to zero any negative results. We have therefore decided to accommodate the United States' request by replacing the phrase "reduced to zero" to "set to zero" in this paragraph and paragraph 3.1 of the Interim Report.

6.2 Subsidies claims

6.2.1 Korea's requests for review of precise aspects of the Interim Report

6.2.1.1 General comment

6.104. Korea asks the Panel to replace the phrase "disproportionate amounts" with the phrase "disproportionately large amounts", to accurately reflect the text of Article 2.1(c).

6.105. The United States does not object to Korea's request.

6.106. We have decided to accommodate the change requested by Korea.

6.2.1.2 Paragraph 7.213 (paragraph 7.213 of the Final Report)

6.107. Korea asks the Panel to replace the phrase "without reference to" in the last sentence with the phrase "without including".

6.108. The United States does not object to Korea's request.

6.109. We have decided to accommodate the change requested by Korea.

6.2.1.3 Paragraphs 7.217, 7.244 (footnote 401), and 7.249 (footnote 410) (paragraphs 7.217, 7.245 (footnote 415), 7.250 (footnote 424) of the Final Report)

6.110. Korea asks the Panel to amend, clarify or expand its description of Korea's arguments.

6.111. The United States does not object to Korea's request in respect of para. 7.217 of the interim Report. Regarding footnote 401, the United States asserts that the material referred to by Korea is irrelevant to the specific point made by the Panel in that footnote. The United States contends that if the Panel nonetheless wishes to include this material at the end of footnote 401, then the Panel should also include a summary of the U.S. position on the relevant issues.

6.112. Regarding footnote 410, the United States suggests that, if the Panel decides to include the material requested by Korea, the insertion should occur after the first sentence of this footnote, as a summary of Korea's position. The United States believes that placing this material after the final sentence, which contains the Panel's evaluation, could give rise to confusion.

6.113. We agree in principle to the changes requested by Korea. With respect to footnote 401, though, we have decided that the additional arguments cited by Korea should be included at the end of paragraph 7.219 of the Interim Report, which describes Korea's main argument against the remand determination. As noted above, the additional arguments alluded to by Korea do not

[43] See Korea's first written submission, paras. 96, 97 and 347.

pertain to the matter addressed in footnote 401. We have also decided to include the U.S. arguments concerning this matter, as requested by the United States.

6.114. Regarding footnote 410, we have decided to accommodate the United States' suggestion to include Korea's text after the first sentence of the footnote.

6.2.1.4 Paragraph 7.[254], footnote 420[44] (paragraph 7.255 of the Final Report)

6.115. Korea asks the Panel to clarify that the United States merely alleged that the USDOC took the two mandatory factors into account.

6.116. The United States denies that the mandatory factors were only allegedly taken into account. The United States contends that it has identified language in the USDOC redetermination confirming that they were taken into account.

6.117. In order to avoid any confusion, we have decided to delete footnote 420 of the Interim Report.

6.2.1.5 Paragraph 7.256 (paragraph 7.257 of the Final Report)

6.118. Korea asks the Panel to include specific arguments made by Korea in this paragraph.

6.119. The United States asserts that paragraph 7.256 does not purport to summarize *in total* Korea's arguments concerning the USDOC's regional specificity findings, but rather provides a road map to the Panel's subsequent analysis, with each sentence ("first," "second", "third," and "fourth") relating to the corresponding section of analysis that follows. The United States asserts that the Panel already provides a summary of Korea's various arguments within each of the relevant sections. The United States also contends that Korea's request for the inclusion of two additional paragraphs immediately after paragraph 7.256 is similarly unwarranted. The United States suggests that the arguments identified by Korea are in any event sufficiently summarized and addressed at section 7.6.3.2 of the interim report.

6.120. Paragraph 7.256 of the Interim Report merely introduces the claims brought by Korea. It is not intended to describe arguments made by Korea in support of those claims. Korea's main arguments are described in subsequent paragraphs of the Report. For this reason, we have decided not to include any additional arguments in this paragraph.

6.2.1.6 Paragraph 7.260 (paragraph 7.261 of the Final Report)

6.121. Korea asks the Panel to delete the second sentence of paragraph 7.260, on the ground that it "may not take into account the full breadth of Korea's arguments regarding Article 2.1(b)".

6.122. The United States asserts that Korea has failed to provide a basis for deleting the second sentence of this paragraph. The United States contends that Korea fails to explain how the second sentence is inaccurate. According to the United States, Korea does not – and cannot – point to any submission in which it provides the discussion or support that the Panel found to be lacking.

6.123. The second sentence of this paragraph states that "Korea does not discuss the relationship between Articles 2.1(b) and 2.2, [or] support its assertion with any analysis of the text of these provisions". At interim review, Korea has not identified any specific arguments pertaining to the relationship between Articles 2.1(b) and 2.2, nor identified any analysis of the text of those provisions. In these circumstances, we have decided not to delete the second sentence of this paragraph.

6.2.1.7 Paragraph 7.261 (paragraph 7.262 of the Final Report)

6.124. Korea suggests that the third sentence of this paragraph does not accurately reflect its arguments, and therefore requests the deletion thereof.

[44] Korea's request for review of precise aspects of the Interim Report of the Panel referred to paragraph 7.253, footnote 420, which we understand to be a typo on the part of Korea.

6.125. The United States does not object to Korea's request.

6.126. Since the precise textual formulation of the third sentence does not feature in any of Korea's submissions to the Panel, we have decided to accommodate Korea's request.

6.2.1.8 Paragraph 7.262 (paragraph 7.263 of the Final Report)

6.127. Korea proposes a number of changes to the Panel's description of its arguments in paragraph 7.262.

6.128. The United States does not support Korea's request to delete and reformulate the third, fourth, and fifth sentences of this paragraph. The United States asserts that Korea fails to explain how these sentences are deficient. According to the United States, the sentences accurately reflect Korea's position at paragraphs 346-356 of its second written submission. The United States does not object to other changes proposed by Korea.

6.129. We have decided to accommodate the request by Korea. The amendments proposed by Korea all reflect arguments made in Korea's submissions to the Panel. Although the current summary of those arguments is not inaccurate, we see no reason not to use a formulation that more closely mirrors the actual arguments made by Korea in its submissions.

6.2.1.9 Paragraph 7.265 (paragraph 7.266 of the Final Report)

6.130. Korea proposes a number of changes to the manner in which the Panel presents Korea's claim in this paragraph. Korea proposes to amend the second sentence, and replace the penultimate and final sentences with a new sentence. Korea also proposes to change the text of footnote 431, by replacing the second sentence with a statement that the United States' interpretation of "enterprise" in this case is not consistent with its practice in free trade agreements.

6.131. The United States contends that Korea fails to explain why the second sentence of this paragraph – which Korea seeks to delete and replace – is inaccurate. In that sentence, the Panel observes that "Korea interprets 'enterprises' as companies or businesses having legal personality." According to the United States, this accurately reflects Korea's statement at paragraph 356 of its second written submission. The United States also opposes the replacement of the penultimate and final sentences of paragraph 7.265. According to the United States, these sentences accurately reflect statements in Korea's submissions. The United States also denies that Korea's requested change would provide a more comprehensive summary of its arguments, as it seeks to replace two sentences with one.

6.132. The United States does not support Korea's request to delete and replace the second sentence of this footnote. According to the United States, the second sentence accurately reflects Korea's argument at paragraph 34 of its response to Panel question No. 5.10. The United States suggests that the language that Korea now seeks to introduce would obscure the meaning of the first sentence, as it would leave unexplained the alleged significance that Korea seeks to draw from definitions contained in U.S. free trade agreements (i.e., that they allegedly do not expressly refer to an entity's facilities).

6.133. We have decided not to make the change proposed by Korea in respect of the second sentence. This sentence reflects the arguments made by Korea at paragraph 356 of its second written submission: "The term 'enterprises' within the meaning of Article 2.2 should be interpreted to mean that the recipient of the subsidy must be a company with legal personality." We have the same view in respect of the penultimate sentence, which reflects an argument made by Korea at paragraph 329 of its first written submission: "RSTA Article 26 tax credits are limited, not to 'certain enterprises located within a designated geographical region', but rather, are limited to certain uses – namely, to investments made outside the overcrowding control region of the Seoul Metropolitan Area."

6.134. Regarding the final sentence, the text simply reflects the Panel's understanding of Korea's position. RSTA Article 26 is entitled Tax Deduction for Facilities Investment. Since the heading of

that provision refers to "Facilities", it is reasonable to understand Korea to argue that RSTA Article 26 concerns the location of facilities, rather than the location of enterprises.

6.135. Regarding footnote 431, we do not consider it appropriate to include the qualification of the United States' argument proposed by Korea. Since we have decided not to evaluate Korea's claim by reference to the practice of the United States in respect of its free trade agreements, there is no basis for us to state whether the interpretation proposed by the United States is or is not consistent with that practice. Nor is there any basis to delete the second sentence, which is based on Korea's assertion at paragraph 34 of its response to Panel question No. 5.10 that "interpreting the term 'enterprise' to refer to facilities is not even consistent with the consistent practice of the United States".

6.2.1.10 Paragraph 7.269, footnote 435 (paragraph 7.270, footnote 453 of the Final Report)

6.136. Korea asks the Panel to amend its description of Korea's handling of a question from the Panel, by replacing the second sentence of footnote 435 with two additional sentences, and deleting the last sentence.

6.137. The United States contends that the second sentence of footnote 435 accurately reflects the fact that Korea's responses did not address the temporal issue that the Panel raised in question No. 5.10 – i.e., whether the Article 2.2 specificity analysis hinges on whether an enterprise receives the subsidy *before* or *after* acquiring new facilities. The United States asserts that likewise, in its comments on the U.S. response to Panel question 5.10, Korea reiterated its assertion that the term "enterprise" does not encompass "facilities," but failed to address the various arguments outlined by the United States with respect to this temporal issue. The United States proposes alternative text to be used in the event that the Panel chooses to amend footnote 435.

6.138. We consider that the second sentence of footnote 435 is an accurate reflection of Korea's reply to Panel question No. 5.10. In its reply, Korea did not address the temporal issue raised by the Panel. Korea instead repeated its view that "facilities" should be distinguished from "enterprises". We have clarified the second sentence by replacing the word "matter" with the phrase "temporal issue". Regarding the last sentence of footnote 435, we have decided to replace it with two sentences that more clearly explain Korea's reaction to Panel question No. 5.10, and its comments on the United States' reply to that question.

6.2.1.11 Paragraphs 7.274 and 7.283 (paragraphs 7.275 and 7.284 of the Final Report)

6.139. Korea asks the Panel to include additional elements in its description of Korea's arguments.

6.140. The United States does not object to Korea's request.

6.141. We have decided to accommodate Korea's request.

6.2.1.12 Paragraph 7.291 (paragraph 7.292 of the Final Report)

6.142. Korea asks the Panel to amend its description of Korea's arguments by deleting the first and third sentences.

6.143. The United States does not support Korea's request to delete the first and third sentences of this paragraph. The United States contends that, when read in context with the surrounding sentences in that paragraph, the first and third sentences accurately reflect Korea's arguments. Nonetheless, if the Panel wishes to amend this paragraph in response to Korea's request, the United States proposes alternative language.

6.144. We agree with Korea that the original formulation of this paragraph may risk misrepresenting Korea's arguments. Rather than deleting entire sentences, though, we consider it more appropriate to amend the text in the manner proposed by the United States. This approach preserves the description of the main elements of Korea's position.

6.2.1.13 Paragraphs 7.301 and 7.302 (paragraphs 7.302 and 7.303 of the Final Report)

6.145. Korea asks the Panel to amend its description of Korea's arguments, and include the argument that the R&D tax credits were enacted to provide an incentive to undertake R&D activities.

6.146. The United States does not support Korea's request to modify these paragraphs. As an initial matter, the United States contends that it is inadequate, in light of Article 15.2 of the DSU, for Korea to simply propose that the Panel make an unspecified "addition" to "reflect" Korea's arguments. The United States also disagrees that these paragraphs warrant revision. The United States observes that Korea does not dispute that the existing text is an accurate rendering of its position. Regarding the additional "incentive" argument referred to by Korea, the United States contends that this argument appears to relate to an issue that is already addressed at paragraph 7.303 of the Interim Report.

6.147. Korea does not specify which additional "incentive" argument it would have the Panel include in these paragraphs. To the extent Korea is referring to the argument made in its reply to Panel question No. 5.2, this argument is already reflected at paragraph 7.303 of the Interim Report. There is therefore no need to include that argument in paragraphs 7.301 and 7.302. If Korea is referring to some other argument, its failure to specify that argument precludes any meaningful intervention by the Panel at this stage.

6.2.2 United States' requests for review of precise aspects of the Interim Report

6.2.2.1 Paragraphs 7.224, 7.277, 7.293, 7.296, 7.311, 7.312, and 7.313 (paragraphs 7.224, 7.278, 7.294, 7.297, 7.312, 7.313, and 7.314 of the Final Report)

6.148. The United States asks the Panel to supplement its description of the United States' arguments.

6.149. Korea does not object to the United States' request.

6.150. We have decided to accommodate the United States' request.

6.2.2.2 Paragraph 7.269 (paragraph 7.270 of the Final Report)

6.151. The United States asks the Panel to include a reference for the definitions of the verb "locate".

6.152. Korea does not object to the United States' request.

6.153. We have decided to accommodate the United States' request.

7 FINDINGS

7.1 Introduction

7.1. Korea has advanced three sets of claims concerning the anti-dumping measures at issue in this case. First, Korea challenges the use of zeroing (i) when applying the W-T comparison methodology "as such", (ii) in the *Washers* anti-dumping investigation, and (iii) in "subsequent connected stages" of the *Washers* proceeding. Second, Korea challenges certain aspects of the methodology used by USDOC in the *Washers* anti-dumping investigation (i.e. the *Nails II* methodology) to determine whether the W-T comparison methodology under the second sentence of Article 2.4.2 should be applied. Third, Korea pursues claims concerning certain aspects of the Differential Pricing Methodology, which replaced *Nails II* methodology as the USDOC's methodology for determining application of the W-T comparison methodology under the second sentence of Article 2.4.2. Some of the factual and legal arguments of the parties regarding these various claims are interlinked or overlapped. To ensure that all of Korea's claims are addressed in respect of the relevant measures, we proceed as follows. In Section 7.2, we review the general principles governing treaty interpretation, the standard of review and the burden of proof. In Section 7.3, we address Korea's claims concerning the application of the W-T comparison methodology in the *Washers* anti-dumping investigation, excluding Korea's claims regarding the use of zeroing. In Section 7.4, we turn to Korea's claims concerning the DPM. In Section 7.5, we

address Korea's "as such" and "as applied" claims concerning the use of zeroing in the context of the W-T comparison methodology. These claims have been brought under a number of provisions of the Anti-Dumping Agreement and GATT 1994. Once we have resolved all issues concerning the relevant anti-dumping measures, we address Korea's claims concerning the countervailing measures in Section 7.6.

7.2 General principles regarding treaty interpretation, the standard of review, and burden of proof

7.2.1 Treaty interpretation

7.2. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[45] It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

7.2.2 Standard of review

7.3. Article 11 of the DSU provides, in relevant part, that:

> [a] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.4. In addition, Article 17.6 of the Anti-Dumping Agreement sets forth the special standard of review applicable to disputes under the Anti-Dumping Agreement:

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

Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review we will apply with respect to both the factual and the legal aspects of the present dispute.

7.5. The Appellate Body has explained that where a panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.[46] In the context of Article 17.6(i) of the Anti-Dumping Agreement, the Appellate Body has clarified that a panel should not conduct a *de novo* review of the evidence, nor substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[47] At the same time, a panel must not simply defer to the conclusions of the investigating

[45] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.

[46] Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; and *US – Lamb*, para. 103.

[47] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".[48]

7.6. The Appellate Body has clarified a panel's standard of review of the facts pursuant to the above provisions in the following terms:

> It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities.'[49] (footnote omitted)

7.2.3 Burden of proof

7.7. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[50] Therefore, as the complaining party in this proceeding, Korea bears the burden of demonstrating that certain aspects of the measures at issue are inconsistent with the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[51] Finally, it is generally for each party asserting a fact to provide proof thereof.[52]

7.3 Claims concerning the USDOC's application of the W-T comparison methodology in the *Washers* anti-dumping investigation

7.3.1 Introduction

7.8. Article 2.4.2 of the Anti-Dumping Agreement provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account

[48] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[49] Ibid.
[50] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.
[51] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[52] Appellate Body Report, *US – Wool Shirts and Blouses*, para. 337.

appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

7.9. Article 2.4.2 comprises the comparison methodologies applicable to establish margins of dumping in the investigation phase. The first sentence provides for two comparison methodologies that should "normally" be used to establish margins of dumping. The second sentence provides for a third comparison methodology for establishing the margins of dumping, to be used in exceptional cases only.[53] The second sentence of Article 2.4.2 is divided into three parts. The first part, which we refer to as the "methodology clause", explains that an investigating authority is allowed to use an asymmetrical comparison methodology involving the comparison of a weighted average normal value with "prices of individual export transactions". The second and third parts provide that certain conditions must be met before such asymmetrical comparison may be undertaken. The second part, which we refer to as the "pattern clause", requires the existence of a "pattern of export prices which differ significantly among different purchasers, regions or time periods". The third part, which we refer to as the "explanation clause", requires the investigating authority to explain why "such differences" cannot be taken into account appropriately by the use of a weighted average-to-weighted average (W-W) or transaction-to-transaction (T-T) comparison methodology.

7.10. Korea has advanced claims under each of the three parts of the second sentence concerning the USDOC's application of the *Nails II* methodology[54] in the *Washers* anti-dumping investigation. We begin with Korea's claims concerning the methodology clause. Thereafter, we address Korea's claims concerning the pattern and explanation clauses.

7.3.2 Claim regarding the methodology clause

7.11. This claim concerns the scope of application of the W-T comparison methodology. In the *Washers* anti-dumping investigation, the USDOC applied the W-T comparison methodology to all export transactions, including export transactions falling outside of the relevant patterns.[55] Korea claims that the USDOC acted inconsistently with the second sentence of Article 2.4.2 because, according to Korea, the W-T comparison methodology may only be applied to transactions falling within the relevant patterns.

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[53] See Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97; and *US – Zeroing (Japan)*, para. 131.

[54] The *Nails II* methodology is described by Korea at paras. 104-108 of its first written submission and by the United States at paras. 92-95 of its first written submission and paras. 8-31 of its response to the Panel question No. 2.2. The *Nails II* methodology applies a two-stage test for determining the existence of "targeted dumping". Following an allegation of "targeted dumping" by a member of the domestic industry, the "standard deviation test" aims to find whether there are export prices that differ among different purchasers, regions or time periods. The "gap test" aims to address the issue whether observed price differences are significant. Both tests are run on a CONNUM (i.e. model) basis. If a sufficient volume of a respondent's export sales pass both stages of the *Nails II* methodology, then the USDOC considers that there is a "pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

Under the "standard deviation test", the USDOC determines whether the weighted average price to an alleged targeted group in a particular CONNUM is below a benchmark price that equals to one standard deviation below the weighted average mean price in that CONNUM. If the volume of sales below the benchmark price exceeds 33% of volume across all CONNUMs (for the basis being tested, i.e. purchaser, regions or time periods), the USDOC moves on to the second stage of the *Nails II* methodology.

Under the "gap test", where the gap (or difference) between the weighted-average prices of the identified sales to the allegedly targeted group and the next highest weighted-average prices to a non-targeted group exceeded the average gap among the weighted-average prices between the non-targeted groups, these identified sales are considered to have passed the "gap test". The "gap test" is only performed for export sales that passed the "standard deviation test". If the sales passing the "gap test" accounts for more than 5% of the exporting producer's total sales by volume (for the basis being tested, i.e. purchaser, regions or time periods), the USDOC considers that the price differences "significant".

If the "standard deviation test" and the "gap test" are both met, the USDOC evaluates the difference between the weighted-average dumping margin calculated with the W-W comparison methodology (without zeroing) and the weighted-average dumping margin calculated using the W-T comparison methodology (with zeroing) for purposes of the explanation clause of the second sentence of Article 2.4.2. Where there was a meaningful difference between the results of the W-W and the W-T comparison methodologies, the W-T comparison methodology will be applied to all export sales.

[55] See *Washers* Anti-Dumping I&D Memo, (Exhibit KOR-18), pp. 33-34.

7.3.2.1 Main arguments of the parties

7.12. Korea submits[56] that the structure and text of Article 2.4.2 confirm that the W-T comparison methodology may only be applied to those transactions determined to have met the criteria for invocation of that methodology ("pattern transactions"), and not to export transactions falling outside of the relevant pattern ("non-pattern transactions"). In terms of structure, Korea observes that the exceptional W-T comparison methodology "may" be used in certain limited circumstances, whereas a strong preference is expressed for the mandatory application of the W-W or T-T comparison methodologies outside of those circumstances. Korea concludes from this that the W-T comparison methodology should only be applied to those transactions that have justified its use. Regarding text, Korea observes that the Appellate Body in *US – Zeroing (Japan)* understood the phrase "individual export transactions" to refer to the transactions that "fall within the relevant pricing pattern". Korea notes that the Appellate Body also stated that "this universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply." Korea suggests that this interpretation is reinforced by the requirement in the second sentence of Article 2.4.2 to explain why the relevant price differences, pertaining only to the narrower universe of targeted dumping transactions, cannot be taken into account appropriately by using either the W-W or T-T comparison methodology. Korea notes that in the *Washers* anti-dumping investigation the USDOC indicated that the identified pattern "is defined by all of the respondent's U.S. sales". Korea understands the USDOC to suggest that the broad application of the W-T comparison methodology is predicated on its view that the term "pattern" refers to all export sales. Korea contends that this is not a plausible interpretation, since the relevant "pattern" refers only to those export transactions whose prices differ significantly among different purchasers, regions or time periods.

7.13. The United States disagrees[57] with Korea's argument that it follows from the structure of the second sentence of Article 2.4.2 that the scope of application of the W-T comparison methodology should be limited to those transactions that have justified its use. The United States contends that, when the conditions for the use of the exceptional comparison methodology are met, nothing in the second sentence of Article 2.4.2 suggests that the use of the alternative methodology is further constrained. The United States acknowledges that in *US – Zeroing (Japan)* the Appellate Body read the phrase "individual export transactions" as referring to the transactions that fall within the relevant pricing pattern.[58] The United States notes, though, that the Appellate Body went on to suggest that "in order to unmask targeted dumping, an investigating authority *may* limit the application of the [average-to-transaction] comparison methodology to the prices of export transactions falling within the relevant pattern."[59] Noting the Appellate Body's use of the word "may", the United States asserts that the Appellate Body did not definitively declare in *US – Zeroing (Japan)* that the W-T comparison methodology must only be applied to pattern transactions.

7.14. The United States asserts that even if the W-T comparison methodology were only allowed to be applied to pattern transactions, the relevant "pattern of export prices" necessarily includes both lower and higher export prices that "differ significantly" *from each other*. The United States contends that an export price cannot "differ significantly" on its own. The United States asserts that because "difference" is a comparative or relative concept, for something to be different, it must differ from something else. The United States therefore contends that lower export prices, which likely do not differ significantly from one another, cannot form a "pattern of export prices which differ significantly" without reference within that pattern to the higher export prices from which they differ significantly. The United States argues that, in the *Washers* anti-dumping investigation, because the pattern identified by the USDOC comprised of all of the exporter's US sales, the USDOC's application of the W-T comparison methodology to all export sales is not at odds with the Appellate Body's statement in *US – Zeroing (Japan)* that an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.

[56] Korea's main arguments are set forth at paras. 168-179 of its first written submission.
[57] The United States' main arguments are set forth at paras. 145-153 of its first written submission.
[58] See Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[59] Ibid. (emphasis added)

7.15. The United States submits that Korea's proposed interpretation of Article 2.4.2 is at odds with the Appellate Body's recognition that the alternative methodology provides Members a means to "unmask targeted dumping".[60] The United States asserts that "targeted dumping" – which is evidenced by lower-priced sales that "differ significantly" from higher-priced sales – is "unmasked" by also applying the W-T comparison methodology to the higher-priced sales.

7.3.2.2 Main arguments of third parties[61]

7.16. Brazil contends[62] that there seems to be considerable uncertainties as to how the W-T comparison methodology should operate in practice. According to Brazil, an interpretation of the second sentence of Article 2.4.2 that would limit the application of the W-T comparison methodology to the transactions that fall within the pattern[63] raises several doubts relative to the practical operation of such understanding.

7.17. China contends[64] that Article 2.4.2 of the Anti-Dumping Agreement is concerned with the establishment of margins of dumping, and that the provision is explicit in stating that such margins are "normally" to be determined on the basis of one or the two symmetrical comparison methodologies. China asserts that the permission to use the alternative W-T comparison methodology is *exceptional*[65], applying only where a relevant price pattern cannot be taken into account *appropriately* through a symmetrical comparison methodology. According to China, this means that the allowance to use the W-T comparison methodology applies only on a limited basis: although an authority must consider the entire universe of sales in order to identify a relevant pricing pattern within that universe, the alternative methodology may be applied only to those sales that comprise the relevant pricing pattern. For export sales that are *not* part of the relevant pricing pattern, Article 2.4.2, second sentence, does not permit departure from the rule, stated in the first sentence, that mandates use of a symmetrical comparison methodology.

7.18. The European Union disagrees [66] with Korea's argument that the final sentence of Article 2.4.2 requires that the existence and amount of targeted dumping, if any, must be calculated only on the basis of the export transactions falling within the pricing pattern. The European Union asserts that this would not comport with the basic objective of the targeted dumping provision, which is to permit an investigating authority to unmask targeted dumping by purchaser, region or time period that would otherwise be concealed. It is not clear to the European Union how this can be achieved if the sole option open to an investigating authority would be to make a calculation only on the basis of the transactions that have passed the standard deviation and gap tests.

7.19. Japan contends[67] that the plain meaning of the second sentence of Article 2.4.2 suggests that the W-T comparison methodology is limited to the "pattern" of export prices which differ significantly among different purchasers, regions, or time periods. According to Japan, the provision does not indicate that the W-T comparison methodology should extend to *all* sales transactions once a pattern is found. Japan also contends that the context of the sentence implies that "individual sales transactions" to be used for comparison are precisely those that fall into the "pattern" discerned by the authorities, and the purpose of the provision to unmask targeted dumping similarly speaks for such understanding. Japan asserts that its interpretation finds strong support in the holding of the Appellate Body in *US – Zeroing (Japan)* that the phrase "individual export transactions" in the second sentence refers to the transactions that fall "within the relevant pricing pattern", and that "an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern".[68] Japan contends that its interpretation is also supported by the context of the first and second sentences of Article 2.4.2. Japan observes that the first sentence provides that the existence of margins of dumping shall "normally" be established through W-W or T-T comparisons. According to

[60] See Appellate Body Reports, *US – Zeroing (Japan)*, para. 135; and *EC – Bed Linen,* para. 62.
[61] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[62] Brazil's third party submission, paras. 30-32.
[63] Ibid. para. 31 (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 135).
[64] China's third party submission, para. 39.
[65] Ibid. (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 131).
[66] European Union's third party submission, para. 47.
[67] Japan's third party submission, paras. 68-70.
[68] Ibid. para. 69 (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 135).

Japan, this makes the W-T comparison methodology an exception, which an investigating authority "may" use in its discretion if it finds a "pattern" and provides an explanation. Japan submits that it follows from the nature of the second sentence of Article 2.4.2 as an exception that the W-T comparison methodology has to be applied in an appropriately limited manner – i.e. to an identified "pattern" – and not to all transactions, which would make the exception the rule as it would allow proceeding in the same manner as for W-W or T-T comparisons.

7.20. Viet Nam agrees[69] with Korea that, assuming the W-T comparison methodology can be used, it can only be applied to the transactions found to "differ significantly", that is, within the pattern. Viet Nam contends that the two "normal[]" methodologies should be applied to transactions outside the pattern.

7.3.2.3 Evaluation by the Panel

7.21. Korea's scope claim raises the issue of whether the W-T comparison methodology may be applied to all export transactions, or only to transactions that constitute the relevant pattern (pattern transactions). Korea's claim requires us to determine whether the "prices of individual export transactions" used in the W-T comparison provided for in the first part of the second sentence are the same transactions as those comprising the "pattern of export prices which differ significantly among different purchasers, regions or time periods" referred to in the second part of that sentence. Our interpretive analysis suggests that they are.

7.22. We consider that the term "individual" in the first part of the second sentence indicates that the W-T comparison will not involve all export transactions. Rather, the W-T comparison will only involve certain export transactions identified individually. The only textual basis for individual identification of export transactions to be used in the W-T comparison is that they form the pattern referred to in the second part of the second sentence, i.e. those export transactions with prices that differ significantly (by purchaser, region or time period). The second sentence provides no other basis for identifying which "individual" export transactions should be included in the W-T comparison.

7.23. Application of the W-T comparison methodology to pattern transactions only is further supported by the third part of the second sentence, which requires the investigating authority to explain why "such differences" cannot be taken into account appropriately by one of the symmetrical comparison methodologies. The phrase "such differences" refers back to the significant price differences displayed by the pattern transactions referred to in the second part of the second sentence. This textual connection between the second and third parts of the second sentence suggests that the third part requires an explanation why it would not be appropriate to apply the W-W or T-T comparison methodology to *pattern* transactions. In our view, such explanation relates to pattern transactions precisely because only those pattern transactions should be subject to a W-T comparison.

7.24. Our reading of the text of the second sentence is further supported by contextual considerations. We observe that, according to the first sentence of Article 2.4.2, a margin of dumping should "normally" be established using either the W-W or T-T symmetrical comparison methodologies. In such "normal" cases, there is no determination that certain transactions form part of "a pattern of export prices which differ significantly among different purchasers, regions or time periods". All export transactions are effectively non-pattern transactions, and all such transactions are assessed using either the W-W or T-T comparison methodology. In exceptional cases where the W-T comparison methodology applies, a sub-set of export transactions is set aside for specific consideration. The exceptional nature of this comparison methodology suggests that something different from the first sentence should be undertaken, i.e. assessment of only the pattern transactions set aside for specific consideration.

7.25. Further support can be found in the statement of the Appellate Body in *US – Zeroing (Japan)* that:

> [t]he emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers,

[69] Viet Nam's third party statement, para. 19.

> regions or time periods". The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply.[70]

7.26. Our reading of the text of the second sentence of Article 2.4.2 is also supported by its object and purpose. There is broad agreement that the object and purpose of the second sentence of Article 2.4.2 is to enable investigating authorities to "unmask" so-called "targeted dumping". This view has been expressed by the parties[71], all but one of the third parties[72] and, as we explain below, the Appellate Body. This understanding of the object and purpose of the second sentence is also confirmed[73] by negotiating history, which shows that "the issue at stake [when negotiating the second sentence of Article 2.4.2] was masked, selective dumping".[74]

7.27. The Appellate Body stated in the abovementioned *US – Zeroing (Japan)* case that the second sentence of Article 2.4.2 provides an asymmetrical comparison methodology to address a "pattern of 'targeted' dumping".[75] The Appellate Body then referred to the notion of "unmasking" such "targeted dumping". In particular, the Appellate Body stated that "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."[76] The last statement by the Appellate Body could be read in two ways.[77] First – and this is the reading proposed by the United States – the Appellate Body could be stating that an authority is allowed to ("may") limit the scope of application of the W-T comparison methodology to pattern transactions, but it is not required to do so (and may therefore apply the W-T comparison methodology to all export transactions). Second, the Appellate Body could be understood to suggest that, given that the object and purpose of the second sentence is to unmask "targeted dumping", the authority is able to ("may") restrict the application of the W-T comparison methodology to pattern transactions only, since it is those pattern transactions that are indicative of targeted dumping. We favour the second reading, because the first reading would be at odds with the Appellate Body's statement *in the preceding sentence* (set forth in the extract above) that the universe of transactions subject to the W-T comparison methodology would "necessarily" be more limited than the universe of transactions to which the symmetrical comparison methodologies in the first sentence of

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[70] Appellate Body Report, *US – Zeroing (Japan)*, para. 135. A similar statement was made by the Appellate Body in *US – Softwood Lumber V (Article 21.5)*, fn 166.

[71] Korea's first written submission, para. 153. Korea asserts that the "exception" in the second sentence of Article 2.4.2 "was created to address the situation where an exporter's dumping is 'targeted' in the sense that the exporter makes dumped prices to a subset of the market, and 'masks' any dumping in that subset by selling at higher, non-dumped prices in its other U.S. sales". We agree with Korea's understanding of the term "targeted dumping". The United States has not proposed any alternative understanding. See also United States' first written submission, para. 45.

[72] See, for example, para. 20 of Brazil's third party submission, para. 19 of Canada's oral statement, para. 20 of China's third party submission, para. 38 of the European Union's third party submission, para. 6 of Japan's oral statement, para. 8 of Norway's oral statement, para. 4 of Thailand's oral statement, para. 12 of Turkey's oral statement. Viet Nam's response to Panel question No. 1.1(i) indicates that Viet Nam does not associate the second sentence of Article 2.4.2 with "targeted dumping".

[73] Article 32 of the Vienna Convention allows recourse to the preparatory work of the treaty in order *inter alia* to confirm the meaning resulting from the application of Article 31.

[74] Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989, MTN.GNG/NG8/13 (15 November 1989), (Exhibit USA-18), p. 11.

[75] Appellate Body Report, *US – Zeroing (Japan)*, para. 131. The Appellate Body also explained in *EC – Bed Linen* that the second sentence of Article 2.4.2 "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" (Appellate Body Report, *EC – Bed Linen*, para. 62).

[76] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

[77] Korea's second written submission, para. 178. Korea suggests that the Appellate Body's use of the term "may" was not referring to the scope of application of the W-T comparison methodology at all, but was rather referring back to the phrase "may be compared" at the beginning of the second sentence. (Korea asserts that the scope of the W-T comparison methodology was only addressed by the Appellate Body in the preceding sentences of its findings). This argument is not convincing since, immediately after using the word "may", the Appellate Body referred explicitly to an authority "limit[ing] the application of the W-T comparison methodology to …".

Article 2.4.2 would apply. The term "necessarily" excludes the possibility that the W-T comparison methodology might in certain circumstances also apply to non-pattern transactions. This reading is supported by the exceptional nature of the W-T comparison methodology.

7.28. We note the United States' argument that a "pattern" necessarily includes lower export prices that differ from higher export prices, and thus all export transactions may be included in the relevant pattern. However, as we explain below[78], a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations". We also explain that, in the context of the second sentence, the relevant form or sequence is determined by reference to purchasers, regions or time periods. If particular prices are observed to differ by purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period. The price differences are "regular" and "intelligible" because they pertain only to a particular purchaser, region or time period.[79] Once those prices are identified, they constitute the relevant "pattern". Although those prices are identified by reference to other prices pertaining to other purchasers, regions or time periods, those other prices are not part of the relevant "pattern" (just as a floral pattern on a garment is concerned with the flowers printed against a backdrop, rather than the backdrop itself).[80]

7.29. For the above reasons, we find that the W-T comparison methodology should only be applied to transactions that constitute the "pattern of export prices which differ significantly among different purchasers, regions or time periods". In the *Washers* anti-dumping investigation, the USDOC applied the W-T comparison methodology to all transactions, including transactions other than those constituting the patterns of transactions that the USDOC had determined to exist. In doing so, the USDOC acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

7.3.3 Claim regarding the pattern clause

7.30. This claim concerns the USDOC's application of the pattern clause, i.e. the requirement to establish the existence of a "pattern of export prices which differ significantly among different purchasers, regions or time periods". Korea challenges the manner in which the USDOC determined the existence of a "pattern of export prices which differ significantly" among purchasers, regions or time periods in the *Washers* anti-dumping investigation. Korea contends that the USDOC applied purely quantitative criteria in determining the existence of "patterns of export prices which differ significantly", without any qualitative assessment of the reasons for the relevant price differences. Korea asserts that an investigating authority must qualitatively assess why prices differ, and whether such differences reflect what can reasonably be inferred as targeting conduct.

7.3.3.1 Main arguments of the parties

7.31. Korea submits[81] that the ordinary meaning of the terms "pattern" and "significantly" precludes resort to purely quantitative criteria when determining whether there is a pattern of export prices that differ significantly. Korea asserts that each of these terms carries qualitative connotations (that were ignored by the USDOC's purely quantitative tests), such that the second sentence requires an examination of "why", not just "how big".

7.32. Korea asserts that the word "pattern" means that there must be some intelligible and predictable repetition or form that can be discerned, qualitatively, from the sample of prices at issue. Korea contends that the qualitative connotation of the word "pattern" does not allow for random variation, but rather requires a particular design or purpose, namely targeting conduct.

[78] See para. 7.45. below.

[79] We accept Korea's argument that, to be "intelligible" the price differences must have some relationship to one another (Korea's first written submission, para. 132). This relationship exists when the significantly differing prices relate to the same purchaser, region or time period.

[80] This is consistent with the statement by the Appellate Body in *US – Zeroing (Japan)* that the universe of transactions that fall within the relevant pricing pattern "would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply".

[81] Korea's main arguments are set forth at paras. 130-153 of its first written submission.

Korea submits that, to be "intelligible" or to "serve to govern the execution of something"[82], the pattern must be meaningful to the purpose of what is being undertaken – namely determining whether use of the exceptional comparison methodology set forth in the second sentence of Article 2.4.2 is justified.

7.33. Korea contends that this understanding is reinforced by the requirement in Article 2.4.2 that the prices differ "significantly". According to Korea, this term conveys both quantitative and qualitative aspects. Korea contends that the qualitative meaning of "significant" means that the relevant price differences must have meaning or purpose, rather than reflecting random price variation or normal commercial factors. Korea contends that the price differences must be more than merely "large" in order to justify the application of the second sentence of Article 2.4.2. According to Korea, an authority cannot find differences to be "significant" based solely on quantitative criteria with no consideration at all of the qualitative factual context – the reasons why prices might be differing.[83] Korea asserts that a qualitative assessment of the relevant price differences is necessary in order to avoid finding that price differences constitute targeted dumping, even though they are caused entirely by exogenous factors or normal commercial conditions.

7.34. The United States disagrees[84] with Korea's argument that the words "pattern" and "significantly" require an investigating authority to examine, qualitatively, the design, meaning, or purpose underlying the significant differences in export prices. The United States notes that the parties agree that a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations". The United States agrees with Korea's contention that a "pattern" cannot simply be the result of random price variation. However, the United States rejects Korea's argument that there must be some *predictable* repetition or form that can be discerned. The United States notes that an anti-dumping investigation is concerned exclusively with sales during the period of investigation, which necessarily is in the past. According to the United States, nothing in the "pattern clause" or anywhere else in Article 2.4.2 of the Anti-Dumping Agreement relates to predicting future sales.

7.35. Regarding the term "significantly", the United States agrees with Korea's contention that the Appellate Body has suggested that the term "significant" can have both quantitative and qualitative dimensions. The United States does not agree, though, that the price differences that trigger the application of the W-T comparison methodology must be something other than merely "large" quantitative differences. The United States suggests that Korea's understanding would read the quantitative dimension out of the term "significantly". The United States asserts that this would be inconsistent with the ordinary meaning of the term "significantly" in its context, and also with the Appellate Body's guidance in *US – Large Civil Aircraft (2nd Complaint)*.

7.36. In the context of the requirement to identify "a pattern of export prices which differ significantly", the United States asserts that a qualitative analysis would be employed to assess *how* the export prices differ from each other, in the sense of whether that difference qualitatively is notable or important, and thus is "significant". The United States contends that under Korea's notion of a qualitative analysis, the investigating authority would rather ask *why* the export prices are different. The United States suggests that Korea's references to commercial reasons, market explanations, or other exogenous factors all go to why differences may exist between export prices. The United States suggests that these issues would not provide information about how the export prices are different, and whether the observed differences are "significant".

7.37. The United States also contends that Korea's argument concerning the need to demonstrate that dumping is targeted confuses the "pattern of export prices which differ significantly", which is described in the text of the "pattern clause" in the second sentence of Article 2.4.2, with the intention of an exporter to "target" its dumping and "mask" that dumping. The United States asserts that the drafting of the "pattern clause" is passive and not active, such that the

[82] Korea's first written submission, para. 131(referring to the dictionary meaning of the Spanish term "pauta" as "[i]nstrumento o norma que sirve para gobernarse en la ejecución de algo" (an instrument or norm that serves to govern the execution of something) (Exhibit KOR-37).

[83] Korea's oral statement at the second meeting of the Panel, para. 26. However, Korea does not argue that an investigating authority must consider the intent of the exporter. See also Korea's second written submission, para. 89.

[84] The main arguments of the United States are set forth at paras. 55-99 of its first written submission.

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.

7.3.3.2 Main arguments of third parties[85]

7.38. Canada submits[86] that the ordinary meaning of the word pattern implies a qualitative element.

7.39. China shares Korea's concern[87] that the USDOC appears to have failed to consider relevant qualitative explanations for price variations. China asserts that the use of the W-T comparison methodology is conditioned on identification of a "*pattern*" of "prices which differ *significantly*". The mere existence of time-based, or similar, price variations cannot in itself be revealing of "significant" differences. For China, the fact that "significance" has meaning in both quantitative and qualitative terms is a strong indicator that an investigating authority must consider *both* such dimensions whenever it seeks to determine the existence of a "pattern of export prices which differ significantly". China disagrees with the United States as they have asserted that it is sufficient to explore *either* dimension by showing either that price differences are "numerically large" or, alternatively, that even numerically small differences remain "important" in the context of a particular market.

7.40. The European Union argues[88] that the terms "pattern" and "significantly" can be understood quantitatively. The European Union agrees with the United States' understanding of the more limited sense in which that term might be understood qualitatively. The European Union asserts that in a normal anti-dumping calculation, that does not involve any determination of targeted dumping, an investigating authority is not required to assess the reason for which dumping is occurring. Rather, the determination of the existence and amount of dumping is based on an objective assessment of the data. The European Union understands that the situation should be no different under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

7.41. Japan argues[89] that the question of how significant a difference of export prices is, or in other words what the standard of being "large" is, cannot be answered unless one places relevant numerical variations in an appropriate context and assesses their meaning.

7.42. Turkey does not support the interpretation that a "pattern of significant difference" should be necessarily an outcome of a specific intent. Turkey does not agree that usual commercial practices are perfectly plausible if the differing export prices display a pattern in line with the expected results of these practices. Turkey argues that neither the text of Article 2.4.2 nor WTO jurisprudence makes it possible to conclude that the "usual commercial" practices are defences to permit the act of targeted dumping.[90]

7.43. Viet Nam agrees with Korea[91] that the United States' methodology inappropriately creates the possibility that random, relatively minor and commercially entirely commonplace price fluctuations will be characterized as a "pattern" of prices that "differ significantly". Beyond all technicalities of the second sentence of Article 2.4.2, it cannot be that the Anti-Dumping Agreement entitles WTO Members to burden exporters with higher anti-dumping duties simply because they follow standard business practices.

7.3.3.3 Evaluation by the Panel

7.44. Korea submits that in the *Washers* anti-dumping investigation the USDOC acted inconsistently with the pattern clause because it found a "pattern of export prices which differ significantly" among purchasers, regions or time periods based "solely on quantitative criteria with no consideration at all of the qualitative factual context – the reasons why prices might be

[85] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[86] Canada's third party submission, para. 22.
[87] China's third party submission, paras. 14-22.
[88] European Union's third party submission, para. 40.
[89] Japan's third party submission, para. 31.
[90] Turkey's third party oral statement, para. 8.
[91] Viet Nam's third party statement, paras. 16 and 17.

differing".[92] According to Korea, the second sentence "requires an examination of 'why', not just 'how big'".[93]

7.45. Korea's claim is based on its interpretation of the terms "pattern" and "significant". The parties agree that a "pattern" is "[a] regular and intelligible form or sequence discernible in certain actions or situations".[94] We accept that this definition accords with the ordinary meaning of the term "pattern" as used in the second sentence of Article 2.4.2. The parties also agree that random price variation does not constitute a "pattern".[95] Again, we agree.

7.46. The parties disagree on whether a "pattern" of price differences may be discerned without exploring the reasons for those price differences. We note that the text of Article 2.4.2 contains no requirement to consider such reasons. Further, the fact that prices differ in a regular and intelligible form may be discerned through a simple examination of the relevant numerical price values. In the context of the second sentence, the relevant form or sequence is determined by reference to purchasers, regions or time periods. If particular prices are observed to differ in respect of a particular purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period. The price differences are "regular" and "intelligible" because they pertain only to that particular purchaser, region or time period. This is consistent with Korea's argument that, in order to be "intelligible", the relevant price differences "must have some relationship to each other so that this form can be discerned".[96] The relationship results from the fact that the price differences pertain to a given purchaser, region or time period.

7.47. Korea argues that "to be 'intelligible' or to 'serve to govern the execution of something', the pattern must be meaningful to the purpose of what is being undertaken"[97], i.e. "targeting conduct".[98] We disagree. First, 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.

7.48. Nor do we consider 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. In the context of the second sentence, we consider that the term "significant" should be understood to mean "important, notable; consequential".[99] This was the definition applied by the Appellate Body in *US – Tyres*[100] and *US – Large Civil Aircraft (2nd Complaint)*[101], and by the panel in *US – Upland Cotton*.[102] Korea distinguishes "significant" from "large". Korea suggests that even a numerically "large" price difference will not be "significant" if the difference is "simply the natural and completely expected reactions to normal commercial considerations".[103] Korea contends 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.[104] We disagree. We consider that an 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

[92] Korea's oral statement at the second meeting of the Panel, para. 26.
[93] Ibid.
[94] Korea refers at para. 86 of its first written submission to *OxfordDictionaries.com*, Oxford University Press, accessed 18 September 2014 <http://www.oxforddictionaries.com/us/definition/american_english/pattern> (Exhibit KOR-21). The United States refers to the same dictionary definition at para. 59 of its first written submission.
[95] United States' first written submission, para. 73; Korea's first written submission, paras. 132-133.
[96] Korea's first written submission, para. 132.
[97] Ibid. para. 132.
[98] Ibid. para. 133.
[99] *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, (Exhibit KOR-23), p. 2860.
[100] Appellate Body Report, *US – Tyres*, para. 176.
[101] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1272.
[102] Panel Report, *US – Upland Cotton*, para. 7.1325.
[103] Korea's second written submission, para. 87.
[104] Korea's response to Panel question 2.1, para. 36.

stands out, and it stands out because of its size, or scale, rather than the reasons behind it.[105] However, as discussed in section 7.3.4.4 below, the reasons behind the significant price differences may be relevant in the context of the explanation clause.

7.49. 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. We find support for this approach in the report of the panel in *US – Upland Cotton*, concerning the meaning of the phrase "significant price suppression" in Article 6.3(c) of the SCM Agreement. That panel found that:

> [I]t is the degree of price suppression or depression itself that must be "significant" (i.e. important, notable or consequential) under Article 6.3(c) of the SCM Agreement. *In determining whether the price suppression is "significant", it may be relevant to look at the degree of the price suppression or depression in the context of the prices that have been affected – that is, at the degree of significance of suppression or depression.*
>
> Such significance may be manifest in a number of ways. *The "significance" of any degree of price suppression may vary from case to case, depending upon the factual circumstances, and may not solely depend upon a given level of numeric significance. Other considerations, including the nature of the "same market" and the product under consideration may also enter into such an assessment, as appropriate in a given case.*
>
> We cannot believe that what may be significant in a market for upland cotton would necessarily also be applicable or relevant to a market for a very different product. We consider that, for a basic and widely traded commodity, such as upland cotton, a relatively small decrease or suppression of prices could be significant because, for example, profit margins may ordinarily be narrow, product homogeneity means that sales are price sensitive or because of the sheer size of the market in terms of the amount of revenue involved in large volumes traded on the markets experiencing the price suppression.[106] (emphasis added; footnotes omitted)

7.50. We agree 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". We also note that the *US – Upland Cotton* panel 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.

7.51. We also find 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".[107] Regarding the qualitative dimension, the Appellate Body referred to the "highly price-competitive" nature of the market, and the "strategic importance of securing a sale from a particular customer". However, 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.

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[105] We find support for this approach in *China – GOES*, where the Appellate Body stated that a determination of "significant price undercutting" requires a comparison between the price of subject imports and the price of like domestic products: "authorities must consider whether there has been a significant price undercutting by the dumped or subsidized imports as compared with the price of a like domestic product" (Appellate Body Report, *China – GOES*, para. 241). The Appellate Body was not specifically interpreting the term "significant" in this context. However, the fact that the Appellate Body considered that an authority could determine the existence of "significant price undercutting" simply by comparing two prices suggests that the concept of significance may properly be assessed on a purely numerical basis. Just as significant price undercutting may be established by comparing the numerical values of domestic and import prices, significant price differences may be established in the context of the second sentence by comparing the numerical prices to one purchaser, region or time period with the numerical prices to other purchasers, regions or time periods.

[106] The Appellate Body upheld the panel's approach at para. 427 of its report.

[107] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 1272.

7.52. For the above reasons, we reject 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.

7.3.4 Claims regarding the explanation clause

7.53. The third part of the second sentence of Article 2.4.2 requires an authority to provide an explanation "as to why [the pattern of significant price] differences cannot be taken into account appropriately by the use of a [W-W] or [T-T] comparison". Korea claims that the USDOC failed to comply with this explanation clause in the *Washers* anti-dumping investigation.

7.3.4.1 Explanation provided by the USDOC in the *Washers* anti-dumping investigation

7.54. The USDOC provided similar explanations pursuant to the explanation clause in both its preliminary and final determinations in the *Washers* anti-dumping investigation. In its preliminary determination, the USDOC determined:

> For both LG and Samsung, we find that these [pricing] differences cannot be taken into account using the average-to-average methodology because the average-to-average methodology conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Therefore, for the preliminary determination, we find that the standard average-to-average methodology does not take into account LG's and Samsung's price differences because the alternative average-to-transaction methodology yields a material difference in the margin. Accordingly, for this preliminary determination we applied the average-to-transaction methodology to all U.S. sales made by LG and Samsung. In applying this methodology, consistent with our practice, we did not offset negative comparison results with positive comparison results.[108]

7.55. In its final determination, the USDOC determined:

> In this investigation, we find for both LG and Samsung, based on the petitioner's targeted dumping allegations, that a pattern of EPs or CEPs for comparable merchandise that differs significantly among purchasers, regions or time periods exists. Further, our analysis shows that the average-to-average method does not take into account such price differences because there is a meaningful difference in the weighted-average dumping margins when calculated using the average-to-average method and the average-to-transaction method for both respondents. We therefore have applied the average-to-transaction method for LG and Samsung in this final determination.[109]

7.56. Thus, the USDOC's explanation is based on a combination of two factors. First, that the averaging used in the W-W comparison methodology "conceals differences" between the export prices. Second, that there is a "meaningful difference" between the margin of dumping calculated using the W-W comparison methodology and the margin of dumping calculated using the W-T comparison methodology. There is no reference to the T-T comparison methodology in the explanation provided by the USDOC.

7.3.4.2 Main arguments of the parties

7.57. Korea submits[110] that the term "appropriate(ly)" under the explanation clause requires a qualitative assessment of the objective circumstances of a particular industry. Korea suggests that

[108] *Washers* Anti-Dumping Preliminary Determination, (Exhibit KOR-32), p. 46395. See also LG AD Preliminary Calculation Memo, (Exhibit KOR-45), pp. 3 and 4; and Samsung AD Preliminary Calculation Memo, (Exhibit KOR-46), p. 3.

[109] *Washers* Anti-Dumping I&D Memo, (Exhibit KOR-18), p. 20. See also Samsung AD Final Calculation Memo, (Exhibit KOR-41) (BCI), p. 2; and LG AD Final Calculation Memo, (Exhibit KOR-42) (BCI), p. 2.

[110] Korea's main arguments are set forth at paras. 154-167 of its first written submission.

the W-W or T-T comparison methodologies can appropriately take account of price differences in certain circumstances, particularly when those differences are commercially reasonable.[111] Korea asserts that the authority must explain, with reference to the existence of the pattern and the significance of the price differences within that pattern, why the W-W or T-T comparison methodologies cannot take appropriate account of those price differences. Korea contends that the explanation clause excludes the application of the W-T comparison methodology if there is any way in which the W-W or T-T comparison methodologies can produce a dumping margin calculation in which the pattern of significantly differing prices can be taken into account appropriately.

7.58. Korea submits that the USDOC failed to "make clear" and "give details" of the reason or purpose of the failure or impossibility to take into account appropriately the relevant pattern using either the W-W or T-T comparison methodology. Korea asserts that the USDOC merely observed that there was a "material difference" between the margins of dumping calculated using the W-W comparison methodology without zeroing and W-T comparison methodology with zeroing, and then concluded that the use of the W-W comparison methodology was not appropriate. Korea contends that the existence of a "material difference" merely relates to inherent aspects of the W-W comparison methodology that cannot provide the explanation required by the second sentence of Article 2.4.2. Otherwise, according to Korea, the use of the W-T comparison methodology would have been automatically authorized as soon as a pattern of significantly different prices was found, without any obligation to explain. Korea further asserts that the USDOC's reasoning does not amount to the explanation required by Article 2.4.2, but is rather a measure of the impact of zeroing on the calculation of dumping margins. Korea suggests that if the USDOC's approach would be accepted, it would render the explanation clause *inutile*, because the use of zeroing will virtually always produce higher margins. Korea also submits that there is no explanation by the USDOC as to why the T-T comparison methodology cannot take into account appropriately the pattern of significantly differing prices.

7.59. According to the United States[112], the "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear or intelligible or gives details of the reason that it is not possible in the dumping calculation or computation to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. The United States suggests that a relatively brief and not particularly detailed explanation may suffice when, for example, it is readily apparent from a comparison of the results of the application of one of the normal comparison methodologies and the results of the application of the alternative comparison methodology that using one of the normal comparison methodologies would lead to the "masking" of dumping to a material or meaningful degree. The United States asserts that the difference between applying the W-W and W-T comparison methodologies was meaningful in the *Washers* anti-dumping investigation in the sense that it was relatively large and, in the case of Samsung, the difference resulted in a change from a determination of no dumping to an affirmative determination of dumping.

7.60. The United States disagrees with Korea's argument that the explanation should include some qualitative assessment of the reasons for the relevant price differences. The United States does not consider that the explanation need have any connection to the issues of "pattern" and "significance". The United States does not consider that the term "appropriately" introduces any such qualitative assessment into the pattern clause.[113] The United States also rejects Korea's argument that because it is in the very nature of the W-W comparison methodology that, through the use of averaging, it will "conceal" the differences between individual prices, it logically follows that this inherent aspect of the W-W comparison methodology itself cannot provide the required "explanation" as to why that methodology cannot take into account the pattern of lower priced sales found to exist. The United States recalls that the Appellate Body has stated that the second sentence of Article 2.4.2 allows the use of the W-T comparison methodology to "unmask targeted dumping".[114] The United States asserts that it is therefore logical for an investigating authority, in providing the requisite explanation, to examine the extent to which dumping would be masked by

[111] Korea's response to Panel question No. 2.12, para. 99.

[112] The main arguments of the United States are set forth at paras. 100-144 of its first written submission.

[113] United States' second written submission, para. 75.

[114] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

one of the normal comparison methodologies.[115] The United States contends that while it is inherent in the W-W comparison methodology that differences between individual prices may be concealed, it will not necessarily always be the case that "targeted dumping" will be "masked" by this "very nature" of that comparison methodology such that the W-W comparison methodology cannot account for such differences appropriately. The United States suggests, for example, that differing export prices may all be above normal value, so that both the W-W and W-T comparison methodologies would lead to a finding of no dumping. Alternatively, the United States suggests that it may be the case that all of the export prices are below normal value, and thus no "masking" of dumping is occurring, and the weighted average dumping margin calculated under both the W-W and W-T comparison methodologies would be the same. The United States suggests that, apart from these two cases, it may also be the case that the amount of "masking" or the amount of dumping found is relatively small. The United States contends that when there is a pattern of export prices that differ significantly, and the export prices that are lower are below normal value while the export prices that are higher are above normal value, the "inherent aspect of the [average-to-average] comparison methodology itself" does indeed "provide the required 'explanation' as to why that methodology cannot take into account the pattern of lower priced sales found to exist".[116] The United States submits that it is unclear what, other than this "inherent aspect" of the W-W comparison methodology, would provide the requisite explanation.

7.61. The United States does not disagree with Korea's assertion that the comparison undertaken by the USDOC is a measure of the impact of zeroing on the calculation of the dumping margins under those two methodologies, when applied to all of an exporter's sales, not merely to those found to constitute a pattern of significantly difference prices. The United States submits that this is an acknowledgement by Korea that the results of the comparisons would be mathematically equivalent without zeroing under the W-T comparison methodology.

7.62. The United States disagrees with Korea's argument that the USDOC should also have explained why the T-T comparison methodology could not "take into account appropriately the pattern of significantly different prices". The United States refers to the Appellate Body's statement in *US – Softwood Lumber V (Article 21.5 - Canada)* that the W-W and T-T comparison methodologies "fulfil the same function", and are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two".[117] The United States also refers to the Appellate Body's statement in that case that it would be illogical if these two comparison methodologies were to yield "results that are systematically different". The United States contends that, logically, if the W-W and T-T 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 T-T 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 W-W comparison methodology. The United States also observes the Appellate Body's statement 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."[118] The United States asserts that a T-T comparison methodology may be particularly unsuitable, and could be quite burdensome, when there are a large number of sales transactions in both the home market and the export market. The United States asserts that nothing in the first sentence of Article 2.4.2 requires an investigating authority to apply both comparison methodologies in the course of a single anti-dumping investigation. The United States contends that the initial choice between the W-W and T-T comparison methodologies is reflected in the use of the word "or" in the explanation clause.

7.3.4.3 Main arguments of third parties[119]

7.63. Brazil argues[120] that if the investigating authority proceeds to use the W-T comparison methodology, there must be other reasons to have recourse to this method beyond purely mathematical differences in the amount of dumping, which are the consequence of the intrinsic

[115] United States' second written submission, para. 81.
[116] United States' first written submission, para. 133.
[117] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.
[118] Ibid.
[119] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[120] Brazil's third party submission, paras. 25-27.

characteristics and of the operation of each of the methods. Brazil understands that investigating authorities have an obligation to give details on why the regular tools already afforded to them by the Anti-Dumping Agreement were not sufficient to enable the use of one of the symmetrical methods.

7.64. Canada asserts [121] that the United States does not explain its recourse to the W-T comparison methodology. Canada contends that instead it compares the dumping margins that would be obtained by using the W-W comparison methodology to those that would be obtained by using the W-T comparison methodology. This "meaningful difference test" only demonstrates that using the two methodologies yields a different result, not that the difference in export prices cannot be taken into account by one of the symmetrical methodologies.

7.65. In China's view [122], the requirement of an explanation under Article 2.4.2 is a crucial discipline upon use of the exceptional W-T comparison methodology. China submits that the explanation must have genuine explanatory value, making it clear "why" relevant "differences cannot be taken into account appropriately" using a symmetrical comparison methodology. [123] China notes that the explanation provided by the USDOC in the *Washers* anti-dumping investigation was incomplete: it centres on the idea that averaging somehow "conceals" targeted dumping, providing no analysis as to why the averaging of prices has this effect. Rather, USDOC's reference to averaging resurrects the US assertion – repeatedly rejected in WTO zeroing cases – that dumping may be understood as a *transaction-specific* concept, meaning that *average* values including *all* transactions are to be avoided in favour of "denying offsets" (zeroing) where specific export transaction prices exceed normal value. China also believes that the USDOC has failed to address the T-T comparison methodology. China asserts that under Article 2.4.2, an investigating authority must provide an explanation "as to why [the relevant] differences cannot be taken into account appropriately by use of a weighted average-to-weighted average or transaction-to-transaction comparison". The use of the disjunctive "or" in this phrase signals that *both* methodologies must be considered and rejected, because if one of these methodologies *can* "take into account appropriately" the relevant pricing pattern, then the conditions for use of the exceptional W-T comparison methodology are not met. This is confirmed by the fact that the symmetrical methodologies "shall normally" be used. In China's view, there are cases in which the T-T comparison methodology could appropriately take into account a relevant pricing pattern. For instance, in a case involving allegations of significant differences in pricing among *time periods*, the T-T comparison methodology may appropriately take those differences into account because it is the methodology that gives most particular effect to the requirement under Article 2.4 that comparisons of export price and normal value are "made at as nearly as possible the same time". In this way, the T-T comparison methodology may have utility in dealing with seasonal price variations in a manner that ensures a "fair comparison".

7.66. The European Union refers [124] to the examples set by Korea to illustrate why the use of the W-T comparison methodology would be inappropriate to conclude that they do not explain nor demonstrate their argument. Insofar as Korea is arguing that the explanation must extend to the reasons it refers to in its submission, the European Union agrees with the United States that the Panel should reject that claim. Specifically, with respect to Korea's first example of seasonal prices, Korea does not explain or demonstrate that the patterns of export prices found to exist in the measure at issue are the result of seasonal pricing. Nor does Korea explain and demonstrate that they are the result of discounting during key holiday seasons (Korea's second example). With respect to Korea's third example (quantities), the European Union observes that this is one of the differences that Article 2.4 expressly requires must be given due allowance, and yet Korea does not appear to be developing any claim or argument with respect to that specific obligation. Finally, with respect to Korea's fourth example, the European Union notes that Korea does not explain or demonstrate that the patterns of export prices found to exist in the measure at issue are the result of changes in costs of production. However, the European Union agrees with Korea that the explanations in the measure at issue make no reference to the possible use of the T-T comparison methodology. The European Union submits that the consistency of the measure at issue with the final sentence of Article 2.4.2 of the Anti-Dumping Agreement should be assessed in that light.

[121] Canada's third party submission, paras. 28-30.
[122] China's third party submission, paras. 28-35.
[123] Ibid. para. 33 (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 131).
[124] European Union's third party submission, paras. 53-55.

7.67. Japan agrees with Korea[125] that the meaning of "explanation" and "why" in the second sentence of Article 2.4.2 must be interpreted to mean that an investigating authority must provide clear and detailed reasons for or the purpose of the inability or impossibility to take into account appropriately a pattern of significantly different export prices by the use of a W-W or T-T comparison. Japan asserts that the United States' argument renders the "explanation" requirement of the second sentence of Article 2.4.2 practically ineffective as it is obvious that the calculation results of the W-T comparison methodology and of the W-W comparison methodology will differ if one allows zeroing for the former and prohibits it for the latter. Japan considers that the "explanation" is also insufficient for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement as it merely rests on a difference in dumping margins achieved by the W-W or W-T comparison methodologies, without making clear or giving details of the reasons or purposes of the inability or impossibility to take into account appropriately a pattern of significantly different export prices among the three types of category, i.e. purchasers, regions or time periods, by the use of the W-W comparison methodology. Japan considers that the USDOC's mechanical methodology for finding a "pattern" does not allow any assessment whether the export prices within the "pattern" deviate from the normal pricing behaviour. Japan sees no inherent "appropriate" reason to distinguish an exporter's pricing with respect to a certain limited universe of the market of the importing country that is a mere reaction to the market situation of the importing country from its pricing with respect to the rest of the same market, which is also a mere reaction to the market situation. In such a scenario, variations seen in export prices do not pertain to exporters' behaviour to mask dumping, and therefore, Japan sees no reason why such price differences could not be taken into account appropriately by W-W or T-T comparisons.

7.68. Turkey understands[126] that the explanation of why normal methodologies cannot be used should be in such a context that it should not deprive the interested parties from using their right of presenting evidence they consider relevant in respect of the question. Thus, Turkey asserts that the base of the test controlling the adequacy of the explanation should be Article 6.1 of the Anti-Dumping Agreement.

7.69. Viet Nam argues[127] that the United States' practice reduces to an empty formality the requirement to provide an "explanation" as to why the two "normally" applicable methodologies cannot be used. Viet Nam supports its argument with three reasons: first, the United States fails to provide any explanation with respect to the T-T comparison methodology. Second, the explanation that the W-W comparison methodology "conceals" certain price differences is, as Korea argues, merely a description of what any averaging process entails by its very essence. Finally, saying that the W-T comparison methodology with zeroing yields a higher margin than the W-W comparison methodology without zeroing is not an explanation why price differences "cannot be taken into account appropriately" by the W-W comparison methodology. When zeroing is applied the margins of dumping will always be higher than if zeroing is not applied because of the absence of any offset for the margin by which export prices exceed normal value. Recourse to the third methodology cannot be driven, or justified, by the fact that the application of zeroing will always result in the highest possible dumping margin. Viet Nam concludes that nothing in Article 2.4.2 supports such an interpretation.

7.3.4.4 Evaluation by the Panel

7.70. The explanation clause in the second sentence of Article 2.4.2 requires an explanation as to why the significant price differences cannot be taken into account appropriately by the use of the W-W or T-T comparison methodologies. We must consider whether the USDOC complied with that requirement when it determined in the *Washers* anti-dumping investigation that the relevant export price differences could not be taken into account "appropriately" by the W-W comparison methodology because (a) the averaging in that methodology conceals price differences and (b) the margin of dumping calculated using that methodology was "'materially' or 'meaningfully'"[128] lower than the margin calculated using the W-T comparison methodology. We must also consider whether the USDOC was required to provide an explanation in respect of both the W-W and the

[125] Japan's third party submission, paras. 57-64.
[126] Turkey's third party statement, para. 9.
[127] Viet Nam's third party statement, para. 18.
[128] We note that the USDOC used inconsistent terminology in the *Washers* anti-dumping investigation: "material difference" in the preliminary determination and "meaningful difference" in the final determination. The USDOC did not define or explain the meaning of the terms "material" or "meaningful".

T-T comparison methodologies, or whether it was sufficient to provide an explanation only in respect of the W-W comparison methodology.

7.3.4.4.1 The assessment of appropriateness

7.71. Although the second sentence of Article 2.4.2 provides that the W-T comparison methodology can only be applied when the authority explains that the W-W or T-T comparison methodologies cannot take "appropriate" account of the relevant price differences, the text of the second sentence does not provide any guidance for determining "appropriateness" in this context. In considering the ordinary meaning of the term "appropriately", we observe that both parties[129] rely on the statement by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that:

> [R]elevant dictionary definitions of the term "appropriate" include "proper", "fitting" and "specially suitable (*for, to*)". These definitions suggest that what is "appropriate" is not an autonomous or absolute standard, but rather something that must be assessed by reference or in relation to something else. They suggest some core norm — "proper", "fitting", "suitable" — and at the same time adaptation to particular circumstances.[130] (footnote omitted)

We shall be guided by the Appellate Body's understanding of the ordinary meaning of the term "appropriate" in evaluating Korea's claim. We note in particular that the term "appropriately" should not be understood to suggest any autonomous or absolute standard, but rather suggests that the potential application of the W-W or T-T comparison methodology should be assessed by reference or in relation to something else, with proper consideration of attendant factual circumstances.

7.72. The second sentence of Article 2.4.2 does not explicitly identify any reference point for assessing appropriateness. It is therefore reasonable to refer to the object and purpose of the second sentence in this context. As explained elsewhere in this Report[131], the object and purpose of the second sentence concerns the unmasking of targeted dumping.[132] We have also observed, with reference to the findings of the Appellate Body in *US – Zeroing (Japan)*, that the existence of a pattern of export prices which differ significantly among different purchasers, regions or time periods is indicative of targeted dumping.[133] Since the use of either the W-W or T-T comparison methodology may result in that targeted dumping being hidden[134], it is appropriate for an authority to use the W-T comparison methodology in order to avoid it being hidden. However, this does not mean that the W-T comparison methodology may be applied simply because of the existence of a pattern of export prices which differ significantly among different purchasers, regions or time periods. If this were the case, there would have been no need to include the explanation clause in the second sentence of Article 2.4.2.

7.73. In our view, the explanation clause is needed because there may be factors other than targeted dumping that may cause export prices to differ – even significantly – among different purchasers, regions or time periods.[135] Price differences caused by factors other than targeted dumping may "normally" be taken into account appropriately by one of the "normal" comparison methodologies provided for in the first sentence of Article 2.4.2. Bearing in mind the object and

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[129] United States' first written submission, para. 108; Korea's response to Panel question No. 2.14, para. 97.

[130] Appellate Body, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552 (citing *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 106).

[131] See para. 7.26. above.

[132] Appellate Body Report, *EC – Bed Linen*, para. 62. We recall that the Appellate Body explained in *EC – Bed Linen* that the phrase "targeted dumping" refers to "dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods". We agree that dumping must be "targeted" by the exporter in order to constitute "targeted dumping".

[133] See para. 7.27. above.

[134] Korea's second written submission, para. 27. We note that Korea acknowledges that "possible hidden dumping [may be] masked by the use of averages in the W-W comparisons".

[135] There is no disagreement between the parties on this issue. The United States asserts that "[t]here could be many reasons that would explain why export prices might differ among different purchasers, regions, or time periods" (United States' response to Panel question No. 4.17, para. 57). Korea asserts that "[t]here are many reasons for price differences" (Korea's response to Panel question No. 4.17, para. 83).

purpose of the second sentence, the use of the W-T comparison methodology should be reserved for exceptional[136]cases where it is necessary to unmask a pattern of significant price differences that constitute targeted dumping. A pattern of export prices which differ significantly among purchasers, regions or time periods is merely indicative of targeted dumping. It is not determinative of targeted dumping. Thus, even after establishing the existence of a pattern, an investigating authority must still analyse the prevailing factual circumstances in order to consider the possibility that something other than targeted dumping is responsible for these relevant price differences. The authority's analysis of the prevailing factual circumstances must then be explained, before the authority is entitled to depart from one of the normal comparison methodologies provided for in the first sentence of Article 2.4.2.

7.74. The USDOC referred to the averaging effect of the W-W comparison methodology as a reason why use of that methodology was not appropriate in the *Washers* anti-dumping investigation. We disagree, for it is in the very nature of the W-W comparison methodology that, through the use of averaging, it will "conceal" the differences between individual export prices. Notwithstanding this inherent aspect of the W-W comparison methodology, and notwithstanding the prevalence of export price differentials, the first sentence provides that the W-W comparison methodology shall normally be used. Accordingly, we do not consider that the masking effect inherent in the W-W comparison methodology itself provides an "explanation" as to why that methodology cannot take into account the relevant pattern of price differences.

7.75. The United States asserts that the USDOC properly took into account the particular factual circumstances of the *Washers* anti-dumping investigation when it compared the margin of dumping calculated using the W-W comparison methodology with the margin of dumping calculated using the W-T comparison methodology. The United States asserts that this revealed the amount of dumping that would be masked by use of a normal comparison methodology, consistent with the object and purpose of the second sentence.[137] We disagree that an authority is entitled to only consider such difference in margin, since the use of the second sentence may result in a higher margin of dumping even in cases where the pattern of significantly differing export prices has nothing to do with targeting conduct by the exporter. For example, take a hypothetical scenario in which both domestic and export prices are $20 at the beginning of the period of investigation and fall to $10 during the last one of that period as a result of a decline in costs. Under the W-W comparison methodology, the average price in both markets would be $15, and there would be no dumping. Under the second sentence, assuming the export transactions during the last month of the period of investigation were found to constitute "a pattern of export prices which differ significantly among different … time periods", the $10 export price at the end of the period of investigation would be compared with the $15 average domestic price over the entire period, thereby increasing the likelihood of a finding of dumping. We do not consider that the use of the W-T comparison methodology would be appropriate in this hypothetical scenario, even though there will be an increase in the margin of dumping resulting from application of the W-T comparison methodology, since an objective assessment of the facts suggests that the drop in export price at the end of the period of investigation – which occurs at the same time as a similar drop in domestic price – is a reflection of the drop in costs, rather than targeted dumping. Bearing in mind the object and purpose of the second sentence, there is no reason why one of the normal comparison methodologies could not take appropriate account of these price differences.

7.76. The appropriateness standard set forth in the explanation clause requires an authority to examine these factual circumstances, in order to avoid the second sentence being applied in factual circumstances that have nothing to do with targeted dumping. The United States accepts that "if the evidence were to show that prices in both the domestic market and the export market dropped at nearly the same time and in nearly the same amount, and there was a causal relationship connecting the price decline with the cost decline, that could lead an investigating authority to conclude that one of the 'normal' comparison methodologies could take into account the observed 'pattern' of export prices 'appropriately'".[138] This statement suggests that the United States acknowledges the need for an investigating authority to examine the attendant factual circumstances "presented by the interested parties"[139] in order to avoid the second

[136] See Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97; and *US – Zeroing (Japan)*, para. 131.

[137] United States' second written submission, para. 81.

[138] United States' response to Panel question No. 4.3, para. 22.

[139] Ibid.

sentence being applied in factual circumstances that have nothing to do with targeted dumping. In the *Washers* anti-dumping investigation, the USDOC failed to consider whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping. The USDOC instead focused on the difference between the margin of dumping calculated using the W-W comparison methodology and the margin calculated using the W-T comparison methodology.[140]

7.77. For the above reasons, we find that the USDOC acted inconsistently with the explanation clause of the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation. We emphasise that we are not finding that the factual circumstances of the *Washers* anti-dumping investigation indicate that the relevant price differences were caused by something other than targeted dumping. We are simply finding that the USDOC's failure to consider this possibility is inconsistent with the requirements of the explanation clause.

7.3.4.4.2 Whether it is necessary to address both the W-W and T-T comparison methodologies

7.78. Korea submits that the USDOC acted inconsistently with the explanation clause in the *Washers* anti-dumping investigation by failing to explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology. Korea observes that the USDOC only provided an explanation in respect of the W-W comparison methodology.

7.79. Beginning with the text of the explanation clause, we note that an explanation is required of why "a" W-W "or" T-T "comparison" cannot take into account appropriately the relevant price differences. The indefinite Article ("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 W-W "or" T-T.

7.80. Furthermore, considering the broader context of the explanation clause, we note that the Appellate Body 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."[141] 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 W-W 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 T-T comparison methodology in the context of the explanation clause, before being able to apply the W-T comparison methodology. Korea contends that "[t]he authority has discretion to choose between them in the first instance, but then must again consider both comparison methods before turning to a W-T comparison as the exceptional method".[142] We disagree with the latter part of Korea's contention, since the initial discretion of an investigating authority to choose between the W-W and T-T comparison methodologies would be undermined by Korea's approach to the explanation clause.

7.81. Accordingly, we reject Korea's claim that the USDOC acted inconsistently with the explanation clause by failing to explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology.

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[140] See Letter from Warren Connelly to Ms Rebecca M. Blank regarding Antidumping Duty Investigation on Large Residential Washers from the Republic of Korea: Opposition of Samsung to Whirlpool's Targeted Dumping Allegation (July, 2012), (Exhibit KOR-68); and United States Department of Commerce, Case Brief of LG Electronics, Inc. and LG Electronics USA, Inc, Investigation No. A-580-868 (2012), (Exhibit KOR-83). The USDOC's application of the explanation clause was restricted to a statement that the averaging in that methodology conceals price differences, and a finding that the margin of dumping calculated using that methodology was lower than the margin calculated using the W-T comparison methodology. The USDOC failed to address in this context the respondents' denials that they were engaged in targeted dumping.

[141] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93.

[142] Korea's response to Panel question No. 2.16(i), para. 113.

7.3.5 Additional issues concerning the USDOC's application of the W-T comparison methodology in the *Washers* anti-dumping investigation

7.82. At paragraph 102 of its second written submission, Korea asserts that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation by "calculat[ing] standard deviations based on average export prices, not the actual 'export prices' themselves". At paragraph 103 of its second written submission, Korea alleges an inconsistency regarding the USDOC's use of allegedly biased standard deviations based on average, rather than actual, prices. At paragraphs 111 to 117 of its second written submission, Korea refers to an alleged inconsistency regarding the "sufficiency test" allegedly applied by USDOC in the *Washers* anti-dumping investigation. These alleged inconsistencies were not included in Korea's first written submission, even though paragraph 6 of the Panel's Working Procedures provides that "[b]efore the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments". As a result, we must consider the appropriateness of making findings in respect of these allegations.

7.83. Korea contends that the abovementioned allegations of inconsistency pertain to a claim articulated in its first written submission that "the USDOC improperly finds a 'pattern' based on unreasonable mechanical rules".[143] Korea refers in this regard to paragraphs 127 and 349 of its first written submission. We find no reference to any such claim in those parts of Korea's first written submission. Instead, both of those paragraphs refer in relevant part to a claim that "USDOC applies fixed numerical criteria" to determine whether there is a pattern, and "categorically rejects the relevance … of the commercial context". Korea's Request for Establishment of a panel identifies two separate claims that are relevant to the present discussion. First, Korea claims that "[t]he failure of the USDOC to consider legitimate commercial reasons and market explanations for any patterns of differing prices is clearly inconsistent with the meanings of 'pattern' and 'differ significantly'".[144] Second, Korea claims that "[t]he mechanical rules used by the USDOC to define 'patterns' of differing prices that 'differ significantly' are statistically unsound and produce economically irrational results".[145] We are in no doubt that the first claim is the one referenced in relevant part at paragraphs 127 and 349 of Korea's first written submission, concerning the relevance of the "commercial context". This is also the claim that we have addressed in section 7.3.3 above. There is no reference to the second claim (concerning "statistically unsound" and "unreasonable mechanical rules" that "produce economically irrational results") anywhere in Korea's first written submission, nor any indication of any arguments that might support such claim. Thus, although the second claim is covered by the Panel's terms of reference (as defined by Korea's Request for Establishment of a panel), Korea failed to pursue that claim in its first written submission.[146]

7.84. Furthermore, even if the relevant allegations could somehow be treated as arguments pertaining to the claim that was pursued in Korea's first written submission (concerning the USDOC's failure to consider the "commercial context"), there is no doubt that such arguments were not included in Korea's first written submission, contrary to the requirement of paragraph 6 of the Panel's Working Procedures. Korea contends that the relevant allegations could not have been included in its first written submission because they rebut arguments made subsequently by the United States.[147] Concerning the allegations of WTO-inconsistency in respect of the USDOC's use of standard deviations and average export prices, Korea contends that these allegations respond to the United States' assertion that the USDOC had applied the *Nails II* methodology "as a rigorous and holistic analysis".[148] Regarding the sufficiency test, Korea contends that the Panel should address this argument because the issue of the sufficiency test was raised by the

[143] Korea's response to Panel question No. 4.21(i), para. 144.
[144] Document WT/DS464/4, Section III.3.
[145] Ibid. Section III.4.
[146] Korea's second written submission, para. 101. We also observe that Korea introduced a number of "respects" in which the USDOC allegedly violated the pattern clause. The first two "respects" concern the standard deviation and use of average export price issues (see Korea's second written submission, paras. 102 and 103). The third "respect" refers to the USDOC's failure to "consider the reasons for price differences" (Korea's second written submission, para. 104). This third element concerns the first claim described above, regarding the relevance of the "commercial context". This structure of Korea's second written submission confirms our understanding that the relevant allegations of WTO-inconsistency do not pertain to the first claim outlined above.
[147] Korea's response to Panel question No. 4.21(ii), paras. 147 and 151.
[148] Ibid. para. 147 (referring to United States' first written submission, para. 96).

United States as a rebuttal to Korea's argument about the USDOC's application of the *Nails II* methodology in the *Washers* anti-dumping investigation.[149] Korea refers in this regard to the United States' response to Panel question No. 2.2, in which the United States asserted that "the USDOC considers, on a case by case basis, whether the volume of export sales which pass the *Nails II* methodology constitutes a sufficient volume of sales as compared to all sales made by the exporter during the period of investigation".[150]

7.85. We accept that rebuttal arguments need not be included in a party's first written submission. In our view, though, the relevant allegations of WTO-inconsistency are more realistically treated as arguments in support of the second claim outlined above (concerning "statistically unsound" and "unreasonable mechanical rules" that "produce economically irrational results") than as arguments rebutting arguments made by the United States in defence of the first claim outlined above (concerning the relevance of the "commercial context"). The subject-matter of the relevant arguments relates far more closely to Korea's statistical claim than to Korea's "commercial context" claim. Furthermore, we would not normally expect rebuttal arguments to form the basis for specific allegations of WTO-inconsistency, as is the case with the allegations of WTO-inconsistency at issue.[151]

7.86. In any event, it is well established that panels are not required to address all arguments made by the parties.[152] We do not consider it necessary to address the United States' general assertion that the USDOC conducted a "rigorous and holistic analysis" in applying the *Nails II* methodology in resolving Korea's claim that the USDOC failed to consider the "commercial context" in establishing the existence of a pattern of transactions. The United States' assertion is very general and therefore not relevant to our evaluation of Korea's claim. Accordingly, there is no need for us to address Korea's alleged rebuttal of the United States' general assertion.

7.87. The same is true for the sufficiency issue. The United States' assertion regarding the USDOC's application of a sufficiency test was part of the United States' response to a request by the Panel to explain how it had determined the existence of a pattern in the *Washers* anti-dumping investigation. We do not consider it necessary to consider the United States' explanation regarding the USDOC's application of a sufficiency test in evaluating Korea's claim that the USDOC failed to consider the "commercial context" in establishing the existence of a pattern of transactions.[153] For this reason, it is not necessary for us to address Korea's alleged rebuttal of this explanation.

7.88. For the above reasons, we decline to make any findings regarding the abovementioned allegations of WTO-inconsistency set forth in paragraphs 102, 103 and 111-117 of Korea's second written submission.

7.4 Claims concerning the DPM

7.89. We now consider Korea's claims concerning the DPM, which has replaced the *Nails II* methodology since the *Xanthan Gum* anti-dumping investigation in March 2013.[154] Korea challenges the DPM both "as such", and "as applied" in the first administrative review of the *Washers* anti-dumping order.[155] To the extent that the same three alleged errors concerning the

[149] Korea's response to Panel question No. 4.21(ii), para. 146.

[150] United States' response to Panel question No. 2.2, para. 27.

[151] Korea's second written submission, introductory statement, para. 101. Regarding the standard deviation and use of average export price issues, Korea identified these as two specific inconsistencies with the "pattern" clause that the USDOC "acted inconsistently with the 'pattern' clause in the following specific respects". Regarding the sufficiency issue, Korea asserted that "[a]n implicit finding of an unexplained test is not enough to satisfy the obligations of the second sentence of Article 2.4.2" (Korea's second written submission, para. 116). Furthermore, the relevant sub-section of Korea's second written submission is entitled "Inconsistencies in the *Washers* original investigation" (Korea's second written submission, Section III.A.5).

[152] See, for example, Appellate Body Report, *US – Carbon Steel*, para. 4.233.

[153] Korea's response to Panel question No. 4.21(ii), para. 146. Korea suggests that the issue of the USDOC's sufficiency test pertains to the "reasonable[ness]" of the *Nails II* methodology. However, there is no claim concerning the reasonableness of the *Nails II* methodology in these proceedings.

[154] *Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China:* Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. and Shandong Fufeng Fermentation Co., Ltd. (March 4, 2013) (Xanthan Gum I&D Memorandum), (Exhibit KOR-33).

[155] Korea's opening statement at the first meeting of the Panel, para. 46; Korea's response to Panel question No. 1.3, para. 19; Korea's second written submission, para. 73.

Nails II methodology applied in the *Washers* anti-dumping investigation are repeated in the application of the DPM in subsequent connected reviews, Korea also challenges them as ongoing conduct.[156] Korea indicates that the key point of its multiple challenges is to establish the WTO-inconsistency of the DPM as the underlying measure.[157] Korea indicates that its preference is for the Panel to address its claims concerning the DPM "as such".[158]

7.90. The United States disagrees that the DPM is a measure that may be challenged "as such".[159] The United States further argues that even if the DPM may be challenged "as such", it cannot be found to be inconsistent with Article 2.4.2 "as such" because it does not necessarily result in a breach of Article 2.4.2.[160] The United States asserts that the DPM cannot be challenged "as applied" in the present case, because the first administrative review of the *Washers* anti-dumping order has not yet been finalised, and it is not within the Panel's terms of reference.[161] As regards Korea's ongoing conduct claim, the United States argues that the purported ongoing conduct measure is not within the Panel's terms of reference, as it consists of an indeterminate number of future anti-dumping measures for which no final action had been taken at the time of Korea's panel request.[162] Moreover, the United States asserts that the facts in this dispute do not support the conclusion that the challenged practices "would likely continue to be applied in successive proceedings."[163]

7.91. We will first address the issue whether the DPM may be challenged "as such". If we find that the DPM may be challenged "as such", we will then proceed to examine the substance of Korea's claims regarding that measure. After that, we will address Korea's "as applied" and "ongoing conduct" claims.

7.4.1 Whether the DPM is a measure that may be challenged "as such"

7.4.1.1 Main arguments of the parties

7.4.1.1.1 Korea

7.92. Korea submits that the DPM is a rule or norm of general and prospective application that may be challenged in WTO dispute settlement proceedings. Korea asserts that the USDOC has described the nature of the DPM in writing.[164] Referring to the jurisprudence of the Appellate Body in *US – Zeroing (EC)*, Korea contends that even if the DPM is not considered to be expressed in the form of a written document, it may be challenged as an unwritten rule or norm if the complaining Member demonstrates (i) that the alleged "rule or norm" is attributable to the responding Member; (ii) its precise content; and (iii) that it has general and prospective application.[165] Korea asserts that there can be no dispute that the DPM is attributable to the United States. Korea also asserts that the precise content of the DPM, as reflected in its systematic application since the *Xanthan Gum* anti-dumping investigation, is invariable.[166] Korea asserts that the DPM also constitutes a rule or norm of general and prospective application. Korea argues in this regard that, since the DPM was first applied in an original investigation on 4 March 2013, and in an administrative review on 22 March 2013, the USDOC now applies it in all newly initiated anti-dumping investigations and administrative reviews.[167] Korea provides the Panel with a summary of 138 determinations where

[156] Korea's first written submission, paras. 180-181.
[157] Korea's second written submission, paras. 200-206; Korea's response to Panel question No. 4.22, paras. 153 and 157.
[158] Korea's second written submission, para. 233.
[159] United States' first written submission, paras. 269-319.
[160] Ibid. paras. 282-290.
[161] United States' response to Panel question 2.3, paras. 33, 35; United States' response to Panel question No. 2.8, para. 61; United States' response to Panel question No. 2.18, para. 84; United States' response to Panel question No. 2.21, para. 95; United States' Second written submission, para. 160.
[162] United States' first written submission, para. 323.
[163] Ibid. para. 324, referring to Appellate Body Report, *US – Continued Zeroing*, para. 191.
[164] Korea's first written submission, para. 184.
[165] Ibid. para. 185.
[166] Ibid. para. 186.
[167] Ibid. para. 187.

the DPM is applied (Exhibit KOR-95)[168], the Generic SAS Code which embodies the DPM (Exhibit KOR-24)[169], and an "expert opinion" (Exhibit KOR-94) which describes the precise content and the general and prospective application of the DPM.[170] Korea also asserts that the USDOC has made it clear that it will continue using the DPM going forward. According to Korea, the USDOC has stated that "[t]he Department is now using a 'differential pricing' analysis instead of the targeted dumping analysis"[171], and that it has "switched to a differential pricing analysis for preliminary results issued after March 4 [of 2013]".[172]

7.4.1.1.2 United States

7.93. The United States argues that Korea has failed to demonstrate that the DPM exists as a measure that may be challenged "as such".[173] The United States asserts that the evidence adduced by Korea is little more than a "string of cases or repeated action".[174] Such evidence contrasts sharply with the evidence put forward before the panel in *US – Zeroing (EC)*, and is insufficient to meet the "high threshold" as set out by the Appellate Body in that case.[175] The United States points out that there exist instances wherein the USDOC has not applied the DPM. For example, in the *Washers* anti-dumping investigation the *Nails II* methodology was applied.[176] Furthermore, the United States argues that the USDOC's Request for Comments shows that the USDOC "is seeking comments to further develop and/or refine its differential pricing analysis".[177] The United States adds that the Generic SAS Code submitted by Korea does not support its argument that the DPM is a measure consisting of a rule or norm of general and prospective application, because that Code is not permanent or fixed, and may be changed depending on the particular situation in a given proceeding.[178] With regards to Korea's summary of the 138 proceedings where the USDOC used the DPM in order to determine whether to use the W-T comparison methodology, the United States argues that the summary does not establish the content of the determinations or that the USDOC applied one and the same DPM in each of the 138 determinations.[179] In the view of the United States, even if Korea were to provide the Panel with actual public documentation pertaining to the 138 determinations, that would not suffice. What is needed is a "close examination of the records of the determinations".[180] The United States further points out that several elements of Korea's summary are misleading. First, the figure of 138 proceedings includes 32 preliminary determinations where the USDOC has not rendered final determinations.[181] Second, there are a few cases where the USDOC did not apply the DPM because it applied adverse facts available to a respondent, or the USDOC lacked sufficient data to apply the DPM.[182] The United States asserts that the USDOC is not applying the same DPM in case after case.[183] Finally, the United States challenges the impartiality of Korea's "expert", on the basis that

[168] List of USDOC Proceedings Applying Differential Pricing Methodology, (Exhibit KOR-95), has been updated until 12 April 2015 by Updated List of USDOC Proceedings Applying Differential Pricing Methodology, (Exhibit KOR-123), which provides an updated list of USDOC determinations applying the DPM through 12 April 2015 (see Korea's second written submission, para. 216).

[169] Korea's first written submission, para. 187 (referring to Generic SAS Code, (Exhibit KOR-24)).

[170] Korea's opening statement at the first meeting of the Panel, para. 38; and second written submission, para. 215.

[171] *Citric Acid and Certain Citrate Salts from Canada*, Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 Fed. Reg. 34338 (USDOC June 7, 2013), I&D Memorandum (Citric Acid I&D Memorandum), (Exhibit KOR-52), p. 2.

[172] *Fresh Garlic from the People's Republic of China*, Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 Fed. Reg. 36168 (USDOC June 17, 2013), I&D Memorandum, (Fresh Garlic I&D Memorandum), (Exhibit KOR-54), p. 10.

[173] United States' first written submission, para. 270.

[174] United States' second written submission, para. 150 (citing Appellate Body Report, *US – Zeroing (EC)*, para. 204).

[175] United States' first written submission, paras. 270-273.

[176] Ibid. para. 274.

[177] Ibid. para. 278 (quoting from the Differential Pricing Analysis Request for Comments (Request for Comments), (Exhibit KOR-25)).

[178] Ibid. paras. 279-281.

[179] United States' response to Panel question No. 2.30, para. 123.

[180] Ibid. para. 123.

[181] Ibid. para. 124.

[182] Ibid. para. 125.

[183] Ibid. para. 123.

she works for one of the law firms representing Korea in this dispute, and one of the respondents in the *Washers* proceedings before the USDOC.[184]

7.4.1.2 Main arguments of the third parties[185]

7.94. Brazil argues that the distinction between "as such" and "as applied" claims was a jurisprudential development to facilitate the understanding of the nature of a measure at issue. There is no limitation on the types of measures that may be challenged. According to Brazil, the criteria set out in *US – Zeroing (EC)* must be assessed on a case-by-case basis, taking into consideration not only the characteristics and the nature of the measure that is being challenged but also the period of time that the measure has been in place.[186] Furthermore, recognizing the value of "as such" claims in protecting the security and predictability to conduct future trade, Brazil considers it would be important and of systemic relevance to avoid reaching a situation similar to what WTO Members faced in the "zeroing" saga until very recently in the WTO.[187]

7.95. China submits that care is necessary in approaching the novel issues raised by Korea's challenges to both the *Nails II* methodology and the DPM. China argues that the Panel should be mindful not to go beyond the issues that are squarely before it, because elements of these methodologies not challenged in this case are, or may well be, the subject of distinct proceedings.[188]

7.96. The European Union argues that since the DPM was not applied in the *Washers* anti-dumping investigation, the Panel does not have before it the confidential documents (such as the Programme Log and Output for each exporter) that would explain precisely what was done. The European Union asserts that the Panel is therefore unable to make findings about either the existence or precise content of the DPM.[189]

7.4.1.3 Evaluation by the Panel

7.97. Korea first claims that the DPM is a rule or norm of general and prospective application, which is expressed in the form of a written document.[190] As discussed below, the DPM has been described by USDOC in a series of documents. However, Korea has not identified a single document which establishes, normatively, the content of the DPM, that the DPM is the means for applying the second sentence of Article 2.4.2, or that the DPM must be applied in all anti-dumping proceedings. Accordingly, we do not consider that the DPM may be considered as a rule or norm expressed in the form of a written document. Korea asserts that, even if the DPM is considered not to be expressed in the form of a written document, it still can be challenged "as such". In *US – Zeroing (EC)*, the Appellate Body stated that rules or norms may be challenged "as such" even if they are not expressed in the form of a written instrument.[191] The Appellate Body cautioned that, when a challenge is brought against a rule or norm that is not expressed in the form of a written document, "the very existence of the challenged 'rule or norm' may be uncertain", and its existence shall not be lightly assumed.[192] The Appellate Body articulated the following legal standard for assessing whether a complainant has proven the existence of an unwritten rule or norm of general and prospective application:

> In our view, when bringing a challenge against such a "rule or norm" that constitutes a measure of general and prospective application, a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. It is only if the complaining party meets this high threshold, and puts forward sufficient evidence with respect to each of these elements, that a panel would be in a position to find that the "rule or

[184] See United States' second written submission, para. 147.
[185] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[186] Brazil's third party oral statement, para. 12.
[187] Ibid. para. 14.
[188] China's third party submission, para. 5.
[189] European Union's third party submission, para. 60.
[190] Korea's first written submission, para. 184.
[191] Appellate Body Report, *US – Zeroing (EC)*, para. 193.
[192] Ibid. para. 196.

> norm" may be challenged, as such. This evidence may include proof of the systematic application of the challenged "rule or norm". Particular rigour is required on the part of a panel to support a conclusion as to the existence of a "rule or norm" that is *not* expressed in the form of a written document. A panel must carefully examine the concrete instrumentalities that evidence the existence of the purported "rule or norm" in order to conclude that such "rule or norm" can be challenged, as such.[193]

7.98. This legal standard has been applied by panels considering "as such" challenges in *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)*, *US – Shrimp (Viet Nam), US – Shrimp (Viet Nam II)*[194], and *Argentina – Import Measures.*[195] This standard was confirmed by the Appellate Body in *Argentina – Import Measures*.[196] Accordingly, in assessing whether the evidence presented by Korea is sufficient to prove the existence of the DPM as a measure that can be challenged "as such", we will be guided by the legal standard developed by the Appellate Body in *US – Zeroing (EC)*.[197] We will consider, in particular, whether Korea has provided sufficient evidence to clearly establish (i) that the DPM is "attributable to" the United States, (ii) the precise content of the DPM, and (iii) that the DPM has general and prospective application. We will address each of these elements in turn.

7.4.1.3.1 Attribution of the DPM to the United States

7.99. Korea asserts that there can be no dispute that the DPM is attributable to the United States.[198] The United States does not contest this. As will be explained below, the USDOC has adopted a deliberate policy of using the DPM to govern the application of the W-T comparison methodology since March 2013. Furthermore, the precise content of the DPM can be ascertained on the basis of USDOC documents.[199] Accordingly, we conclude that the DPM is attributable to the United States.

7.4.1.3.2 The precise content of the DPM

7.100. Concerning the precise content of the DPM, Korea refers to a number of USDOC memoranda pertaining to particular anti-dumping proceedings.[200] These memoranda contain statements confirming that the USDOC applied the DPM in those proceedings. They also contain a detailed description of the nature and content of the DPM applied by the USDOC in those proceedings. For example, the Post-Preliminary Analysis Memorandum in *Xanthan Gum from the People's Republic of China* describes the DPM in the following terms:

> The differential pricing analysis used in this post-preliminary analysis evaluates all purchasers, regions, and time periods to determine whether a pattern of significant price differences exists. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the customer codes reported by Fufeng. Regions are defined using the reported destination code (i.e. zip code) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the period of investigation being examined based upon the reported date of sale. For purposes of analyzing sales transactions by customer, region and time period, comparable merchandise is considered using the product control number and any characteristics of the sales, other than purchaser, region and time period, that the Department uses in making comparisons between export price (or constructed export price) and normal value for the individual dumping margins.

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[193] Appellate Body Report, *US – Zeroing (EC)*, para. 198.
[194] Panel Reports, *US – Zeroing (Japan)*, paras. 7.47-7.59; *US – Stainless Steel (Mexico)*, paras. 7.28-7.42 and 7.84-7.97; *US – Shrimp (Viet Nam)*, paras. 7.110-7.111; and *US – Shrimp II* (Viet Nam), paras. 7.29-7.56.
[195] Panel Report, *Argentina – Import Measures*, paras. 6.319-6.342.
[196] Appellate Body Report, *Argentina – Import Measures*, para. 5.107.
[197] The parties agree that this is the appropriate legal standard to be applied in the present case.
[198] Korea's first written submission, para. 186.
[199] See Exhibits KOR-24, KOR-25, KOR-33, KOR-67, KOR-52, and KOR-94.
[200] Korea's first written submission, para. 184. See also, Exhibits KOR-33, KOR-52, KOR-54 and KOR-67.

> In the first stage of the differential pricing analysis used here, the "Cohen's *d* test" is applied. The Cohen's *d* test is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group. First, for comparable merchandise, the Cohen's *d* test is applied when the test and comparison groups of data each have at least two observations, and when the sales quantity for the comparison group account for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen's *d* coefficient is calculated to evaluate the extent to which the net prices to a particular purchaser, region or time period differ significantly from the net prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen's *d* test: small, medium or large. Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. The difference was considered significant if the calculated Cohen's *d* coefficient is equal to or exceeds the large (i.e. 0.8) threshold.
>
> Next, a ratio test assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66 percent or more of the value of total sales, then the identified pattern of export prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen's *d* test as an alternative to the average-to-average method. If 33 percent or less of the value of total sales passes the Cohen's *d* test, then the results of the Cohen's *d* test do not support consideration of an alternative to the average-to-average method.
>
> If both tests in the first stage (i.e. the Cohen's *d* test and the ratio test) demonstrate the existence of a pattern of export prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, we examine whether using only the average-to-average method can appropriately account for such significant price differences. In considering this question, the Department tests whether using an alternative method, based on the results of the ratio test described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average to- average method only. If the difference between the two calculations is meaningful, this demonstrates that the average-to-average method cannot account for price differences such as those observed in this analysis, and, therefore, an alternative method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if 1) there is a 25 percent relative change in the weighted-average dumping margin between the average-to-average method and the alternative method, or 2) the resulting weighted-average dumping margin moves across the *de minimis* threshold.[201]

7.101. The description above clearly identifies three main components of the DPM: (i) the Cohen's *d* test, (ii) the ratio test, and (iii) the "meaningful difference" test. The Cohen's *d* test considers whether price differences exhibited among different purchasers, regions, or time periods are significant. The ratio test assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. Finally, the "meaningful difference" test examines whether using only the W-W comparison methodology can appropriately account for such significant price differences.

7.102. The Issues and Decision Memoranda in *Citric Acid and Certain Citrate Salts from Canada* (Exhibit KOR-52), *Fresh Garlic from the People's Republic of China* (Exhibit KOR-54) and *Xanthan*

[201] *Xanthan Gum* Post-Preliminary Analysis Memorandum, (Exhibit KOR-33), pp. 3-5.

*Gum from the People's Republic of China (*Exhibit KOR-67)[202] also describe the nature and content of the DPM applied by the USDOC in those proceedings in largely identical terms. The substantive content of the DPM in each of these Issues and Decision memoranda is identical: (i) the Cohen's *d* test, (ii) the ratio test, and (iii) the "meaningful difference" test. These Issues and Decision Memoranda constitute evidence of the precise content of the DPM as applied by the USDOC in general.

7.103. Korea also refers to the fact that the USDOC sought comments on the DPM in the form of a Request for Comments on the DPM (Exhibit KOR-25). Korea asserts that the USDOC's summary of the DPM in the Request for Comments establishes the precise content of the DPM as a measure. We agree, for the USDOC's Request for Comments on the DPM describes the application of the DPM in terms almost identical to those in the abovementioned Issues and Decision Memoranda, referring in particular to (i) the Cohen's *d* test, (ii) the ratio test, and (iii) the "meaningful difference" test.

7.104. In addition, Korea provides further details of the precise content of the DPM through an opinion of a practitioner on the USDOC's Generic SAS Code.[203] Korea refers in this regard to an affidavit from Ms Anya Naschak[204], an International Trade Analyst with the law firm representing Korea before this Panel, and formerly an analyst with the USDOC (Exhibit KOR-94).[205] In her affidavit, Ms Naschak describes in detail how the Generic SAS Code implements the DPM.[206] In particular, Ms Naschak identifies the following eight separate "steps" in the Generic SAS Code:

> Step 1: Calculate the average weighted mean price for a particular product model (i.e. CONNUM) in the tested group (i.e. customer, region or time) (for example, Model 8 for the first quarter of the year (1Q).
>
> Step 2: Calculate the average weighted mean price for the remainder of the test group (not including those transactions being tested) (that is, for example, the average weighted mean price for Model 8 for all other quarters (2Q, 3Q and 4Q).
>
> Step 3: Calculate the standard deviation for all transactions for the particular model (e.g. Model 8) (including those being tested), and also calculate the Cohen's *d* test for all model (CONNUM)-basis (time, customer or region) pricing.
>
> Step 4: Insert the results of Step 1, Step 2 and Step 3 into Commerce's differential pricing test.
>
> Step 5: Determine all CONNUM-basis pricing that have a Cohen's *d* result more than the absolute value of 0.8 (in other words, more than +0.8 or less than -0.8), and then flag all individual sales transaction in those CONNUMs accordingly (e.g. "Pass" or "No Pass" based on the results).

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[202] The USDOC announced the new policy in March 2013 in the in the *Xanthan Gum* Post-Preliminary Analysis Memorandum (Exhibit KOR-33), and then finalized its application in the *Xanthan Gum* case in June 2013 in the Issues and Decision Memorandum issued in conjunction with the final determination (Exhibit KOR-67).

[203] The Generic SAS Code is a standard computer code that is used by the USDOC to calculate dumping margins in anti-dumping investigation and reviews. It is publicly available from the USDOC website (see Anti-Dumping Margin Calculation Programs, Targeted Dumping Macros (Generic SAS Code), USDOC website accessed 18 September 2014 <http://enforcement.trade.gov/sas/programs/amcp.html> (Exhibit KOR-24); see Korea's response to Panel question No. 1.3, paras. 29-30).

[204] Korea's response to Panel question No. 1.3, para. 31.

[205] The United States argues that Ms Naschak's affidavit cannot be viewed as "evidence" from an impartial or independent source, because Ms Naschak works for one of the law firms representing Korea in this dispute and one of the respondents in the proceedings before the USDOC. In our view, the fact that Ms Naschak works for one of the law firms representing Korea in this dispute and one of the respondents in the proceedings before the USDOC is not in itself a reason for us to exclude her affidavit. This is particularly so in light of the fact that the United States has not contested the relevance and correctness of any substantive elements of Ms Naschak's affidavit, and the credentials of Ms Naschak as an expert. Moreover, we note that in *US – Shrimp II (Viet Nam)*, the panel took into account, *inter alia*, an affidavit by Ms Naschak in relation to the USDOC's use of zeroing in three administrative reviews (see Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.44).

[206] Affidavit of Ms Anya Naschak, (Exhibit KOR-94), paras. 17-26.

> Step 6: Determine percentage of the total U.S. sales transactions (by value) that meet Step 5.
>
> Step 7: Calculate overall AD margin three ways: (a) not applying [the W-T comparison methodology], (b) applying [the W-T comparison methodology] to only those U.S. sales transactions included in Step 5 and (c) applying [the W-T comparison methodology] to all U.S. sales transactions (regardless of whether they are or are not included in Step 5).
>
> Step 8: Determine whether the results of Step 7 result in a "meaningful difference" in the margin, defined as either (a) crossing the *de minimus* threshold; or (b) resulting in a 25% relative change in the margin between applying [the W-T comparison methodology] and not.[207]

7.105. In her affidavit, Ms Naschak also explains that the DPM is enshrined in the Generic SAS Code's "Macros Program", which is not subject to changes by individual case analysts handling anti-dumping investigations and reviews. Based on her personal involvement and analysis of the Generic SAS Code as applied in four USDOC preliminary and final determinations over a two-year time span from March 2013 to March 2015[208], Ms Naschak confirms that the SAS code used to apply the DPM in each of these cases was identical in all material respects. Her affidavit also directs our attention to certain actual SAS code language that was utilized in the abovementioned proceedings. That code language was identical in each case, and identical to the Generic SAS Code. We observe that the relevant Generic SAS Code confirms the description of the DPM in the abovementioned Issues and Decisions Memoranda and the USDOC's Request for Comments. In particular, Steps 1-5 above correspond to the Cohen's *d* test; Steps 6 and 7 correspond to the ratio test; Step 8 corresponds to the "meaningful difference" test.

7.106. The United States argues that the Generic SAS Code does not support Korea's argument that the DPM is a measure consisting of a rule or norm of general and prospective application, because this Generic SAS Code is not permanent or fixed, and may be changed depending on the particular situation in a given proceeding. However, in response to our question regarding the type of changes to the DPM that can be made by government officials handling an anti-dumping investigation or review, the United States referred only to possible modifications concerning the default group definitions (i.e. how purchasers, regions and time periods are defined), where such changes can be or have been made.[209] The United States did not indicate that changes could have been made regarding the Cohen's *d* test, the ratio test, or the "meaningful difference" test.

7.107. Based on a careful review of the entirety of the evidence above, we consider that the description of the DPM contained therein is precise and complete. The evidence explains in detail the methods applied to determine the existence of a "pattern of export prices which differs significantly among different purchasers, regions or time periods", and whether the identified pattern of significant price differences cannot be appropriately taken into account by the W-W or T-T comparison methodologies. The evidence also demonstrates that the DPM is applied in a consistent manner. The three main components of the DPM, namely (i) the Cohen's *d* test, (ii) the

[207] Affidavit of Ms Anya Naschak, (Exhibit KOR-94), para. 22.

[208] These are (1) *Xanthan Gum from China* (final determination dated May 28, 2013); (2) *Diffusion-Annealed Nickel-Plated Steel from Japan* (final determination April 3, 2014); (3) *Frozen Warmwater Shrimp from Vietnam* (final determination September 19, 2014); and (4) *Washers from Korea* (preliminary results March 2, 2015).

[209] United States' response to Panel question No. 4.26, paras. 106 and 108. We observe that this feature of the DPM is not challenged by Korea. The United States refers to an administrative review of the anti-dumping duty order on seamless refined copper pipe and tube from China, in which the USDOC changed the default definition of time period from quarterly to monthly upon determining that a respondent's export pricing was tied to a published monthly index for copper prices on the London Metals Exchange during a period of significant volatility for copper prices. See *Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 Fed. Reg. 23,324 (April 28, 2014), (Exhibit USA-96); and accompanying Issues and Decision Memorandum, comment 6, (Exhibit USA-97), p. 13. In an administrative review of the anti-dumping duty order on pasta from Italy, the USDOC also changed its default setting for consolidated customer code to individual customer code upon determining that a respondent maintained distinct price lists and rebates for each sub-entity that was part of a larger consolidated company. See *Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 Fed. Reg. 8,604 (February 18, 2015), (Exhibit USA-98), and accompanying Issues and Decision Memorandum, comment 4, (Exhibit USA-99), p. 5.

ratio test, and (iii) the "meaningful difference" test, feature throughout the evidence supplied by Korea, and are described in virtually identical terms on each occasion. These main components were also included in the United States' own description of the DPM applied in the first administrative review of the *Washers* anti-dumping duty order.[210] Furthermore, the United States has not contested any aspect of Korea's description of the DPM as being imprecise or incorrect.

7.108. Accordingly, we conclude that Korea has established the precise content of the DPM.

7.4.1.3.3 General and prospective application of the DPM

7.109. The abovementioned Issues and Decision Memoranda contain statements indicating that the USDOC has adopted a policy choice of applying the DPM since 4 March 2013. For example, the USDOC stated shortly after that date that "[t]he Department is now using a 'differential pricing' analysis instead of the targeted dumping analysis"[211], and that it has "switched to a differential pricing analysis for preliminary results issued after March 4".[212] Furthermore, in its Request for Comments on the DPM, the USDOC states clearly that:

> [T]he Department is developing a new approach for determining whether application of such a comparison method is appropriate in a particular segment of a proceeding pursuant to 19 CFR 351.414(c)(1) and consistent with section 777A(d)(1)(B) of the Act. The new approach is referred to as the "differential pricing" analysis, as a more precise characterization of the purpose and application of section 777A(d)(1)(B) of the Act.[213]

7.110. We take particular note of the USDOC's reference to the DPM as the "new approach" for determining whether to apply the W-T comparison methodology. This indicates that the USDOC has adopted a policy choice of applying the DPM, going beyond the simple repetition of the application of that methodology in isolated cases. As previous panels have done[214], we consider such policy statements as evidence of the general and prospective nature of the DPM.

7.111. Korea also relies on a summary of 138 instances in which the DPM has been applied in anti-dumping proceedings since 4 March 2013. The United States argues that Korea must provide a "close examination of the records of the determinations"[215] to discharge its burden of proof that one and the same DPM was applied in all of these cases. Although we agree with the United States that the burden of proving the general and prospective application of the DPM rests on Korea, we find the United States' approach to be unduly restrictive and burdensome.[216] We note that Korea offered, at the first meeting of the Panel, to provide all public documentation pertaining to the USDOC's application of the DPM in 138 anti-dumping proceedings.[217] We do not consider that such an exercise is warranted or necessary in the present dispute. We observe that the summary of the relevant proceedings provided by Korea contains most, if not all, pertinent information relevant to the issue before the Panel: whether the DPM was applied in the determinations, the results of the application of the Cohen's *d* and the ratio tests, the outcome of the "meaningful difference" test, and the final comparison methodology applied by the USDOC in each of these determinations. The summary provided by Korea confirms that the DPM was applied in all of these determinations,

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[210] United States' response to Panel question No. 2.3, paras. 44-58. Referring to the *Washers* AD Administrative Review Preliminary Decision Memo and the Preliminary LG AD Review Calculation Memo, the United States described the way in which the USDOC used the Cohen's *d* test to consider whether price differences exhibited among different purchasers, regions or time periods are significant, and the way in which the USDOC used the ratio test to determine whether the "pattern" clause of the second sentence of Article 2.4.2 was satisfied. The United States' description confirms the content of the DPM as described in the other evidence, and reflects the application of the DPM to a particular set of facts.

[211] Citric Acid I&D Memorandum, (Exhibit KOR-52).

[212] Fresh Garlic I&D Memorandum, (Exhibit KOR-54).

[213] Request for Comments, (Exhibit KOR-25), p. 26722.

[214] See Panel Reports, *US – Zeroing (Japan)*, para. 7.52; *US – Stainless Steel (Mexico)*, paras. 7.40 and 7.95; and *US – Shrimp (Viet Nam)*, para. 7.112.

[215] United States' response to Panel question No. 2.30, para. 123.

[216] The United States has not challenged any of these summaries.

[217] Korea's opening oral statement at the first meeting of the Panel, para. 41.

except where its application was not necessary given that the USDOC applied adverse facts available or where there were insufficient comparable sales data.[218]

7.112. The United States also argues that certain aspects of the summary of the proceedings provided by Korea are misleading. First, the United States refers to the fact that 32 out of the 138 determinations are preliminary determinations for which the final determinations are not published yet. However, the preliminary nature of these determinations does not change the fact that the DPM has been applied systematically in all proceedings initiated after 4 March 2013. Second, the fact that the DPM was not applied when the USDOC applied adverse facts available, or when there was not sufficient data to apply the DPM, should not be determinative. The United States does not contest that the USDOC applied the DPM in all cases where the potential application of the W-T comparison methodology could have been considered. Nor has the United States suggested that the USDOC would have used some methodology other than the DPM for applying the second sentence of Article 2.4.2, in cases where facts available were used, or where the relevant data was not available.

7.113. Korea also relies on the affidavit of Ms Naschak that the DPM is "a well-defined policy enshrined in the SAS Code that is being applied consistently and without any material change in every antidumping proceeding before the USDOC".[219] We recall that the United States argues that the Generic SAS Code submitted by Korea does not support the general and prospective application of the DPM because it may be changed depending on the particular situation in a given proceeding. However, while not identifying any material change to the DPM, the United States only emphasized in general terms the "continuing evolution of the USDOC's approach to determining whether to apply the alternative, average-to-transaction comparison methodology" as evidenced by its request for comments and the possibility for interested parties to make comments on the DPM in the first administrative review of the *Washers* anti-dumping duty order.[220]

7.114. Finally, we note that the United States argues for an "appropriately broad view" of the evidence by taking into account all methodologies historically used to determine whether or not to resort to the W-T comparison methodology, including those that were applied before the DPM was introduced, such as the *Nails II* methodology.[221] We are not persuaded by this broad view proposed by the United States. As mentioned above, the United States itself refers to the DPM as the "new approach" to determining whether the W-T comparison methodology should be applied. We have also found that the precise content of this "new approach" to applying the second sentence of Article 2.4.2 can be ascertained, as distinct from other methodologies previously used by the USDOC when applying the second sentence of Article 2.4.2. Therefore, our analysis shall focus on the DPM itself, as distinct from other methodologies previously applied by the USDOC for the application of the second sentence of Article 2.4.2.

7.115. We recall the Appellate Body's statement in *US – Zeroing (EC)* that a panel should not lightly assume the existence of a rule or norm constituting a measure of general and prospective application, particularly where the rule or norm at issue is not expressed in written form. In our view, the entirety of the evidence discussed above meets the high threshold referred to by the Appellate Body. It clearly demonstrates that the USDOC's application of the DPM represents a policy choice that extends well beyond the mere repetition of the methodology in certain specific cases. Furthermore, in its response to our question, the United States could not identify any investigation or review initiated after 4 March 2013 where, in determining whether to apply the W-T comparison methodology, the USDOC applied some methodology other than the DPM.[222]

7.116. For the above reasons, we are satisfied that the DPM has general and prospective application.

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[218] The Cohen's *d* test component of the DPM is applied when the test and comparison groups of data each have at least two observations and when the sales quantity for the comparison group account for at least 5% of the total sales quantity of the comparable merchandise. See para. 7.100. above.

[219] Affidavit of Ms Anya Naschak, (Exhibit KOR-94), para. 33. See also Korea's response to Panel question No. 1.3, para. 31.

[220] United States' response to Panel question No. 4.26, paras. 109 and 110.

[221] United States' response to Panel question No. 2.30, para. 122.

[222] United States' response to Panel question No. 4.27. The United States refers to two instances where group definitions have been changed, and several instances where the *Nails II* methodology has been used in administrative reviews initiated *before*, but completed after the final determinations were published in *Xanthan Gum* on 4 June 2013.

7.4.1.3.4 Conclusion

7.117. In light of the above, we conclude that the evidence advanced by Korea supports a finding that Korea has clearly established (i) that the DPM is attributable to the United States, (ii) the precise content of the DPM, and (iii) that the DPM has general and prospective application. Accordingly, we conclude that the DPM is a measure that may be challenged "as such".

7.4.2 Claims concerning the WTO-consistency of the DPM "as such"

7.4.2.1 The alleged inconsistencies concerning the DPM

7.118. Korea claims that the DPM is inconsistent with the second sentence of Article 2.4.2 in five aspects[223]:

a. the DPM applies fixed numerical criteria to determine whether there is a "pattern", and categorically rejects the relevance to its inquiry of the commercial context in which the alleged "pattern" arises;

b. the DPM fails to provide any adequate explanation as to why the significant price differences cannot be taken into account appropriately by using the W-W or T-T comparison methodology[224];

c. the DPM applies the exceptional comparison methodology to transactions that do not meet its own criteria for determining "differential pricing"[225];

d. the DPM does not identify a "pattern" of significant price differences among different purchasers, regions or time periods, but simply compares each individual transaction with the exporter's other export prices ;

e. the DPM sets any negative W-W comparison result to zero when aggregating the two intermediate dumping calculations when applying a mixed comparison methodology[226].

7.119. Regarding aspects a. to c. in the paragraph above, Korea essentially makes the same legal arguments that it makes with respect to the application of the *Nails II* methodology in the *Washers* anti-dumping investigation.[227] Equally, the United States responds in similar terms to its response to Korea's claims regarding the *Washers* anti-dumping investigation.[228] We refer to our findings in section 7.3 above, which apply *mutatis mutandis* in the context of the DPM. For the same reasons, we find that:

a. the DPM is not inconsistent "as such" with the second sentence of Article 2.4.2 by determining the existence of "a pattern of export prices which differ significantly" among

[223] Korea's first written submission, para. 128; Korea's response to Panel question No. 4.22, paras. 154-156.

[224] As mentioned above at para. 7.100. , the "meaningful difference" test is one of the three main components of the DPM. Under this test, the USDOC concludes that the W-W comparison methodology cannot appropriately take into account the observed pattern of significantly different prices where the respondent's dumping margin using the W-W comparison methodology and the W-T comparison methodology yields a "meaningful difference". The USDOC defines "meaningful" as a 25% relative change in the weighted-average dumping margin between the W-W and W-T comparison methodologies where both rates are above *de minimis*, or the resulting weighted-average dumping margin moves across the *de minimis* threshold. The DPM does not address at all why the T-T comparison methodology cannot take into account appropriately the pattern of significantly differing prices found to exist. See Korea's first written submission, para. 197. We recall that the United States does not contest any aspect of Korea's description of the DPM, including the "meaningful difference" test that is used to apply the explanation clause.

[225] As mentioned above at para. 7.100. , the USDOC applies the W-T comparison methodology to all export transactions when the result of the ratio test is above 66%.

[226] We recall that where the result of the ratio test is between 33% and 66%, the DPM will lead to the application of a mixed comparison methodology.

[227] Korea's first written submission, paras. 190-200; Korea's response to Panel question No. 4.22, para. 155.

[228] United States' first written submission, paras. 293-311.

purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences;

b. the DPM is inconsistent "as such" with the explanation clause of the second sentence of Article 2.4.2 because, in applying the "meaningful difference" test, the DPM focuses on the difference between the margin of dumping calculated with the W-W comparison methodology and the margin calculated using the W-T comparison methodology or the mixed comparison methodology. The DPM fails to provide for any consideration of whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping. However, the DPM is not inconsistent with the explanation clause when, after the USDOC concludes that the W-W comparison methodology cannot appropriately take into account the observed pattern of significantly different prices, the DPM does not require the USDOC to also consider whether the relevant price differences could be taken into account appropriately by the T-T comparison methodology;

c. the DPM is inconsistent with the second sentence of Article 2.4.2 because it applies the W-T comparison methodology to all transactions where the value of transactions to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66% or more of the value of total sales, including transactions falling outside the "pattern[s] of export prices which differ significantly among different purchasers, regions or time periods".

7.120. Having considered Korea's claims under aspects a. to c. above, we move to address Korea's claims under aspects d. and e.

7.4.2.2 Whether the DPM aggregates random, unrelated price differences

7.4.2.2.1 Main arguments of the parties

7.4.2.2.1.1 Korea

7.121. Korea claims that the DPM is inconsistent with the pattern clause, because the DPM aggregates random, unrelated price differences, without properly identifying "a pattern of export prices which differ significantly among different purchasers, regions or time periods".[229] According to Korea, the pattern clause requires that a pattern be established among different purchasers, regions or time periods as distinct categories, in the sense that the pattern must be discernible:

a. as between one purchaser and all other purchasers; or

b. as between one region and all other regions; or

c. as between one time period and all other time periods.[230]

7.122. Korea argues that the DPM does nothing more than measure the amount of price variation that can be found within an exporter's sales by aggregating random, unrelated price differences of every possible type and combination.[231] By doing this, the DPM does not identify a meaningful pattern which can serve as the basis to apply the W-T comparison methodology.[232] Korea identifies three distinct respects in which the DPM fails to identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods".[233] Korea refers to these as vertical variation[234], horizontal variation[235] and cross-category variation[236], respectively.

7.123. Concerning the vertical variation aspect, Korea argues that the DPM does not analyse whether export prices differ at the level of particular purchasers, regions or time periods. Instead,

[229] Korea's first written submission, paras. 201-202.
[230] Ibid. para. 210.
[231] Ibid. paras. 202 and 213; second written submission, para. 121.
[232] Korea's first written submission, paras. 213 and 216.
[233] Ibid. para. 203.
[234] Ibid. paras. 217-221.
[235] Ibid. paras. 222-226.
[236] Ibid. paras. 227-233.

the analysis of price variation takes place at the level of individual models (i.e. control number (CONNUM[237])) without ever determining whether export prices differ among different purchasers, regions or time periods.[238] Korea argues that the reference to "a pattern of export prices" in the second sentence of Article 2.4.2 should be understood to refer to a pattern of export prices for the product under investigation, not to a pattern that is discerned from the export prices for only certain models and sub-types of the product under investigation.[239]

7.124. In Korea's view, the USDOC is entitled to analyse price variation at the level of individual models, as an intermediate step, to ensure that the analysis is based on export prices for comparable transactions. However, the USDOC must take into account the price variation, or lack thereof, for all models in order to reach an ultimate determination whether there is a pattern. Otherwise the USDOC may incorrectly identify a "pattern" when in fact the export prices do not differ in any significant respect.[240]

7.125. Concerning the horizontal variation aspect, Korea argues that the DPM aggregates price variation across all purchasers (or regions or time periods, as the case may be) to establish a "pattern", where no one of these purchasers (or regions or time periods, as the case may be), on its own, has a sufficient amount of "passed" price variation to meet the 33% threshold that the USDOC uses to identify a "pattern".[241] Korea contends that this renders the DPM incapable of evaluating whether the export prices to a particular purchaser, region or time period must be distinct from the prices to all other purchasers, regions or time periods, respectively.[242] Korea argues that this practice is incompatible with the meaning of "a pattern of prices which differ significantly among different purchasers, regions or time periods".

7.126. Furthermore, Korea argues that to exhibit a "pattern", the price differences must follow some sort of discernible sequence and may not reflect random or spurious price fluctuations.[243] Using a hypothetical example of the DPM, Korea contends that the aggregation of "passed" transactions which spread across different purchasers, and which can be either too high or too low, amounts to random or spurious price fluctuations lacking any meaningful pattern.[244]

7.127. Concerning the cross-category variation aspect, Korea asserts that by aggregating price variation among purchasers, regions and time periods, the DPM undertakes an "apples and oranges" analysis of unrelated price variation.[245] Korea asserts that this is inconsistent with the ordinary meaning of the second sentence, which plainly contemplates that purchasers, regions and time periods are three distinct categories – not categories that can be added together to identify a "pattern".[246]

7.4.2.2.1.2 United States

7.128. The United States argues that the USDOC's previous *Nails II* methodology focused only on lower-priced export sales. However, Article 2.4.2 does not require the "targeted dumping" approach to the "pattern" analysis.[247] The United States contends that the DPM seeks to identify a "pattern", rather than a "target". The terms "targeting" or "targeted dumping" are not present in Article 2.4.2, and are just one example of a "pattern", which is expressly provided for in Article 2.4.2.[248] Therefore, the conceptual framework of the DPM, which looks for export prices

[237] The panel in *US – Zeroing (EC)* described the USDOC's use of CONNUM as follows:

The investigating authority, as well as determining the overall product scope of the proceeding (also referred to as subject product or subject merchandise), will, in applying the weighted average-to-weighted average comparison method, identify those sales of sub-products in the United States considered "comparable", and will include such sales in an "averaging group". An averaging group consists of merchandise that is identical or virtually identical in all physical characteristics. Each category of sub-product within the subject merchandise is assigned a control number, or CONNUM. (Panel Report, *US – Zeroing (EC),* para. 2.3).

[238] Korea's first written submission, paras. 203 and 216.
[239] Ibid. para. 219.
[240] Ibid. para. 221.
[241] Ibid. paras. 222-223.
[242] Ibid. para. 224.
[243] Ibid. para. 224.
[244] Ibid. para. 226.
[245] Ibid. paras. 203 and 222-233.
[246] Ibid. para. 230.
[247] United States' second written submission, para. 166.
[248] Ibid. para. 165.

which are either significantly higher or significantly lower, is consistent with the terms of the pattern clause of the second sentence of Article 2.4.2.[249] According to the United States, the DPM reflects an approach that hews closely to the text of the second sentence of Article 2.4.2.[250] The United States contends that normal values and dumping are not relevant to the question of the existence of a "pattern" of export prices which differ significantly because either lower-priced or higher priced export sales may be less than normal value, and either lower-priced or higher priced export sales may be more than normal value. A "pattern" of export prices which differ significantly does not provide evidence of dumping or the masking of dumping. Rather, it only establishes that conditions exist in the export market in which "masked dumping" could occur.[251]

7.129. Concerning the vertical variation aspect, the United States maintains that Korea's arguments are based on a flawed legal premise. According to the United States, the second sentence of Article 2.4.2 requires the identification of a "pattern" rather than a "target". Nothing in the "pattern clause" requires the investigating authority to find that all of the export sales to one particular purchaser (or region or time period) *as a whole* differ significantly from those to other purchasers (or regions or time periods).[252] The United States agrees with Korea that the "pattern" shall be determined for the product under investigation as a whole and that the analysis of the price variation at the level of individual model is a necessary intermediate step. The United States points out that that is exactly why the USDOC has aggregated the results of the model-specific comparisons in the ratio test to ensure that the "pattern" identified is for the product under investigation as a whole, and is based on the exporter's overall pricing behaviour in the U.S. market.[253]

7.130. Concerning the horizontal variation aspect, the United States denies that the USDOC improperly combines price variation across different purchasers (or regions or time periods). The United States argues that there is no textual support in Article 2.4.2 for Korea's contention that there must be a significant difference between the export prices to one purchaser and the export prices to all other purchasers. According to the United States, the use of the word "among" in the "pattern clause" under Article 2.4.2 contemplates a holistic analysis of the exporter's pricing behaviour for the product as a whole.[254]

7.131. Concerning the cross-category variation aspect, the United States argues that nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 suggests that the significant export price differences among purchasers (or regions or time periods) cannot be cumulated with the significant differences in export prices among other categories when assessing whether there exists "a pattern of export prices which differ significantly among purchasers, regions or time periods".[255] The United States contends that by aggregating the results across the three categories, the USDOC was not undertaking an "apples and oranges" analysis of unrelated price variation, but considering the pricing behaviour of the exporter in the Unites States market as a whole.[256] The United States further asserts that Korea's approach that a "pattern" of significant price differences must be established for one purchaser against all other purchasers is inconsistent with the Appellate Body's guidance that a dumping margin must be exporter-specific and determined for the product as a whole.[257]

7.4.2.2.2 Main arguments of the third parties[258]

7.132. Brazil argues that not all "pattern(s) of export prices that differ significantly" matter for the purpose of resorting to the W-T comparison methodology. Brazil contends that any decision about the existence of "a pattern of export prices which differ significantly" for the purpose of the second sentence of Article 2.4.2 must be based on criteria of analysis coherent with the object and purpose of the Anti-Dumping Agreement.

[249] United States' second written submission, para. 167.
[250] Ibid. para. 170.
[251] Ibid. para. 168.
[252] Ibid. para. 179.
[253] Ibid. paras. 180-181.
[254] Ibid. paras. 184-185.
[255] Ibid. para. 186.
[256] Ibid. para. 187.
[257] Ibid. para. 188.
[258] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.

7.133. Canada argues that the use of the disjunctive "or" in the term "among purchasers, regions or time periods" means that the three categories are distinct.[259] Canada contends that by aggregating the results of comparisons of export prices to purchasers, regions and time periods, the USDOC ignores the requirement that a pattern of significantly different export prices must be identified with respect to one of these categories.[260]

7.134. China argues that the question whether export prices "differ significantly" in any of the three categories so as to form a relevant pricing "pattern" must be answered by examining the differences severally within the categories of purchaser, region or time period and not by combining unrelated price differences across different purchasers, regions or time periods.[261]

7.135. With respect to the alleged vertical variation problem, the European Union asserts that a targeted dumping determination must ultimately be made with respect to the product as a whole (in relation to a particular exporter). With respect to the alleged horizontal variation problem, the European Union considers that adjacent regions, related purchasers and adjacent time periods may be considered as one and cumulated for the purpose of establishing a "pattern" of export prices which differ significantly. With respect to the alleged cross-category variation problem, the European Union finds it difficult to understand the justification for combining data that are not generated on the basis of equivalent parameters.[262]

7.136. Japan disagrees with the United States' understanding that a pattern within the meaning of the second sentence of Article 2.4.2 includes both lower and higher prices that differ significantly from each other.[263] Japan notes that the Appellate Body has clarified that the role of the second sentence of Article 2.4.2 is to "enable investigating authorities to capture pricing patterns constituting 'targeted dumping'" and "unmask" such targeted dumping.[264] Japan argues that the DPM cannot identify targeted dumping with "a disorderly mixture of higher and lower prices across all purchasers, regions and time periods as well as across different models".[265] Japan further argues that simply extracting and aggregating unrelated variation in export prices among various models across different purchasers, regions and time periods without contextualizing or interpreting such variation into a discernible form or sequence, is very different from identifying a pattern as defined in terms of different purchasers, regions or time periods.[266]

7.137. Viet Nam shares the concerns expressed by Korea over the vertical variation, horizontal variation and cross-category variation issues.[267]

7.4.2.2.3 Evaluation by the Panel

7.138. The DPM analyses any given export transaction in three different ways (by purchaser, region and time period respectively) in order to identify six possible types of price variation that the USDOC considers to pass the Cohen's *d* test: 1) prices that are too high (i.e. where the Cohen's *d* coefficient is greater than 0.8) to a particular purchaser; 2) prices that are too low (i.e. where the Cohen's *d* coefficient is lower than -0.8) to a particular purchaser; 3) prices that are too high to a particular region; 4) prices that are too low to a particular region; 5) prices that are too high during a particular time period; and 6) prices that are too low during a particular time period.[268] In assessing the extent of the significant price variation by using the ratio test, the USDOC aggregates the value of these six different types of price variation, and measures this aggregated value against the total value of export sales. If the aggregated value is more than 33%

[259] Canada's third party submission, para. 26.
[260] Canada's third party oral statement, para. 6.
[261] China's third party submission, para. 25.
[262] European Union's third party submission, paras. 73-76.
[263] Japan's third party submission, para. 40.
[264] Ibid. (citing Appellate Body Reports, *US – Stainless Steel (Mexico)*, para. 127; and *US – Zeroing (Japan)*, para. 133).
[265] Japan's third party submission, para. 39.
[266] Ibid. para. 26.
[267] Viet Nam's third party oral statement, para. 15.
[268] Unlike the *Nails II* methodology, the USDOC applies the DPM automatically, without the need for specific allegation from the domestic industry of targeted dumping to a particular purchaser, region or during a particular period of time.

of the total value of export sales, the USDOC considers a pattern to exist.[269] Korea argues that the DPM merely measures the amount of the price variation, instead of identifying a "pattern".[270] Korea further identifies three respects in which the DPM fails to identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods":

a. By analysing price variation only at the level of individual models of the product concerned, the DPM does not analyse whether export prices differ significantly at the level of particular purchasers, regions or time periods (the so-called "vertical variation" issue);

b. By aggregating price variation across all purchasers (or across regions or across time periods), the DPM does not analyse whether export prices differ among different purchasers, regions or time periods (the so-called "horizontal variation" issue);

c. By aggregating price variation among the three different categories, the DPM undertakes an "apples and oranges" analysis of unrelated price variation (the so-called "cross-category variation" issue).[271]

7.139. The recurring theme of the alleged vertical, horizontal and cross-category variation issues identified by Korea is that the DPM does not identify a "pattern" for a particular purchaser, region or time period.[272]

7.140. Korea argues that the pattern must be identified among different purchasers, regions or time periods as distinct categories, in the sense that the "pattern" must be discernible from price differences as between one purchaser and all other purchasers, or as between one region and all other regions, or as between one time period and all other time periods. In contrast, the United States asserts that identifying a "pattern" for the exporter and product as a whole among different purchasers, regions and time periods requires examining the exporter's export sales holistically and in the aggregate, across the categories. Moreover, the parties disagree on whether a "pattern" consists of a subset of prices found to differ significantly among different purchasers, regions or time periods, or consists of all of the exporter's export sales.

7.141. According to the second sentence of Article 2.4.2, one of the conditions for applying the W-T comparison methodology is the identification of "a pattern of export prices which differ significantly among different purchasers, regions or time periods". In our view, the phrase "among different purchasers, regions or time periods" determines the question of how the relevant "pattern" must be identified. The use of the disjunctive "or" in this phrase is significant, as its ordinary meaning indicates that a "pattern" can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods. This excludes the possibility of establishing a "pattern" *across* the three categories cumulatively. We find support for this approach in the Appellate Body's previous clarification that there are "three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods".[273] The Appellate Body did not identify any other types of "targeted" dumping.

7.142. We also emphasise the use of the word "among" in the second sentence of Article 2.4.2. According to its dictionary meaning, the word "among" is "used when you are mentioning a

[269] See para. 7.100. above, which provides a description of the DPM; Exhibit KOR-25, where the USDOC summarizes the DPM similarly; and United States' response to Panel question 2.3, paras. 49-57, where the United States summarizes the DPM.

[270] Korea's first written submission, para. 202; second written submission, para. 121.

[271] Korea's first written submission, para. 203.

[272] We note that Korea itself also views the vertical, horizontal and cross-category variation problems as three distinct aspects of the overarching failure of the DPM to identify the necessary pattern for resorting to the W-T comparison methodology. Korea considers the vertical, horizontal and cross-category variation problems as the "three respects in which the differential pricing methodology fails to identify a 'pattern'" (Korea's first written submission, para. 203). Korea also argues that "[w]hat these three flaws reflect is the fact that no aspect of the differential pricing methodology seeks to identify a pattern of export prices which differ significantly among different purchasers, regions or time periods, as the second sentence requires" (Korea's first written submission, para. 235).

[273] Appellate Body Report, *EC – Bed Linen*, para. 62. We are mindful of the fact that the terms "target" or "targeted dumping" are not used in the second sentence of Article 2.4.2. However, it is a generally held view as confirmed by the Appellate Body that the second sentence of Article 2.4.2 is intended to allow authorities to unmask targeted dumping.

particular person or thing *in relation to the rest of the group they belong to*".[274] The use of the word "among" thus emphasises membership of a group, and the notion of belonging to that group. We are of the view that something belongs to a group when it shares certain common characteristics with the other members of that group, or has some form of relationship with them. As a result, a "pattern" of significant price differences "among" different purchasers must be found in the price variation within a group of purchasers, as between one or more particular purchasers in relation to all other purchasers of the same group. The same is true for a "pattern" of significant price differences "among" different regions or time periods.

7.143. With the above analysis in mind, we find the United States' approach of identifying one single pattern by aggregating six different types of price variation to be inconsistent with the text of the second sentence of Article 2.4.2. This approach effectively identifies a "pattern" of export prices *across* different categories (purchasers, regions or time periods), rather than "among" the constituents of each category, as we understand the second sentence of Article 2.4.2 to require.[275] We are also not persuaded by the United States' argument that identifying "*a* pattern" in the singular form requires examining the exporter's export sales holistically and in the aggregate. To the contrary, we consider that the use of the singular word "*a* pattern" is simply to indicate that the finding of a pattern within any of the three categories could potentially be a sufficient basis for the application of the W-T comparison methodology.

7.144. Furthermore, it follows from the definition of "pattern" that price variation within a "pattern" must pertain to the same parameters. Otherwise, no "regular and intelligible form or sequence"[276] may be discerned from the group of price variation. For this reason, prices that are too high and prices that are too low do not belong to the same pattern: high prices differ significantly from all other prices because they are higher than them; low prices differ significantly from all other prices because they are lower than them. The characteristic for establishing the degree of price variation is therefore not the same.

7.145. The United States argues that the DPM does not necessarily result in a breach of the second sentence of Article 2.4.2 because the application of the DPM only resulted in the application of the W-T comparison methodology "in approximately 20-30% of instances".[277] In response, Korea argues that it has shown that the DPM will necessarily result in breaches of Article 2.4.2 in certain circumstances. Korea asserts that the fact that, in some factual situations, the WTO-inconsistent features of the DPM may not be applied does not make them WTO-consistent, or save them from review of WTO consistency. Korea draws an analogy with the WTO case law concerning the United States' zeroing methodology. Korea argues that, under the United States' theory, the zeroing methodology could never have been found to be WTO-inconsistent "as such" because it did not result in zeroing in cases where there were no export producers' prices above the normal value.[278]

7.146. We recall that the DPM is a methodology for determining whether the W-T comparison methodology should be applied in a particular situation. Where the conditions of the DPM are fulfilled, its application will necessarily result in the application of the W-T comparison methodology. On the other hand, where the conditions of the DPM are not fulfilled, the W-T comparison methodology will not be applied. The fact that the application of the DPM only results in the application of the W-T comparison methodology in certain situations[279] does not prevent a finding that the DPM is inconsistent "as such". By its structure and design, the DPM will necessarily result in a breach of the second sentence of Article 2.4.2 in certain circumstances. We find the analogy that Korea draws with the treatment of the zeroing methodology by previous panels and

[274] McMillanDictionary.com, accessed on 23 September 2015 <http://www.macmillandictionary.com/dictionary/british/among>

[275] The United States itself uses the words "among" and "across" interchangeably. The United States argues that "[u]sing purchaser-specific weighted averages allows the investigating authority to disregard price variation within the sales to each purchaser and focus on meaningful price variation among (i.e. across) the purchasers" (United States' second written submission, para. 27). Use of the term "across" in this context is not an accurate reflection of the text of the second sentence of Article 2.4.2.

[276] See para. 7.45. above.

[277] United States' first written submission, paras. 287 and 289.

[278] Korea's second written submission, para. 220.

[279] We recall that where more than 33% of the transactions by value pass the Cohen's *d* test and where the meaningful difference test is satisfied, the DPM will lead to the application of the W-T comparison methodology (above 66%) or a mixed comparison methodology (33% to 66%).

the Appellate Body to be highly relevant in this regard. Even though the application of the zeroing methodology will not have any impact where *all* export prices are less than normal value, the Appellate Body nevertheless found the zeroing methodology to be WTO-inconsistent "as such". This is because the zeroing methodology will result in WTO-inconsistent zeroing in cases where certain export prices are greater than normal value. For the same reason, we agree with Korea that the fact that the DPM will not result in the application of the W-T comparison methodology in some factual situations does not mean that it cannot be found to be WTO-inconsistent "as such". It suffices that there are certain factual situations in which the DPM will result in the application of the W-T comparison methodology, in breach of the second sentence of Article 2.4.2.[280]

7.147. For the above reasons, we conclude that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish "a pattern of export prices which differ significantly among different purchasers, regions or time periods".

7.4.2.3 "Systemic disregarding"

7.148. We now turn to Korea's "as such" claims against the USDOC's use of "systemic disregarding" in the context of the DPM, whereby, when the W-T comparison methodology for pattern transactions is combined with the use of the W-W or T-T comparison methodology for non-pattern transactions, any negative amount of dumping resulting from the W-W or T-T comparison methodology is set to zero.[281] Korea has brought these claims under the second sentence of Article 2.4.2, and Article 2.4.

7.4.2.3.1 Claims against "systemic disregarding" under the second sentence of Article 2.4.2

7.4.2.3.1.1 Main arguments of the parties

7.149. Korea observes that in certain situations, the DPM provides for a combined methodology wherein the W-W comparison methodology is applied to non-pattern transactions, and the W-T comparison methodology to pattern transactions. Where a negative amount of dumping is determined for non-pattern transactions, the DPM sets such amount to zero, so that it does not

[280] We note that the United States asserts that the Panel should follow the analysis of the Appellate Body in *US – Carbon Steel (India)* in connection with India's "as such" claim, where the Appellate Body essentially applied the mandatory/discretionary distinction. In response to the Panel's written questions, the United States confirms that, in referring to the analysis of the Appellate Body in *US – Carbon Steel (India)*, it is suggesting that the Panel apply the mandatory/discretionary distinction that has been relied upon by the Appellate Body and panels previously when addressing "as such" claims against alleged rules or norms of general and prospective application (See United States' response to Panel questions Nos. 4.23 and 4.24, para. 100). The United States, however, has not made any submission on how this mandatory/discretionary distinction should be applied in the present dispute. We recall that the Appellate Body has specifically confirmed that "as such" challenges can be brought against non-mandatory measures (See Appellate Body Report, *Argentina – Import Measures*, para. 5.106). Our finding above is therefore consistent with the Appellate Body's approach.

[281] We note that the United States asserts that Korea fails to present a *prima facie* case of an "as such" inconsistency for the two additional aspects of the DPM (namely, (i) the DPM does not identify a pattern but merely aggregates random, unrelated price differences; (ii) the "systemic disregarding" issue) by basing its arguments exclusively on hypothetical scenarios that are entirely the invention of Korea, without making reference to any actual evidence that any of its concerns have actually manifested themselves in any actual application of the DPM. We note that United States does not dispute that Korea sufficiently identifies the DPM as the measure at issue and the basic import of the aspects being challenged. Nor does the United States dispute that Korea sufficiently identifies the second sentence of Article 2.4.2 as the relevant provision, and the basis of the claimed inconsistency of the five aspects of the DPM with the second sentence of Article 2.4.2. Instead, the United States emphasized on the lack of sufficient evidence on the actual manifestation of the alleged inconsistencies in the actual *application* of the DPM. We disagree with the United States. In our view, having established that the DPM is challengeable "as such", the Panel reviews the DPM independently from the application of the DPM in specific cases, just like a written rule or norm. As the Appellate Body confirmed, written rules or norms can be challenged as such "independently of whether or how those rules or norms are applied in particular instances" (see Appellate Body Report, *US – 1916 Act (EC)*, paras. 60-61). Therefore the United States' argument that Korea has not established a *prima facie* case for the additional aspects of the DPM is without foundation.

offset any amount of positive dumping established in respect of pattern transactions.[282] Korea contends that such "systemic disregarding" is "essentially a new form of zeroing" and is inconsistent with Articles 2.4 and 2.4.2 at the same time.[283] More specifically, Korea argues that the systemic disregarding inflates the dumping margin, and is contrary to the concept of establishing a single margin of dumping per exporter for the "product as a whole".[284]

7.150. The United States argues that, because the use of zeroing in the context of the application of the W-T comparison methodology to all sales is permissible, there is no basis for finding that "systemic disregarding" is impermissible.[285] The United States asserts that it is necessary to "zero" the negative W-W subset results for non-pattern transactions to ensure that the W-T subset results for pattern transactions are not masked or offset by the W-W subset results. Otherwise, the purpose of the asymmetrical comparison methodology, which is to "unmask" dumping, would be thwarted.[286]

7.4.2.3.1.2 Main arguments of third parties[287]

7.151. Brazil submits that the practice of "systemic disregarding" shares the same rationale as that of "zeroing" inasmuch as it zeros a negative result in the W-W comparison subset that could be used to offset the positive result found in the W-T subset, and inflates the dumping margin.[288] Brazil argues that if the practice of "systemic disregarding" is found to be like "zeroing", it would also not be consistent with the fair comparison requirement of Article 2.4.[289]

7.152. China agrees with Korea[290] that the "systemic disregarding" of intermediate results is not permissible. China contends that a manipulation of data in this way fails to have regard "to the results of *all* those comparisons"[291] and thereby fails to establish a margin of dumping for the product as a whole.

7.153. The European Union contends[292] that the investigating authority must have the possibility of applying an appropriate methodology in order to address the targeted dumping, which can only mean that high priced export transactions would not be allowed to offset the dumping amount.

7.4.2.3.1.3 Evaluation by the Panel

7.154. The second sentence enables an investigating authority to apply the W-T comparison methodology in order to focus on the evidence of dumping in respect of pattern transactions, and to ensure that any evidence of dumping with regard to those transactions is not masked by non-dumping in respect of transactions falling outside of that pattern. The United States asserts that "systemic disregarding" is needed in order to prevent such masking.

7.155. In order to address the question before us, we will first review the intent of the comparison methodology established in the second sentence of Article 2.4.2. We note that the W-T comparison methodology is an exceptional and an alternative comparison methodology to the normally applicable methodologies provided in the first sentence of Article 2.4.2. As explained below, it appears that the second sentence of Article 2.4.2 read in light of Articles 2.1, 2.4 and 6.10 of the Anti-Dumping Agreement and the findings of the Appellate Body involves two exceptions to the normally applicable comparison methodologies: first, the scope of transactions to be taken into account to establish dumping and, second, the method of calculating the margin of dumping.

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[282] See Korea's first written submission, para. 239; Exhibit KOR-24, pp. 70-71; Exhibit KOR-100, p. 93 (p. 186 of pdf file) of the programming language titled "The SAS System"; Exhibit KOR-100, p. 124 (p. 324 of the pdf file) of the "U.S. Sales Margin Program"; Exhibit KOR-141, pp. 28-29. The United States does not dispute this fact. See United States' second written submission, para. 198.

[283] Korea's second written submission, para. 198.

[284] Ibid. para. 195.

[285] United States' second written submission, para. 195.

[286] Ibid. para. 198.

[287] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.

[288] Brazil's third party oral statement, para. 16.

[289] Ibid. para. 18.

[290] China's third party submission, para. 81.

[291] Ibid. (citing Appellate Body Report, *US – Softwood Lumber V*, para. 98 (original emphasis)).

[292] European Union's third party submission, para. 47.

7.156. Concerning the scope, we recall our analysis in paragraphs 7.22. to 7.27. that the second sentence limits the application of the W-T comparison methodology to pattern transactions. As explained therein, the meaning of the text of the second sentence is confirmed by its context; in particular, being an exception it must refer to a subset of the universe of all transactions.[293] Moreover, since the object and purpose of the exceptional comparison methodology is to address the situation of a pattern of significantly differing prices, this methodology requires that the amount of dumping be established from the transactions that form the pattern. Consequently, the text and structure of Article 2.4.2 envisage that, as a general rule, an investigating authority is required to take into account all export transactions and compare them to normal value and, as an exception, limit the comparison of normal value to pattern transactions.

7.157. With regards to the calculation of the margins of dumping, and given the relation of Article 2.4.2 with Articles 2.1, 2.4 and 6.10, it appears that the exceptional comparison methodology requires the investigating authority to (i) establish intermediary results on the basis of comparing the weighted average normal value to each of the individual transactions that form the pattern, (ii) aggregate the intermediary results to determine the amount of dumping that may exist (without zeroing[294]), and (iii) express the margin of dumping as a percentage of the export price for the exporter or foreign producer concerned. The latter requires the investigating authority to include the totality of the evidence of dumping from pattern transactions in the numerator and the totality of the exports of that exporter in the denominator of the equation.

7.158. The Appellate Body has found[295] that the determination of a margin of dumping is subject to certain "fundamental disciplines" or "concepts" that apply in all anti-dumping proceedings. The Appellate Body has identified four such fundamental concepts: (a) the concepts of "dumping" and "margins of dumping" pertain to a "product" and to an exporter or foreign producer; (b) "dumping" and "dumping margins" must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer. The Appellate Body has also stated that:

> In order to assess properly the pricing behaviour of an individual exporter or foreign producer, and to determine whether the exporter or foreign producer is in fact dumping the product under investigation and, if so, by which margin, it is obviously necessary to take into account the prices of all the export transactions of that exporter or foreign producer.[296]

7.159. In addition, the Appellate Body in *US – Zeroing (Japan)* explained, specifically in respect of the second sentence of Article 2.4.2, that:

> The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods". The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply.[297]

7.160. We note that, at first glance, there appears to be some tension between (a) the Appellate Body's understanding of the limited scope of application of the W-T comparison methodology and (b) its reference to the "fundamental discipline" that "dumping" and "margins of dumping" pertain

[293] We recall the statement of the Appellate Body in *US – Zeroing (Japan)* that the universe of transactions that fall within the relevant pricing pattern "would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply". See para. 7.25. above.

[294] See our discussion in Section 7.5 below.

[295] Appellate Body Report, *US – Zeroing (Japan)*, paras. 108-114.

[296] Ibid. para. 111.

[297] Ibid. para. 135. We observe that a similar statement was made by the Appellate Body in footnote 166 of its report on *US – Softwood Lumber V (Article 21.5)*.

to an exporter or foreign producer, and to the "product" (as a whole[298]), taking into account all export transactions of the exporter or foreign producer concerned. However, it seems to us that this tension is dissipated by two aspects of the text and structure of Articles 2.1, 2.4.2 and 6.10 of the Anti-Dumping Agreement. First, in the context of the second sentence of Article 2.4.2, when an investigating authority determines the margin of dumping for an individual exporter or foreign producer, the investigating authority is entitled to have particular regard, and therefore limit its analysis to the pricing behaviour of the exporter or foreign producer in respect of the transactions that form "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Second, regardless of the methodology applied, Articles 2.1 and 6.10 of the Anti-Dumping Agreement require that the margin of dumping be established for the product as a whole for the individual exporter or foreign producer concerned. Consequently, while the net amount of dumping may be established from considering the evidence of dumping in pattern transactions (in its entirety, as explained above), the calculation of the margin as a percentage of the exports of that exporter or foreign producer must reflect the price of its total exports. It follows that, while the numerator may be established from the evidence of dumping in pattern transactions, the denominator of the equation has to reflect the value of total exports of the individual exporter or foreign producer concerned.

7.161. With this understanding of Article 2.4.2, we now turn to Korea's claim against the USDOC's use of "systemic disregarding". The so-called "systemic disregarding" arises in the specific situation where the DPM combines the results of applying the W-T comparison methodology in respect of pattern transactions with the results of applying the W-W comparison methodology in respect of non-pattern transactions. One might take the view, consistent with the focus of the second sentence being on the pricing behaviour in respect of pattern transactions, that the combined application of the W-T and W-W (or T-T) comparison methodologies is not envisaged by that provision. However, since Korea has not advanced any claim to this effect, there is no need for us to rule on this matter. For present purposes, therefore, we will assume that the combined application of methodologies is not excluded. If methodologies are combined, one must consider how the results of the combined methodologies should be aggregated. It is in this context that the issue of "systemic disregarding" arises.[299]

7.162. As noted previously, the second sentence of Article 2.4.2 is designed to enable an investigating authority to focus on pattern transactions to unmask targeted dumping that would otherwise be masked by an absence of dumping in respect of non-pattern transactions. Because it is an exceptional comparison methodology, the application of the W-T comparison methodology under the second sentence is subject to stringent conditions. In a situation where an authority chooses to apply the W-T comparison methodology to pattern transactions and the W-W (or T-T) comparison methodology to non-pattern transactions, we see no utility in allowing an investigating authority to use the W-T comparison methodology to zoom in and have particular regard to the exporter's pricing behaviour in respect of pattern transactions, after ensuring compliance with the relevant conditions, if the authority is subsequently required to zoom out from that specific pricing behaviour and give full effect to the exporter's pricing behaviour in respect of non-pattern transactions when making its overall determination of dumping. After 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. Such offsets would be at odds with the object and purpose of the second sentence.

7.163. Korea contends that the failure to provide offsets in respect of negative dumping for non-pattern transactions is "essentially a new form of zeroing".[300] Korea cautions that "the Appellate Body has made it clear that 'dumping' for the product as a whole must properly reflect

[298] Appellate Body Report, *US – Zeroing (Japan)*, para. 151.

[299] In cases where the non-pattern transactions are dumped, aggregating the result of the W-W comparison methodology (without zeroing) for non-pattern transactions with the result of the W-T comparison methodology (without zeroing) for pattern transactions would lead to the same margin of dumping as if the W-W methodology were applied (without zeroing) to all transactions. The potential for the margin of dumping to change only arises when the non-pattern transactions (assessed using the W-W methodology, without zeroing) are not dumped, and when that amount of negative dumping is "systematically disregarded" upon aggregation with the results of the W-T methodology. If "systemic disregarding" is applied, the results of combining the application of the W-T methodology to pattern transactions and the W-W methodology to non-pattern transactions would be equivalent to a simple application of the W-T methodology (without zeroing) to pattern transactions.

[300] Korea's second written submission, para. 198.

all positive and negative margins".[301] We disagree that the Appellate Body's rulings against the practice of zeroing in the context of the first sentence of Article 2.4.2 mean that "systemic disregarding" should also be condemned if the W-W and W-T comparison methodologies are combined. The determination of dumping for the product as a whole in the context of the first sentence requires an authority to have regard to the exporter's pricing behaviour as a whole, in respect of all export transactions. In contrast, as explained, the determination of dumping for the product as a whole in the context of the exceptional methodology is different, in the sense that the second sentence enables an authority to focus on, and have particular regard to, the exporter's pricing behaviour in respect of pattern transactions while taking into account the totality of its exports when calculating the margin as a percentage of exports.[302] If an authority chooses to apply different methodologies for pattern and non-pattern transactions respectively, "systemic disregarding" enables an investigating authority to reveal any dumping in respect of pattern transactions that would otherwise be masked by the negative dumping in respect of non-pattern transactions.

7.164. The exclusion of "systemic disregarding" would also lead to mathematical equivalence with the results of a straightforward application of the W-W comparison methodology to all transactions.[303] Korea asserts that an authority could avoid mathematical equivalence by conducting a "granular analysis" of the domestic and export transactions involved in the W-T comparison. Thus, Korea observes that "when implementing the second sentence, the investigating authority has discretion to undertake a more detailed calculation of weighted-average prices for normal value and a more detailed approach to price adjustments".[304]

7.165. Korea contends that the use of different weighted average normal values, one for the application of the W-T comparison methodology to pattern transactions and a different one for the W-W comparison methodology for non-pattern transactions, would be allowed. Korea contends that "the normal value appropriate for one of the Article 2.4.2 methodologies may be different from the normal value appropriate for another Article 2.4.2 methodology".[305] However, Korea has not identified any textual basis in Article 2.4.2 for concluding that the "normal value established on a weighted average basis" referred to in the second sentence should differ, within the same anti-dumping proceeding, from the "weighted average normal value" referred to in the first sentence. Nor do we consider that any textual basis exists.[306] Korea has rather argued that "the point of the second sentence is to consider the export transactions individually, so the authority can decide about the normal value to which each export transaction will be compared".[307] This argument would seem to refer to the phrase "individual export transactions" in the second sentence. We have already explained that this phrase relates to identifying the (pattern) transactions to be compared to the weighted average normal value, consistent with the general emphasis placed by the second sentence on pattern transactions. This phrase says nothing about the weighted average normal value to which the export prices of those transactions should be compared. While the second sentence envisages that particular regard be had to a particular

[301] Korea's second written submission, para. 198.

[302] As explained below, zeroing is still prohibited in this context, since the investigating authority must have regard to the totality of the exporter's pricing behaviour within the pattern.

[303] We are specifically addressing the mathematical equivalence that would arise when the results of applying the W-W comparison methodology to all transactions are compared to a combined application of the W-T comparison methodology to pattern transactions and the W-W comparison methodology to non-pattern transactions. There is no mathematical equivalence if the application of the W-T comparison methodology to pattern transactions is combined with the application of the T-T comparison methodology to non-pattern transactions (see Example 2 of Exhibit KOR-93, paras. 45-55; and United States' second written submission, para. 115). However, since an investigating authority has discretion to use either the W-W or T-T comparison methodology under the first sentence of Article 2.4.2, we do not consider that an authority choosing to apply a combination of methodologies should be required to apply the T-T methodology to non-pattern transactions simply in order to avoid mathematical equivalence.

[304] Korea's oral statement at the second meeting of the Panel, para. 7.

[305] Korea's second written submission, para. 53.

[306] We do not mean to suggest that only a single weighted average normal value should be applied. We acknowledge that model-specific weighted average normal values may be established, and that different weighted average normal values may be established for different periods within the period of investigation.

[307] Korea's response to Panel question No. 4.19(iv), para. 118. Korea also refers to Article 2.1 of the Anti-Dumping Agreement, whereby dumping exists if the export price is less than a "comparable" home market price (Korea's response to Panel question No. 4.10(ii), para. 40). According to Korea, the authority must therefore determine a normal value that is comparable to the specific individual export transaction at issue. We are not persuaded that a general provision regarding the definition of dumping should result in a reading of the second sentence of Article 2.4.2 that is at odds with the specific text of that provision.

sub-category of export transactions, there is nothing to suggest that the second sentence also envisages the establishment of a separate weighted average normal value with respect to some sub-category of domestic transactions. In other words, the exceptional nature of the W-T comparison methodology seems to reside in the "T", rather than the "W". If a proper application of the second sentence were to depend on it being "appropriate" to use a different weighted average normal value under the second sentence than under the first, as suggested by Korea, we would have expected this to have been reflected in the text of the second sentence.[308]

7.166. We take a similar view concerning Korea's argument that the second sentence also allows the authority to "rethink the adjustments that might be necessary to ensure price comparability".[309] Korea suggests that while an investigating authority might decide to use an overall average expense in making an adjustment under the W-W comparison methodology, it may make more sense for the authority to calculate expenses on transaction-by-transaction basis if the comparison is made using the W-T comparison methodology.[310] Korea explained during the second substantive meeting that such "granular analysis"[311] of adjustments would be undertaken pursuant to an investigating authority's residual discretion under Article 2.4 of the Anti-Dumping Agreement[312], rather than any specific authority governing the making of adjustments exclusively under the second sentence of Article 2.4.2.[313] We observe that the second sentence does not envisage that any price adjustments be made in addition to those made pursuant to an authority's general obligation to make a "fair comparison" pursuant to Article 2.4. Thus, there is nothing in the text of the second sentence to suggest that an authority could or should make the type of adjustments proposed by Korea in order to allow the authority to unmask targeted dumping. Rather, the adjustments referred to by Korea would be made pursuant to a provision that applies to all three comparison methodologies set forth in the first and second sentences of Article 2.4.2. If a proper application of the second sentence were to depend on the type of adjustments envisaged by Korea, we would have expected Article 2.4.2, and particularly the second sentence thereof, to have said something about this issue. Furthermore, price adjustments will likely be made by the investigating authority before the application of the second sentence of Article 2.4.2 is considered.[314] Moreover, adjustments are made prior to determining whether a pattern of significant price differences exists. This is reflected in the structure of Article 2.4, which addresses the need for adjustments for factors affecting price comparability in the chapeau of Article 2.4, before the discussion of comparison methodologies in Article 2.4.2. We see nothing to suggest that the authority should re-visit these adjustments in the event that the second sentence of Article 2.4.2 is ultimately applied. In other words, 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.

7.167. In light of the above considerations, we reject Korea's claim that the USDOC's use of "systemic disregarding" when combining the W-W and W-T comparison methodologies in the context of the DPM is "as such" inconsistent with the second sentence of Article 2.4.2.

7.4.2.3.2 Claims against "systemic disregarding" under Article 2.4

7.168. Korea also brings an Article 2.4 "fair comparison" claim against the use of "systemic disregarding" under the DPM "as such". Korea contends that "systemic disregarding" is not fair

[308] At para. 138 of its second written submission, the United States has explained that comparing export prices in one month to the monthly weighted-average normal value for that same month will not necessarily take into account appropriately the price differences. The United States suggests that this is because the monthly comparisons still are aggregated together to calculate the respondent's overall margin of dumping for the product as a whole, and offsets for negative intermediate comparison results allow higher-priced export sales made during distinct time periods to "mask" lower-priced export sales during other distinct time periods. We see merit in the United States' argument, and note that Korea has not disagreed with it.

[309] Korea's response to Panel question No. 4.19(iv), para. 118.

[310] Korea's response to Panel question No. 4.10(i), para. 35.

[311] Korea's response to Panel question No. 4.19(iv), paras. 119-122.

[312] Article 2.4 of the Anti-Dumping Agreement provides in relevant part that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability".

[313] See also Korea's response to Panel question No. 4.10.

[314] This was the case in the *Washers* anti-dumping investigation. Korea has not challenged this aspect of the investigation. Korea also acknowledges that investigating authorities have the discretion to proceed in this manner (see Korea's response to Panel question No. 4.19(iii), paras. 109 and 111).

because, like zeroing, it unlawfully inflates the dumping margin and makes a positive determination more likely, by ignoring the negative dumping margins.[315] The United States asks us to reject Korea's claim.[316]

7.169. As explained in detail above, we consider that Article 2.4.2 enables investigating authorities to establish the existence of a margin of dumping by focusing on pattern transactions. If such a situation arises and an authority chooses to combine the application of the W-W methodology to non-pattern transactions with the application of the W-T methodology to pattern transactions, systemic disregarding enables it to avoid concealing any dumping identified in respect of pattern transactions with the negative dumping in respect of non-pattern transactions. Accordingly, there is no basis for us to accept Korea's argument that "systemic disregarding" is unfair and contrary to Article 2.4 because it inflates the margin of dumping and ignores the negative amount of dumping in respect of non-pattern transactions.

7.4.3 Additional claims concerning the DPM

7.170. Korea also challenges the DPM as an ongoing conduct, and "as applied" in the first administrative review of the *Washers* anti-dumping order, including the preliminary determination published on 9 March 2015[317] and the final determination published on 8 September 2015.[318]

7.171. We recall our findings above that the DPM is "as such" inconsistent with the second sentence of Article 2.4.2. We also note that Korea's "as applied" claims relate to the same issues as its "as such" claim.[319] We therefore do not consider it necessary for the resolution of the present dispute to also review Korea's ongoing conduct and "as applied" claims concerning the DPM.[320]

7.5 Zeroing in the context of the W-T comparison methodology

7.5.1 Introduction

7.172. Zeroing in the context of establishing margins of dumping using the W-T comparison methodology occurs when the USDOC disregards (i.e. treats as "zero") any negative dumping when the results from multiple comparisons between the weighted average normal value and each of the individual export transactions are aggregated.

7.173. Korea challenges the unwritten measure whereby the USDOC uses zeroing whenever the W-T comparison methodology is applied. We note that the United States does not disagree that this measure exists, or that it is of general and prospective application.[321] Currently, the USDOC

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[315] Korea's first written submission, para. 241.

[316] United States' second written submission, para. 199.

[317] Large Residential Washers from the Republic of Korea: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014, 80 Fed. Reg. 12,456 (March 9, 2015); Large Residential Washers from the Republic of Korea: Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review; 2012-2014; Preliminary Results Margin Calculation for LGE, (Exhibit KOR-96).

[318] Issues and Decision Memorandum for the Final Results of the Antidumping Administrative Review of Large Residential Washers from the Republic of Korea (September 8, 2015), (Exhibit KOR-141). See also fn 306 below.

[319] Korea's "as applied" challenge of the DPM covers only 4 out of the 5 aspects of Korea's "as such" challenge because the improper scope of application issue did not arise in the first *Washers* administrative review. See Korea's second written submission, fn 88; and response to Panel question No. 4.22, paras. 163 and 164.

[320] The USDOC published the preliminary and final determinations of the first administrative review of the *Washers* anti-dumping order during the course of the present proceedings (Exhibits KOR-96 and 141). Korea refers to these determinations in support of its "ongoing conduct" and "as applied" claims concerning the DPM. Since we do not find it necessary to address these claims, it is not necessary for us to consider the procedural issue whether these determinations fall within our terms of reference.

[321] Korea has provided detailed evidence supporting its view that the USDOC's use of zeroing when applying the W-T comparison methodology is an unwritten measure that may be challenged "as such" (see Korea's response to Panel question No. 1.2). The United States has not contested the existence of this measure. In these circumstances, and bearing in mind that findings have been made in respect of the use of zeroing "as such" under the first sentence of Article 2.4.2 in numerous previous dispute settlement proceedings, we find that the unwritten measure whereby the USDOC applies zeroing when applying the W-T comparison methodology may be challenged "as such".

applies the W-T comparison methodology as part of the DPM and applies zeroing to the transactions to which it applies the W-T comparison methodology.[322] In cases where the value of pattern transactions is between 33% and 66% of the total export transactions, the W-T comparison methodology with zeroing is applied to pattern transactions. Alternatively, when pattern transactions represent more than 66% by value of total export transactions, the W-T comparison methodology with zeroing is applied to all export transactions. In the *Washers* anti-dumping investigation, the USDOC used zeroing when applying the W-T comparison methodology to all export transactions pursuant to the then applicable *Nails II* methodology.[323]

7.174. Korea claims that the measure whereby the USDOC applies zeroing in the context of the W-T comparisons in original investigations is inconsistent "as such" with the second sentence of Article 2.4.2, Articles 2.1 and 2.4 of the Anti-Dumping Agreement, and Article VI:1 of the GATT 1994. Korea also claims that the measure whereby the USDOC applies zeroing in the context of the W-T comparisons in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Additionally, Korea claims that the USDOC's application of zeroing when aggregating the results of the W-T comparisons in the *Washers* anti-dumping investigation and "subsequent connected stages", including administrative reviews, is inconsistent with the second sentence of Article 2.4.2, and with Articles 2.1, 2.4 and 9.3 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994.

7.175. The United States asks us to reject these claims.

7.176. We begin by addressing Korea's claims against zeroing under the second sentence of Article 2.4.2.

7.5.2 Korea's claims against zeroing under the second sentence of Article 2.4.2

7.5.2.1 Main arguments of the parties

7.177. Korea's zeroing claims[324] are based primarily on findings made by the Appellate Body concerning the use of zeroing in the context of original investigations and reviews in which the W-W or T-T comparison methodologies were applied. Korea contends that these Appellate Body findings are dispositive of the question of whether zeroing is permitted in the context of any anti-dumping proceeding, regardless of the comparison methodology used. This, according to Korea, is because the Appellate Body has conclusively interpreted the concept of "dumping", for the Anti-Dumping Agreement as a whole, as a product-wide and exporter-specific concept. Korea submits that the USDOC's use of zeroing in the W-T comparison methodology is based on a transaction-specific notion of dumping, allowing it to disregard (i.e. set at zero) non-dumped transactions when aggregating intermediate comparison results. Korea contends that the Appellate Body has on numerous occasions rejected the argument that the concepts of "dumping" and "margin of dumping" could possibly occur at the transaction-specific level. Korea submits that there is nothing in the second sentence of Article 2.4.2 to suggest that zeroing is somehow permissible in that context, while impermissible in the context of all other anti-dumping proceedings. Korea asserts that the application of zeroing in the context of the W-T comparison methodology in original investigations is indistinguishable from the application of zeroing in any other context. Korea submits that the second sentence of Article 2.4.2 merely provides a limited exception to the application of the symmetrical methodologies provided for in the first sentence. Korea submits that the second sentence does not, under any circumstance, provide an exception to the general rule that "dumping" and "margin of dumping" reflect product-wide and exporter-specific concepts throughout the Anti-Dumping Agreement.

7.178. The United States disagrees[325] with Korea's suggestion that prior Appellate Body reports are dispositive of the permissibility of zeroing in the context of the W-T comparison methodology. The United States asserts that the Appellate Body has expressly stated that it has not ruled on the question of whether or not zeroing is permissible under the W-T comparison methodology when the requirements of the second sentence of Article 2.4.2 are satisfied. The Appellate Body has merely addressed contextual arguments pertaining to that methodology when considering the

[322] Korea's first written submission, paras. 120-121.
[323] Korea's response to Panel question No. 1.2, para. 13.
[324] Korea's main arguments are set forth at paras. 54-70 of its first written submission.
[325] United States' main arguments are set forth at paras. 154-268 of its first written submission.

WTO-consistency of zeroing when applying the normal comparison methodologies provided for in the first sentence of Article 2.4.2. The United States also denies that it treats the results of transaction-specific comparisons as "margins of dumping" when the W-T comparison methodology is applied. The United States submits that it is not asking the Panel to depart from the Appellate Body's finding that such transaction-specific comparisons are merely inputs that are to be aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer. The United States argues that nothing in the text of the second sentence of Article 2.4.2 prohibits the use of zeroing and, contextually, since the second sentence is an exception to the first sentence of Article 2.4.2, the W-T comparison methodology set forth in the second sentence should not yield results that are systematically similar to the results of the comparison methodologies set forth in the first sentence (W-W and T-T). The United States submits that, if the use of zeroing is prohibited in connection with the W-T comparison methodology, then the result of applying the W-T comparison methodology would be mathematically equivalent to the result of applying the W-W comparison methodology, rendering the second sentence of Article 2.4.2 *inutile*. The United States contends that, while the Appellate Body has considered mathematical equivalence previously, nothing in prior Appellate Body findings forecloses the possibility that mathematical equivalence could support a finding that zeroing is permissible in connection with the use of the W-T comparison methodology. The United States also argues that negotiating history documents from the Uruguay Round confirm the interpretation proposed by the United States.

7.5.2.2 Main arguments of third parties[326]

7.179. Brazil notes[327] that there are considerable uncertainties as to how the W-T comparison methodology should operate in targeted dumping situations and that no decision has yet been taken on whether "zeroing" is or is not permitted in this context. Brazil argues that the Appellate Body has already held that there "is an inherent bias in a zeroing methodology"[328] and that as a "way of calculating" margins the zeroing methodology "cannot be described as impartial, even-handed, or unbiased"[329], because the comparison necessarily excludes any negative results.

7.180. Canada argues [330] that the definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement applies throughout the Agreement. In Canada's opinion, when examining the use of zeroing under the T-T comparison methodology, the Appellate Body found that the concepts of "dumping" and "margins of dumping" can only be found to exist in relation to a product. Because the individual comparisons only yield intermediate results and not margins of dumping, margins of dumping cannot be found to exist under any methodology at the transaction level.[331] Canada argues that this means that even when an investigating authority is justified in using the exceptional W-T comparison methodology, the results of the individual comparisons must be aggregated to determine the margin of dumping in accordance with Article 2.4.2.

7.181. China agrees with Korea[332] that the Appellate Body has settled that the term "dumping" used throughout the Anti-Dumping Agreement is a "product-related" concept[333], and that the existence of "dumping" and "margins of dumping" are determined in relation to all export sales by an exporter or foreign producer of the relevant product. China stresses on the importance of the rejection of a transaction-specific understanding of dumping for the resolution of the zeroing issues in this dispute. China contends that if dumping is – in contrast to the apparent United States' position – understood to exist only in the aggregate of an exporter's pricing of a product over time, and a "margin of dumping", by definition, is a margin for the product as a whole, then any calculation or aggregation of comparison results that fails to take account of all intermediate comparison results is simply not a margin of dumping consistent with the covered agreements.

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[326] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.

[327] Brazil's third party oral statement, para. 17.

[328] Ibid., referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 135.

[329] Ibid., referring to Appellate Body Report, *US – Zeroing (Japan)*, para. 146, quoting Appellate Body Report, *US – Softwood Lumber V (21.5)*, para. 142.

[330] Canada's third party submission, paras. 8 and 9.

[331] Ibid. para. 8 (citing Appellate Body Reports *US – Zeroing (Japan)*, para. 115; *US – Stainless Steel (Mexico)*, paras. 104 and 105; and *US – Continued Zeroing*, para. 308).

[332] China's third party submission, paras. 65 and 66.

[333] Ibid. para. 65 (citing Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94).

7.182. The European Union disagrees with Korea's argument[334] that a targeted dumping case has already been decided by the existing case law on zeroing. According to the European Union, panels and the Appellate Body have exercised judicial restraint in this matter, addressing specific cases with specific types of comparison methodologies. As a targeted dumping case has not been addressed before, the European Union contends that it is not prejudged.

7.183. Japan agrees with Korea's understanding[335] that the Appellate Body jurisprudence covers the W-T comparison methodology under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Japan contends that the Appellate Body has clarified that the determination of dumping is made in relation to "a product", so that the concepts of "dumping" and "margins of dumping" must be applied in a coherent and consistent manner to all provisions of the Anti-Dumping Agreement, and for all types of anti-dumping proceedings.[336]

7.184. Norway agrees[337] with Korea in that the Appellate Body has repeatedly found that "dumping" and "margins of dumping" must be established for the "product as a whole", as opposed to at the individual transaction level.[338] Furthermore, Norway contends that the Appellate Body has underlined that the concepts of "dumping" and "margin of dumping" are exporter-specific, and it has further clarified that these two terms must have "the same meaning in all provisions of the *Agreement* and for all types off anti-dumping proceedings"[339]. Norway agrees with Korea that the cohesive interpretation of these terms by the Appellate Body precludes an interpretation of "dumping" and "margins of dumping" to the effect that these may be considered on a transaction-specific basis, including under the second sentence of Article 2.4.2.

7.185. Thailand contends[340] that although the Appellate Body has not yet considered the use of zeroing in the W-T comparison methodology in cases of "targeted dumping" under the second sentence of Article 2.4.2, the Anti-Dumping Agreement does not permit the use of zeroing in such case.

7.186. Viet Nam agrees[341] with Korea's reading of the second sentence of Article 2.4.2 as not permitting recourse to the "zeroing" methodology. Viet Nam contends that the fact that it is an exception does not speak to the issue of zeroing, as it is exceptional because it is asymmetrical-that is, what is compared on one side of the comparison (a weighted average) is different from what is on the other side of the comparison (individual transactions).

7.5.2.3 Evaluation by the Panel

7.187. We recall the emphasis placed on pattern transactions in the second sentence of Article 2.4.2.[342] As we shall explain, we consider that in light of the text of the second sentence of Article 2.4.2 and previous findings of the Appellate Body concerning zeroing when determining the margins of dumping, the second sentence of Article 2.4.2 allows an investigating authority to have particular regard to the pricing behaviour of an exporter in respect of those pattern transactions in determining the margin of dumping for that exporter. However, such possibility requires that the entirety of the pricing behaviour within that pattern must be taken into account. We see no basis for ignoring, or zeroing, individual pattern transactions that may be priced above normal value.

7.188. We refer to our analysis in paragraphs 7.158. to 7.160. above concerning the four fundamental concepts identified by the Appellate Body[343], which apply regardless of the comparison methodology used to establish margins of dumping. Our analysis therein explains our understanding of the possible tension that may be inferred from those principles and the

[334] European Union's third party submission, para. 46.
[335] Japan's third party submission, para. 10.
[336] Ibid. (citing Appellate Body Reports, *US – Softwood Lumber V*, paras. 92 and 93; *US – Zeroing (EC)*, para. 126; and *US – Stainless Steel (Mexico)*, para. 106).
[337] Norway's third party statement, para. 5.
[338] Ibid. (citing Appellate Body Reports, *US – Zeroing (EC)*, para 126; and *US – Softwood Lumber V*, paras. 92 and 93).
[339] Ibid. (citing Appellate Body Report, *US – Zeroing (Japan),* para. 109).
[340] Thailand's third party statement, para. 6.
[341] Viet Nam's third party statement, paras. 6 and 7.
[342] See para. 7.25. above.
[343] See Appellate Body Report, *US – Zeroing (Japan)*, paras. 108-114.

explanation by the Appellate Body[344], that the phrase "individual export transactions" in the second sentence of Article 2.4.2 refers to the transactions that fall within the relevant pricing pattern, a more limited universe than the export transactions covered when applying the symmetrical comparison methodologies foreseen in the first sentence of Article 2.4.2. With this analysis in mind, we refer to the claim by Korea that zeroing in the context of the W-T comparison methodology is contrary to the second sentence of Article 2.4.2.

7.189. In the context of the second sentence of Article 2.4.2, when an investigating authority determines the margin of dumping for an individual exporter or foreign producer, the investigating authority is entitled to have particular regard, and therefore limit its analysis to the pricing behaviour of the exporter or foreign producer in respect of the transactions that form "a pattern of export prices which differ significantly among different purchasers, regions or time periods". This explains the Appellate Body's reference to the "emphasis" of the second sentence of Article 2.4.2 being on pattern transactions. Consequently, and in order to fulfil the object and purpose of the second sentence of Article 2.4.2, the W-T comparison methodology allows the investigating authority to zoom in on the evidence of dumping in respect of pattern transactions, and ensure that such evidence is fully reflected in the margin of dumping, rather than being masked through the use of one of the symmetrical comparison methodologies provided for in the first sentence.[345]

7.190. Since the second sentence involves particular emphasis on the exporter's pricing behaviour in respect of pattern transactions, the *entirety* of the evidence of dumping in respect of that pattern must be taken into account. The focus of the W-T comparison methodology is on the prices of the "individual" export transactions within the pattern. The word "individual" suggests to us that each pattern transaction should be considered in its own right, and with equal weight, irrespective of whether the export price is above or below normal value. There is no basis to conclude that the export prices in certain individual transactions (e.g. those below normal value) should be accorded greater significance than the export prices in other individual export transactions (e.g. those above normal value). There is certainly nothing in the text of the second sentence to suggest that the investigating authority is entitled to disregard evidence pertaining to pattern transactions where the export price is above normal value. On the contrary, the phrase "individual export transactions" in the first part of the second sentence suggests to us that each and every pattern transaction should be fully taken into account in the assessment of the exporter's pricing behaviour in respect of that pattern.

7.191. The United States asserts that zeroing is needed to ensure that pattern transactions whose export price is above normal value do not mask the evidence of dumping in respect of pattern transactions whose export price is below normal value.[346] We see no justification for this approach. As indicated above, the object and purpose of the second sentence indicates that non-pattern transactions should not mask the evidence of dumping in respect of pattern transactions. The possibility that non-pattern transactions might mask dumping in respect of pattern transactions arises because of the significant price difference between these transactions. There is no consideration of whether transactions *within* the pattern are priced at significantly different levels relative to one another. There is therefore no basis to conclude that one (pattern) transaction priced significantly lower than non-pattern transactions might mask evidence of dumping in respect of another (pattern) transaction priced significantly lower than non-pattern transactions.

7.192. For the reasons set forth above, we find that the USDOC's use of zeroing when applying the W-T comparison methodology is "as such" inconsistent with the second sentence of Article 2.4.2. For the same reasons, we also find that the USDOC acted inconsistently with the second sentence of Article 2.4.2 by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation.

7.193. Concerning the claim by Korea of violation of Article 2.4.2 regarding the use of zeroing when applying the W-T methodology in "subsequent connected stages" of *Washers*, including any administrative reviews of the *Washers* anti-dumping order, we note that the preliminary

[344] Appellate Body Report, *US – Zeroing (Japan)*, para. 135. We observe that a similar statement was made by the Appellate Body in footnote 166 of its report on *US – Softwood Lumber V (Article 21.5)*.

[345] This is consistent with Korea's view that "[t]he specific addition of the term 'pattern' in the text of the second sentence of Article 2.4.2 indicates a focus on a subset of total export sales that constitute the 'intelligible form' that the authority seeks to discern" (see Korea's second written submission, para. 99).

[346] United States' first written submission, para. 151.

determination of the first administrative review of the *Washers* anti-dumping order was published on 9 March 2015 (Exhibit KOR-96). The final determination of that review was published on 16 September 2015 (Exhibit KOR-141). The United States asserts that these determinations fall outside our terms of reference. Korea asserts that they should be included within the Panel's terms of reference. The Panel has already found the USDOC's use of zeroing when applying the W-T comparison methodology is "as such" inconsistent with the second sentence of Article 2.4.2. In light of that finding, it is not necessary for us to address Korea's claim regarding the USDOC's use of zeroing when applying the W-T methodology in "subsequent connected stages of *Washers"*, including any administrative reviews of the *Washers* anti-dumping order. Nor, therefore, is it necessary for us to address the procedural issue of whether the preliminary and final determinations in the first administrative review of the *Washers* anti-dumping order fall within our terms of reference.

7.5.3 Korea's claims against zeroing under other provisions

7.194. Korea has also raised claims regarding the United States' use of zeroing when applying the W-T comparison methodology under other provisions of the Anti-Dumping Agreement. Korea claims that the USDOC's use of zeroing is inconsistent with the "fair comparison" requirement set forth in Article 2.4, and as a consequence also Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, both "as such" and as applied in the *Washers* anti-dumping investigation and "subsequent connected stages". In addition, Korea claims that the use of zeroing in administrative reviews is inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994, both "as such" and as applied in "subsequent connected stages".

7.195. The United States asks us to reject these claims.

7.5.3.1 Main arguments by the parties

7.196. Korea contends[347] that the use of zeroing invariably leads to the results of intermediate W-T comparisons being disregarded or artificially set to zero, thus increasing the resulting margins of dumping and making an affirmative dumping determination more likely. Korea asserts that the use of zeroing is therefore inconsistent with the "fair comparison" requirement set forth in the first sentence of Article 2.4.[348] According to Korea, the Appellate Body has found that the ordinary meaning of the term "fair" requires investigating authorities to be "impartial, even-handed, or unbiased" when comparing the export price and normal value, and this obligation applies with equal force to all three comparison methodologies provided in Article 2.4.2. Korea suggests that the Appellate Body has indicated that the use of zeroing cannot be considered impartial, even-handed or unbiased, because it distorts the prices of non-dumped export transactions, which are either not considered at their real value or artificially reduced.[349]

7.197. Korea also claims that, as a result of zeroing in original investigations being inconsistent with the second sentence of Article 2.4.2 and the Article 2.4 fair comparison requirement, it is also inconsistent with the definition of "dumping" set forth in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, and with the general principle set forth in Article 1 of the Anti-Dumping Agreement.[350]

7.198. Furthermore, Korea contends that the USDOC also systematically applies the zeroing methodology when calculating margins of dumping for the product and exporter in the context of administrative reviews, where those administrative reviews entail the use of the W-T comparison methodology. Korea asserts that the USDOC therefore levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement. Korea submits that the use of zeroing when applying the W-T comparison methodology in administrative

[347] The main arguments of Korea are set forth at paras. 71-76 of its first written submission.

[348] The first sentence of Article 2.4 of the Anti-Dumping Agreement provides "[a] fair comparison shall be made between the export price and the normal value".

[349] Korea's first written submission, para. 75.

[350] Ibid. para. 352. By the terms of Korea's Request for Establishment of a Panel, Korea's Article 1 claim is limited to the USDOC's use of zeroing in the *Washers* anti-dumping investigation (Document WT/DS464/4, Section I.5, p. 3).

reviews is therefore "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.[351]

7.199. The United States asserts that Korea overstates the Appellate Body's findings in previous disputes related to zeroing and Article 2.4 of the Anti-Dumping Agreement. The United States suggests that the Appellate Body's findings that zeroing is inconsistent with Article 2.4 are closely related to, and perhaps even dependent on, earlier findings that zeroing is inconsistent with the first sentence of Article 2.4.2. According to the United States, the second sentence of Article 2.4.2 of the Anti-Dumping Agreement provides Members a means to "unmask targeted dumping"[352] in "exceptional"[353] situations. The United States contends that it is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. The United States asserts that because zeroing is not inconsistent with Articles 2.4 or 2.4.2 (second sentence), there is no basis to uphold Korea's dependent claims under Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

7.200. Regarding Korea's claim that the use of zeroing in administrative reviews is "as such" inconsistent with Article 9.3 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994, the United States notes[354] that this claim is premised on Korea's argument that the USDOC "systematically levies anti-dumping duties in excess of the margin of dumping properly established under Article 2 of the Anti-Dumping Agreement."[355] The United States recalls its earlier arguments that the USDOC's use of zeroing, or its approach to determining dumping under the average-to-transaction comparison methodology, is not inconsistent with Article 2 of the Anti-Dumping Agreement. The United States submits that there is therefore no basis for Korea's claims of inconsistency with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.5.3.2 Main arguments of third parties[356]

7.201. Canada asserts[357] that the practice of zeroing is inconsistent with the obligation to make a "fair comparison" contained in Article 2.4. The chapeau of Article 2.4 requires that "[a] fair comparison shall be made between the export price and the normal value". The introductory clause to Article 2.4.2 indicates that the dumping calculation methodologies set out therein are subject to the fair comparison obligation in Article 2.4.[358] Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4. In this case, the USDOC practice of zeroing while employing the average-to-transaction methodology distorts certain facts related to an investigation and contains an inherent bias. It therefore cannot be described as "fair" in accordance with Article 2.4 of the Anti-Dumping Agreement.

7.202. China considers[359] that zeroing involves disregarding the prices at which above-normal value export transactions occur, thereby *preventing* these relatively high prices from offsetting the relatively low prices of other individual export transactions, and therefore failing to generate a margin for the product as a whole. Instead, such a practice "artificially inflates" the level at which dumping is alleged to occur[360], by basing the determination solely on a subset of the universe of export transactions – specifically, low-priced transactions that generate positive intermediate

[351] Article 9.3 of the Anti-Dumping Agreement provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2". Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1".

[352] Appellate Body Reports, *US – Zeroing (Japan)*, para. 135; and *EC – Bed Linen*, para. 62.

[353] See Appellate Body Reports, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97; and *US – Zeroing (Japan)*, para. 131.

[354] United States' first written submission, para. 267.

[355] Korea's first written submission, para. 98.

[356] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.

[357] Canada's third party submission, para. 10.

[358] Ibid. (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 136).

[359] China's third party submission, paras. 95 and 96.

[360] Ibid. para. 95 (citing Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 142, referring to the use of zeroing in the context of the T-T comparison methodology).

comparison results. Because a margin determined through a methodology that involves zeroing of some intermediate comparison results is not a "margin of dumping" in the sense of the Anti-Dumping Agreement, an approach to the imposition of anti-dumping duties that employs zeroing is inconsistent with Article 9.3, something confirmed by the Appellate Body.[361]

7.203. Japan contends[362] that zeroing under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement violates the fair comparison obligation imposed on Members' authorities by Article 2.4. The Appellate Body found that zeroing in W-T comparisons in the context of periodic reviews and new shipper reviews is, as such, inconsistent with Article 2.4[363], clarifying that disregarding certain comparisons or transactions is unfair because it artificially increases the resulting margins of dumping and making an affirmative dumping determination more likely. Japan concludes that nothing in the Anti-Dumping Agreement suggests that this well-established general proposition under Article 2.4 would not apply to the second sentence of Article 2.4.2.

7.204. Norway considers[364] that as with the other two comparison methodologies, the use of zeroing while applying the W-T comparison methodology distorts certain facts related to the investigation and contains an inherent bias, making a positive determination of dumping more likely. According to Norway this is clearly in violation of the "fair comparison" obligation of Article 2.4 of the Anti-Dumping Agreement.

7.205. Thailand submits[365] that the Anti-Dumping Agreement does not permit the use of zeroing in the W-T comparison methodology. The first sentence of Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal price", which, in Thailand's view, must apply to Article 2.4 as a whole, including both the first and second sentences of Article 2.4.2. According to Thailand, allowing the use of zeroing in the W-T comparison methodology under targeted dumping while prohibiting it in all other instances would render the previous interpretations of "fair comparison" with regard to zeroing meaningless.

7.5.3.3 Evaluation by the Panel

7.206. Turning to Korea's Article 2.4 claim, we observe that the Appellate Body has in a number of cases upheld Article 2.4 claims against the use of zeroing after finding that zeroing is inconsistent with the first sentence of Article 2.4.2.[366] We note in particular the Appellate Body's finding in *US – Zeroing (Japan)* that "[i]f anti-dumping duties are assessed on the basis of a methodology involving comparisons between the export price and the normal value in a manner which results in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter or foreign producer, then this methodology cannot be viewed as involving a 'fair comparison' within the meaning of the first sentence of Article 2.4."[367] We consider that the use of zeroing in the context of the W-T comparison methodology would not lead to a fair comparison, since individual pattern transactions priced above normal value would not be properly taken into account when an investigating authority has particular regard to the exporter's pricing behaviour within that pattern. We therefore find that the use of zeroing in the context of the W-T comparison methodology is "as such" inconsistent with Article 2.4. For the same reasons, we find that the USDOC acted inconsistently with Article 2.4 by using zeroing in the *Washers* anti-dumping investigation.

7.207. Having found that the use of zeroing is inconsistent with both Article 2.4 and the second sentence of Article 2.4.2, we do not consider it necessary for the resolution of the present dispute to also review Korea's dependent claims under Articles 1 and 2.1 of the Anti-Dumping Agreement, and Article VI:1 of the GATT 1994.

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[361] China's third party submission, para 96 (citing in relation to zeroing in reviews "as such", the Appellate Body Reports, *US – Zeroing (Japan)*, para. 166; *US – Stainless Steel (Mexico)*, para. 133; and *US – Continued Zeroing*, para. 199).

[362] Japan's third party submission, para. 17.

[363] Ibid. (citing Appellate Body Report, *US – Zeroing (Japan)*, para. 169).

[364] Norway's third party statement, para. 10.

[365] Thailand's third party statement, para. 4.

[366] See, for example, Appellate Body Reports, *US – Zeroing (Japan)*, paras. 123-125; *EC – Bed Linen*, para. 55; and *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 138-143.

[367] Appellate Body Report, *US – Zeroing (Japan)*, para. 168.

7.208. In respect of Korea's "as such" claim under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the United States' defence is based exclusively on its argument that zeroing is not inconsistent with Article 2 of the Anti-Dumping Agreement. We have already rejected this argument in the context of our findings that the use of zeroing is inconsistent with Articles 2.4 and 2.4.2 (second sentence). Article 9.3 stipulates that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Similarly, Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." Since the use of zeroing in the context of the W-T comparison methodology would artificially inflate the margin of dumping, any duties collected would necessarily be excessive. Thus, bearing in mind our findings under Articles 2.4 and 2.4.2 (second sentence), taking account of the findings of the Appellate Body against the use of zeroing in administrative reviews[368], and in the absence of any additional argumentation by the United States, we find that the use of zeroing by the USDOC when applying the W-T comparison methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

7.209. In light of this finding against the use of zeroing by the USDOC when applying the W-T comparison methodology in administrative reviews "as such", we do not consider it necessary to also address whether the use of zeroing by USDOC when applying the W-T comparison methodology in "subsequent connected stages" of the *Washers* anti-dumping order, including administrative reviews, is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Accordingly, it is not necessary for us to address the procedural issue of whether the preliminary and final determinations of the first administrative review of the *Washers* anti-dumping order are within our terms of reference.

7.6 Claims under the SCM Agreement

7.6.1 Introduction

7.210. Korea pursues a number of claims concerning the USDOC's determination that two tax credit subsidy programmes benefiting Samsung are specific. Korea also challenges the manner in which the USDOC calculated the amount of subsidy conferred on Samsung under those programmes.

7.211. The first programme, Article 10(1)(3) of the Restriction of Special Taxation Act (RSTA), provides tax credits pursuant to certain Research and Development (R&D) expenditures. The USDOC found *de facto* specificity under Article 2.1(c) of the SCM Agreement, on the basis of its finding that Samsung received a disproportionately large amount of the total benefit under that programme. Korea challenges the USDOC's finding of *de facto* specificity.

7.212. The second programme, Article 26 of the RSTA, provides tax credits pursuant to investment in certain business assets. The USDOC found specificity under Article 2.2 of the SCM Agreement, on the basis of its finding that the programme was limited to certain enterprises located within a designated geographical region. Korea challenges this determination of regional specificity.

7.213. The USDOC calculated Samsung's margin of subsidization for the relevant tax credits using an allocation method based on the sales value of all products produced by Samsung in Korea. Korea challenges the USDOC's decision not to calculate an amount of subsidy conferred on Samsung in respect of only the Digital Appliances business unit. Korea also challenges the USDOC's calculation of the amount of subsidization for RSTA Article 10(1)(3) tax credits without including the sales value of LRWs produced by Samsung outside of Korea.

7.214. The United States asks the Panel to reject Korea's claims.

[368] Appellate Body Reports, *US – Continued Zeroing*, paras. 314-316; *US – Stainless Steel (Mexico)*, paras. 133 and 134; *US – Zeroing (Japan)*, para. 166; and *US – Zeroing (EC)*, paras. 134 and 135.

7.6.2 Whether the USDOC properly found that RSTA Article 10(1)(3) tax credit subsidies are *de facto* specific: disproportionately large amounts

7.6.2.1 Introduction

7.215. The USDOC found that the RSTA Article 10(1)(3) tax credit scheme was not *de jure* specific pursuant to Article 2.1(a) of the SCM Agreement, but that it was *de facto* specific pursuant to Article 2.1(c). In particular, the USDOC determined that subsidies had been provided to Samsung under that scheme in "disproportionately large amounts". The USDOC's determination was based on the facts that: (i) Samsung received a "very large" percentage of total subsidies disbursed under that scheme, and (ii) Samsung received many times more than the average recipient.[369] Following domestic judicial proceedings, this issue was subsequently remanded to the USDOC for review. In its remand determination, the USDOC supplemented and reaffirmed its original finding of *de facto* specificity. The USDOC found *inter alia* that Samsung claimed more tax credits and saved more tax under the RSTA Article 10(1)(3) scheme than 99 other companies in a similar "economic position", as measured by taxable income.[370]

7.216. Korea claims that both the USDOC's original determination and its remand determination are inconsistent with Article 2.1(c) of the SCM Agreement. The United States asks us to reject Korea's claims.

7.6.2.2 Main arguments of the parties

7.217. Korea denies[371] that Samsung received subsidies in disproportionately large amounts under RSTA Article 10(1)(3). Korea contends that the USDOC's determination of *de facto* specificity is based solely on the fact that the tax credit claimed by Samsung on its 2011 tax return constituted a larger percentage of the total than the average tax credit claimed by each other Korean company. Korea asserts that the amount of subsidy received by Samsung was not disproportionately large because it was determined using one of the two formulas provided for in the programme, and therefore calculated according to the conditions for eligibility for that subsidy. Korea further asserts that the USDOC was unable or unwilling to state what would have constituted a "proportionately" large amount of the Article 10(1)(3) tax credit that Samsung could have received without being subject to a finding of specificity.

7.218. Korea notes that the Appellate Body found in *US – Large Civil Aircraft (2nd complaint)* that a finding of *de facto* specificity under Article 2.1(c) requires the investigating authority to establish that "a subsidy, although not apparently limited to certain enterprises from a review of the relevant legislation or express acts of a granting authority, is nevertheless allocated in a manner that belies the apparent neutrality of the measure".[372] Korea refers in particular to the Appellate Body's finding that an assessment must be made as to whether "the actual allocation of the 'amounts of subsidy' to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b)".[373] Korea submits that the USDOC had no evidence of any difference between the tax year 2010 credit amount that Samsung calculated and the amount that "would be [calculated] if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b)." Korea submits that the USDOC therefore had no basis to conclude that Samsung's RSTA Article 10(1)(3) tax credits were "disproportionate".

7.219. Korea notes that the USDOC confirmed its finding of disproportionality in a remand determination. Korea asserts that the USDOC again failed to examine whether the amounts of tax credits differed from the allocation that would be expected under the conditions for eligibility for that programme. Korea asserts that the USDOC's focus in the remand determination on the 99 largest Korean companies, measured by taxable income, is no different in principle from its original focus. Korea further asserts, *inter alia*, that the USDOC's reliance upon taxable income to assess the issue of disproportionality is inappropriate because taxable income has no relationship

[369] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), pp. 35-36.
[370] *Washers* CVD Redetermination, (Exhibit KOR-44) (BCI), pp. 10-11.
[371] Korea's main arguments are set forth at paras. 265-276 of its first written submission.
[372] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 877.
[373] Ibid. para. 879.

to a company's size and because taxable income reflects innumerable business decisions on both the sales and expense sides. As such calculating tax savings as a percentage of the amount of the tax owed is irrelevant.[374]

7.220. Korea also claims that the USDOC's original and remand determinations on disproportionality are further inconsistent with Article 2.1(c) because they fail to address two mandatory factors set forth in that provision, namely the extent of economic diversification and the length of time during which the programme has been in operation.[375] Korea observes that there is no explicit reference to these factors in the USDOC's determination, and contends that there is no authority in the SCM Agreement for these factors to be taken into account implicitly.[376]

7.221. The United States submits[377] that the USDOC's determination of *de facto* specificity is consistent with Article 2.1(c) of the SCM Agreement. The United States asserts that the USDOC's determination is amply supported by the facts. According to the United States, despite the broad *de jure* availability of the programme, a single company, Samsung, received a very large proportion of all subsidies disbursed under the programme, which had nearly 12,000 participants.[378] The United States notes that Samsung received many times more subsidy than the average recipient.[379] The United States also notes that the USDOC's remand determination showed that Samsung received a large proportion of all credits claimed by the 100 largest companies participating in the programme, and the bulk of the combined credits claimed by the other 99 largest recipients.[380] The United States also asserts that the USDOC's redetermination showed that Samsung received a greater reduction in its tax liability to Korea than the average tax reduction received by the other 99 largest companies.[381] According to the United States, it is remarkable that Korea would criticize the USDOC for relying on taxable income as an indicator of company size, given that the GOK refused to provide data on company revenue or assets. The USDOC explained that its "initial attempt" to address the size argument "based upon the size of assets and amount of revenue was not possible," but that "[t]axable income is a suitable alternative" in part because the "benefit" of a tax credit can be framed as a function of the amount by which taxes are reduced – i.e. the tax savings – and thus premised on taxable income.[382] In the view of the United States, the fact that a company's taxable income and tax savings may reflect tax planning strategies does not render this data irrelevant, particularly at the level of an aggregate comparison between Samsung and the other 99 companies. The United States argues that the USDOC used the best data available, which accounts for company size.[383]

7.222. The United States further submits that, in accordance with the findings of the Appellate Body in *US – Large Civil Aircraft (2nd complaint)*, the USDOC determined that there was a significant disparity between the expected distribution of these subsidies based on the programme's eligibility criteria – which are open to any company investing in research or human resources development – and their actual distribution. The United States refers in this regard to the USDOC's determination that:

> It is a significant indicator of disproportionate use that Samsung and LG together accounted for a very large percentage of all tax credits provided under this program, when this program had more than 11,000 beneficiaries. Even though we would not expect each beneficiary to receive an equal percentage of the total benefits, in the case of Samsung and LG, the percentage of total benefits received is significant.[384]

7.223. The United States contends that this statement should be read in context with the USDOC's finding that RSTA Article 10(1)(3) is not *de jure* specific. The United States asserts that

[374] Korea's second written submission, paras. 273-275.
[375] Korea's first written submission, paras. 272-274.
[376] Korea's second written submission, para. 270.
[377] The main arguments of the United States are set forth at paras. 339-382 of its first written submission.
[378] Final Samsung CVD Calculation Memo, Attachment 7, (Exhibit USA-26) (BCI).
[379] Ibid.
[380] *Washers* CVD Redetermination, (Exhibit KOR-44) (BCI), pp. 10-11.
[381] Ibid. pp. 11-12 and 14.
[382] Ibid. p. 28.
[383] United States' second written submission, paras. 259-260.
[384] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), pp. 35-36.

the USDOC found that the implementing statute for RSTA Article 10(1)(3) "do[es] not limit eligibility to a specific enterprise or industry or group thereof"[385], and that the absence of any restrictions on eligibility means that benefits would have been expected to be distributed more evenly across the programme's 11,764 recipients. The United States submits that there was therefore a significant disparity between the expected distribution of subsidy based on those conditions of eligibility and the actual distribution in which two recipients received such a large percentage of credits and so much more than the average recipient. The United States adds that the text of Article 2.1(c) did not require the USDOC to frame its expectations in precise, quantitative terms. The United States also notes that the Appellate Body did not express in quantitative terms the allocation of benefits it would have expected given the eligibility criteria in *US – Large Civil Aircraft (2nd complaint)*. The United States suggests that this is consistent with the panel's observation in *US – Upland Cotton* that "specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition".[386]

7.224. In the view of the United States, the USDOC also considered at length the explanations provided by the parties for the distribution of RSTA Article 10(1)(3) subsidies – including the "common formula" argument and "size defense" asserted by Samsung, and supported by Korea in this dispute. Regarding Korea's argument that Samsung's tax credits were proportionate because they were calculated using one of the formulas provided for in the programme, the United States contends that the fact that common formulas are used to calculate subsidy amounts has no bearing on the disproportionality inquiry. The United States suggests that these formulas relate to different aspects of a specificity analysis under Article 2.1, namely consideration of potential non-specificity on the basis of the existence of "objective criteria or conditions", pursuant to Article 2.1(b). The United States notes in this regard that the Article 2.1(c) *de facto* specificity analysis is made "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)".

7.225. The United States also disputes Korea's argument that the distribution of benefits reflects the fact that Samsung is a large company, and that any tax credit reflects a large company's research and human resources development activities.[387] The United States observes that Samsung made this argument before the USDOC, but failed to offer any supporting evidence, either quantitative or qualitative.[388] According to the United States, this "size defense" was fundamentally at odds with the purpose of the disproportionality inquiry. Given the level of generality at which it was framed, this theory would render subsidies "proportionate" any time a "large" company received larger amounts of subsidy under a program. Regardless of the metric used as the basis for calculating subsidies (investments, revenue, employment, etc.), large companies will often qualify for and receive more. But, in the view of the United States, this fact is not sufficient to characterize *any* distribution that emerges as "proportionate."[389]

7.226. The United States submits that Korea has failed to make a *prima facie* case of inconsistency regarding the USDOC's alleged failure to address two of the mandatory factors set forth in the third sentence of Article 2.1(c).[390] The United States contends that an authority need only take account of these factors to the extent that they inform an authority's task of "determin[ing] whether a subsidy … is specific."[391] The United States asserts that where these factors are plainly irrelevant to that determination, an authority satisfies its obligation by determining that they are, in fact, irrelevant. The United States asserts that an authority need not conduct an empty analysis, merely to demonstrate compliance with a formalistic checklist.

7.227. The United States asserts that the USDOC properly found that neither of the two factors identified by Korea has any bearing on the USDOC's specificity inquiry. The United States argues that the USDOC expressly found, in respect to the "length of time during which the subsidy

[385] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12.
[386] Panel Report, *US – Upland Cotton*, para. 7.1142; see also ibid. ("At some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy …").
[387] United States' first written submission, paras. 380-382.
[388] United States' second written submission, paras. 235-237.
[389] Ibid. para. 239.
[390] United States' first written submission, paras. 383-394.
[391] SCM Agreement, Article 2.1 (*chapeau*).

programme has been in operation", that the RSTA Article 10(1)(3) programme began in 1982.[392] The United States contends that the thirty-year duration of this subsidy programme was repeatedly noted in the record.[393]

7.228. The United States also suggests that the USDOC took Korea's economic diversification into account implicitly. The United States refers in this regard to the fact that, because Korea was unable to provide data setting out the distribution of RSTA Article 10(1)(3) subsidies by industry and sector[394], the USDOC found that "the information on the record is not sufficient to evaluate predominance or disproportionality on an industry basis".[395] The United States also asserts that the USDOC was in any event aware of the publicly known fact that Korea is one of the wealthiest and most diversified economies in the world – a fact that Korea neither raised nor contested.[396] The United States observes in this regard that the record indicates that Korea is a member of both the Organization for Economic Cooperation and Development (OECD) and G20, and chaired a recent G20 summit[397], and that the RSTA Article 10(1)(3) R&D tax credit programme had nearly 12,000 participants[398], reflecting Korea's status as an advanced, diversified economy.

7.6.2.3 Main arguments of third parties[399]

7.229. China asserts[400] that the Appellate Body has confirmed that the term "disproportionately large" is a relative term.[401] According to China, its plain meaning denotes a *comparative* exercise to determine whether the "amounts" of subsidy received are *greater* than the amount that would have been received *in proportion* to something else. China contends that, because the text of Article 2.1(c) is silent on the benchmark (i.e. the "something else") from which to measure whether the amounts received are "disproportionately large" or not, the issue on which the parties disagree is the following: Must the amounts received be disproportionate, solely in absolute terms, when compared both to the total amount available under the subsidy programme and to the amounts received by other recipients (which is the United States' position), or must the amounts received be disproportionate, in "relational" terms[402], to the amount that the recipient at issue could be expected to receive, given the precise terms of the eligibility criteria, the amount of benefitting activity, and other relevant factors (which is Korea's position)? In China's view, the question whether "disproportionately large amounts" of subsidy are received by a particular recipient cannot be based on a simple assessment of whether that recipient receives a major portion of the total amount available under the subsidy programme and a greater amount, in absolute terms, than other recipients. China contends that the implication of such an approach would be that only subsidies received in equal amounts by all producers could be considered non-specific. China asserts that such an approach would turn the concept of "disproportion" on its head: if small producers with little R&D expenditure each received the same amounts of R&D subsidy as a large producer with a massive R&D spend, the small producers are likely receiving a disproportionately large amount. Referring to the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)*, China contends that the question is whether USDOC's determination of "disproportionate amount" rested on something more than a simple finding that Samsung received a major portion of the total amount available under the subsidy programme and a larger share, in absolute terms, of the subsidy than other recipients. That alone would not be sufficient, as

[392] *Washers* CVD Preliminary Determination, 77 Fed. Reg. at 33187, (Exhibit KOR-85).
[393] See, e.g. GOK April 9, 2012 Questionnaire Response (QR) at App. Vol. at II-75, 108 (Exhibit KOR-75) (BCI).
[394] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12. Korea was unable to provide this information, on the grounds that it did not compile data for RSTA Article 10(1)(3) along industry and sector lines (Ibid.).
[395] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12.
[396] The United States refers, for example, to Panel Report, *US – Softwood Lumber IV,* para. 7.124 (finding that the USDOC took into account the "publicly known fact" that Canada is a highly diversified economy when the USDOC noted that the vast majority of companies and industries in Canada do not receive benefits under the programmes in question).
[397] GOK April 9, 2012 QR at Ex. Gen02 (PR-56) at "Minister's Forward" (Exhibit USA-27).
[398] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12; Final Samsung CVD Calculation Memo, Attachment 7, (Exhibit USA-26) (BCI).
[399] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[400] China's third party submission, paras. 102-106.
[401] China refers in this regard to Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.
[402] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.

explained by the Appellate Body, to reach a finding that a recipient received disproportionately large amounts of subsidies in the sense of Article 2.1(c) of the SCM Agreement. China contends that, consistent with the guidance provided by the Appellate Body, an authority must carefully examine two factors: first, whether "the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution"; and, second, "the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy, in relational terms, to certain enterprises".

7.230. Referring to the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)*, the European Union[403] considers that the Panel should identify the amounts of subsidy granted to Samsung pursuant to that provision since its entry into force. Then, the Panel should determine whether those amounts are "disproportionately large" relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b). If there is a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, the Panel should also examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to Samsung. If, ultimately, the reasons for Samsung obtaining more tax credits than other eligible Korean companies is determined by the conditions for eligibility (i.e. qualifying investments in R&D activities), this may indicate that Samsung did not receive disproportionally large amounts for the entire period. Since the amount of subsidisation was established by reference to a particular year (i.e. 2011), the Panel may also look into whether Samsung received disproportionally large amounts of tax credits in that year as compared to other eligible Korean companies in the same period.

7.6.2.4 Evaluation by the Panel

7.6.2.4.1 The USDOC's original determination

7.231. We begin by addressing Korea's claim concerning the finding of disproportionality in the USDOC's original determination. We then address the USDOC's redetermination of this issue. Thereafter, we address Korea's claim concerning the USDOC's alleged failure to address the two factors set forth in the final sentence of Article 2.1(c) of the SCM Agreement.

7.232. Article 2.1(c) of the SCM Agreement provides in relevant part:

> If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[404] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

7.233. Article 2.1(c) of the SCM Agreement therefore allows investigating authorities to find that subsidies are *de facto* specific when they result in the "granting of disproportionately large amounts of subsidy to certain enterprises". There is no guidance in Article 2.1(c) as to how one might establish that the amount of subsidy provided is actually "disproportionately large". However, this issue was addressed by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* in the following manner:

> The language of Article 2.1(c) indicates that the first task is to identify the "amounts of subsidy" granted. Second, an assessment must be made as to whether the amounts of subsidy are "disproportionately large". This term suggests that

[403] European Union's third party submission, paras. 101-103.

[404] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

> disproportionality is a relational concept that requires an assessment as to whether the amounts of subsidy are out of proportion, or relatively too large. When viewed against the analytical framework set out above regarding Article 2.1(c), this factor requires a panel to determine whether the actual allocation of the "amounts of subsidy" to certain enterprises is too large relative to what the allocation would have been if the subsidy were administered in accordance with the conditions for eligibility for that subsidy as assessed under Article 2.1(a) and (b). In our view, where the granting of the subsidy indicates a disparity between the expected distribution of that subsidy, as determined by the conditions of eligibility, and its actual distribution, a panel will be required to examine the reasons for that disparity so as ultimately to determine whether there has been a granting of disproportionately large amounts of subsidy to certain enterprises.[405]

7.234. Referring to these findings, the Appellate Body further explained in *US – Carbon Steel (India)* that it:

> [D]o[es] not see that an investigating authority or a panel could assess whether "amounts of subsidy" that were granted were "disproportionately large" without having some benchmark, perhaps informed by who was expected to receive that subsidy, against which to compare those granted amounts.[406]

7.235. A similar approach had been adopted by the panel in *EC and certain member States – Large Civil Aircraft*:

> [A] subsidy granted to certain enterprises in an amount that represents 50% of the total amount of subsidies granted under a relevant subsidy programme says little, if anything, about whether that amount is "disproportionately large". As we have previously explained, assessing whether the amount of a subsidy is "disproportionately large" involves determining whether the relationship between the amount of the subsidy at issue and a relevant "baseline" demonstrates that the amount of subsidy is greater than the amount that it would need to be in order to be proportionate. Thus, determining whether a 50% share of the total amount of subsidies granted under a particular subsidy programme to certain enterprises is "disproportionately large" involves considering whether the 50% share is greater than what it would need to be in order to say that the certain enterprises received a proportionate amount of all subsidies granted under that same programme.[407] (footnote omitted)

7.236. We agree with these findings, and attach particular importance to the fact that disproportionality is a "relational concept". We understand the relational nature of the analysis to mean that a finding of disproportionality must be based on an assessment of how the amount of subsidy actually received relates to an objective benchmark indicative of the amount of subsidy that the recipient would have been expected to receive if the subsidy were distributed proportionately, in accordance with the conditions for eligibility.[408]

7.237. The United States agrees that disproportionality is a relational concept, but does not consider that the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* mean that the USDOC was required to undertake the type of relational analysis described above. The United States disagrees that the USDOC was required to compare the amount of subsidy received by Samsung with the amount of subsidy that Samsung should have received. The United States

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[405] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.

[406] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.389.

[407] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.972. This finding was not reviewed by the Appellate Body.

[408] Korea suggests that the amount of subsidy received by Samsung should have been compared by the USDOC to a "second ratio" representing the amount of subsidy that Samsung should have received. Korea suggests that the Appellate Body upheld the need for such a "second ratio" in *US – Large Civil Aircraft (2nd Complaint)*. The United States denies that the Appellate Body stated that any such "second ratio" was required. We shall refrain from using the term "second ratio", since the precise meaning of that term is unclear. It is neither a treaty term, not a term defined by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)*. We shall therefore complete our evaluation of Korea's claim without finding whether or not the USDOC was required to have considered any such "second ratio" in its relational analysis.

contends that precise quantification of the amount that Samsung should have received was not required by the Appellate Body in *US – Large Civil Aircraft (2nd Complaint).* The United States asserts that the USDOC properly found that Samsung received more than expected, relative to the amounts received by other recipients and bearing in mind the absence of any *de jure* restrictions on eligibility. The United States asserts that the findings of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint*) support the determination made by the USDOC, because the Appellate Body found that it would have expected "a wider distribution of [subsidy] benefits", and this "provides a reason to believe that the IRB subsidies were granted in disproportionately large amounts to certain enterprises".[409]

7.238. We are not persuaded by the United States' argument. As indicated above, the standard set forth by the Appellate Body clearly calls for a relational analysis. While the Appellate Body accepted that the fact that recipients received 69% of total subsidies "provide[d] a reason to believe"[410] that the relevant subsidies were granted in disproportionately large amounts, because normally a wider distribution would have been expected, the Appellate Body nevertheless explained that it was necessary to examine possible reasons that explain the disparity between actual and expected distribution of a subsidy.[411] The Appellate Body accepted the United States' argument that it would have made sense to examine, in this latter context, whether the disparity could be explained by certain undefined "qualifying investments".[412] Bearing in mind the Appellate Body's earlier reference to disproportionality being a relational concept, this reference to "qualifying investments" is, in our view, clearly intended to establish how the amount received relates to some objective benchmark, i.e. the amount of "qualifying investments" in that case.

7.239. The Appellate Body found that the United States had not placed any evidence on the panel record concerning the level of "qualifying investments". In the absence of "sufficient reasons supported by evidence to undermine the assessment"[413] that the granting of 69% of total subsidies represents an allocation at variance from the allocation that would have been expected, the Appellate Body upheld the panel's finding. This follows from the fact that the task of the Appellate Body in reviewing the findings of a panel is not to conduct its own examination of the facts *de novo*, but rather examine whether the findings of the panel are erroneous as a matter of law. In contrast, in a countervailing duty investigation, an investigating authority has the burden of investigating, and evaluating facts in light of the proper legal framework. The investigating authority is entitled to reach a preliminary determination of disproportionality based on an alleged disparity between the actual and expected distribution of a subsidy. However, that authority is then required to investigate the reasons for that disparity, by undertaking the requisite relational analysis using a relevant benchmark, before finding disproportionality on the basis of that disparity. The authority is not entitled to place the burden on the respondents to rebut that determination with evidence supporting a relational analysis that explains the disparity. The onus is on the investigating authority to investigate the facts concerning the issue of potential disproportionality for itself, and make a determination on the basis of the relational analysis set forth above.[414]

7.240. We note the United States' assertion that the USDOC was not required to express the expected distribution under RSTA Article 10(1)(3) in precise, quantitative terms.[415] We do not disagree. Nor does Korea claim that this is what the USDOC should have done.[416] However, a finding of disproportionality must be based on some form of relational analysis examining how the amount received relates to a benchmark – whether described in quantitative or qualitative terms –

[409] United States' first written submission, para. 370 (citing Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint*), para. 884).

[410] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 884.

[411] Ibid. para. 886.

[412] Ibid. para. 887.

[413] Ibid. para. 888.

[414] We therefore reject the United States' argument that Korea and Samsung were in the same position before the USDOC in the *Washers* countervailing investigation that the United States was in before the panel and Appellate Body in *US – Large Civil Aircraft (2nd Complaint)*, in the sense that they were required to show why the large amount of subsidy received by Samsung did not indicate that the subsidies were granted in disproportionately large amounts (United States' oral statement at the second meeting of the Panel, para. 52). The onus was rather on the USDOC to undertake the relational analysis necessary for a proper determination of disproportionality.

[415] United States' second written submission, para. 214.

[416] Korea's second written submission, para. 258.

that is indicative of the amount that the recipient would have been expected to receive were the distribution proportionate.

7.241. The United States also objects to Korea's argument that the amounts received by Samsung were necessarily proportionate because they were consistent with the amounts that Samsung should have received, bearing in mind the application of the applicable formula to the amount of qualifying investments. The United States considers that the formula and conditions for eligibility of the RSTA Article 10(1)(3) scheme pertain exclusively to the issue of non-specificity under Article 2.1(b). The United States notes in this regard that Article 2.1(c) begins with the phrase "[n]otwithstanding any appearance of non-specificity resulting from the principles laid down in" *inter alia* Article 2.1(b). Second, the United States asserts that while an entitlement to a tax credit under the RSTA Article 10(1)(3) tax credit scheme arises as a result of qualifying investments, those qualifying investments do not determine the amount of tax credit actually claimed.[417] The United States asserts that benefits under RSTA Article 10(1)(3) are calculated according to formulas that vary depending on company size, and recipients may elect not to take tax credits or defer them given Korea's Minimum Tax requirements. The United States submits that benefits do not simply reflect amounts invested, or any formula set forth in RSTA Article 10(1)(3).[418]

7.242. We do not agree that the conditions for eligibility and other provisions governing the amount of subsidy to be provided are only relevant to the issue of non-specificity pursuant to Article 2.1(b) of the SCM Agreement. As explained above, the Appellate Body has stated clearly that the conditions for eligibility may play an important role in the relational analysis required for determining whether or not subsidy amounts are disproportionate in the sense of Article 2.1(c). We agree, since these conditions are generally relevant when identifying a benchmark that is indicative of what the expected amount of subsidy would have been. In these circumstances, reference is not made to conditions for eligibility in order to establish non-specificity under Article 2.1(b). A determination of non-specificity under Article 2.1(b) would not somehow trump a determination of *de facto* specificity under Article 2.1(c). However, the fact that the conditions for eligibility are not relied on to establish non-specificity under Article 2.1(b) does not mean that those same conditions should not – to the extent relevant – inform the relational analysis required to demonstrate *de facto* specificity on the basis of disproportionality.

7.243. Concerning the relevance of qualifying investments to determining the amount of subsidy, we do not disagree with the United States' assertion that "[t]he amount of tax credits received may reflect a range of factors – such as the size of the company (SME vs. non-SME), the extent to which expenses in the tax year compare to the annual average over preceding years, a company's tax loss, compliance with Minimum Tax requirements, and other tax planning considerations".[419] There is no dispute between the parties regarding this matter. However, the fact that the amounts claimed do not relate directly to the amounts of qualifying investments does not mean that the USDOC was not required to undertake the relational analysis explained above. It rather means that, in conducting such relational analysis, the USDOC was required to take account of the broad range of factors having a bearing on the amount that Samsung would have been expected to receive. Since Article 2.1(c) concerns a determination of *de facto* specificity, a determination under that provision must take proper account of all relevant *facts*. We recognize the complexity of the relational analysis required of the USDOC, given the number of different factors having a bearing on the amount of subsidy that Samsung might be expected to claim and receive in a given year. However, the complexity of the task does not absolve the USDOC from its obligations under Article 2.1(c) of the SCM Agreement.[420]

7.244. The USDOC's determination of disproportionality did not include the required relational analysis of the amount of subsidy received by Samsung. The USDOC's determination was based on

[417] See United States' response to Panel question No. 5.3, paras. 8-13.

[418] United States' first written submission, para. 379; and response to Panel question No. 5.3, paras. 8-13.

[419] United States response to Panel question No. 3.1, para. 130.

[420] We disagree with Korea's argument that the USDOC should have assessed disproportionality on the basis of the tax credit *earned*, as opposed to the amount *claimed* (Korea's response to Panel question No. 5.3, para. 8). A tax credit constitutes a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement because it results in "government [tax] revenue that is otherwise due [being] foregone or not collected". The amount of benefit is the amount of tax revenue foregone or not collected, and therefore relates to the amount of tax credit actually claimed by the taxpayer. If no tax credits are claimed for a given period, no revenue is foregone or not collected – even if tax credits are actually *earned* in that period.

the facts that (i) Samsung received a certain percentage of all subsidies disbursed under that scheme, and (ii) Samsung received many times more than the average recipient. While the USDOC considered how the amount received by Samsung related to the amounts received by other recipients, the USDOC failed to consider how the amount of subsidy received by Samsung related to a benchmark that was indicative of the amount that Samsung would have been expected to receive, taking account of all factors having a bearing on that amount were the subsidy distributed proportionately. We therefore find that the USDOC's determination of disproportionality is inconsistent with Article 2.1(c) of the SCM Agreement.

7.6.2.4.2 The USDOC's remand determination

7.245. In its remand determination, the USDOC affirmed its original finding of disproportionality. The USDOC did so *inter alia* by comparing the amounts received by Samsung with the amounts received by the other 99 largest recipients. The USDOC also compared the amount of tax saved by Samsung with the amount of tax saved by 99 other companies in a similar "economic position", as measured by taxable income.[421]

7.246. Before addressing the parties' substantive arguments regarding the USDOC's remand determination, we note the United States' argument that the USDOC's remand determination falls outside the Panel's terms of reference, and therefore cannot be found to be WTO-inconsistent. The United States asserts in this regard that the parties did not consult on the remand determination, and that the remand determination did not exist at the time that the Panel was established.[422] However, the United States accepts that the remand determination "is a relevant fact that the Panel may take into account".[423]

7.247. We consider that the United States' argument that the parties did not consult on the remand determination is linked to its argument that the remand determination was not in existence at the time that the Panel was established. We note that, as such, the remand determination is not expressly covered by the text of Korea's Request for Consultations.[424] In this latter regard, we note that Korea's Request for Consultations, dated 3 September 2013, requested consultations on the following:

> Any determination in the proceeding entitled Large Residential Washers from Korea, including the investigation and all administrative reviews, new shipper reviews, changed circumstances reviews, sunset reviews and other segments of that proceeding.[425]

Korea also requested consultations on "any closely connected, subsequent measures that apply a measure or measures described in this request for consultations".[426] In our view, this language is sufficiently broad to cover the remand determination.

7.248. The Appellate Body addressed the question of whether a measure not in existence at the time of establishment of a panel could be covered by a panel's terms of reference in *US – Zeroing (Japan) (Article 21.5)*. The Appellate Body stated:

> We recall that Article 6.2 of the DSU provides that the request for the establishment of a panel "shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Apart from the reference in the present tense to the fact that the complainant must identify the measures "at issue", Article 6.2 does not set

[421] Exhibit KOR-44 (BCI), p. 28. The United States asserts that the USDOC used taxable income to identify comparable companies because the Government of Korea had failed to provide data on company revenue or assets (United States' second written submission, para. 259). We note that there was no finding by the USDOC that the Government of Korea had failed to cooperate with its investigation. Nor did the USDOC apply facts available in this context.

[422] United States' comments on Korea's response to Panel question No. 5.7, para. 28; and second written submission, fn 348.

[423] United States' comments on Korea's response to Panel question No. 5.7, para. 29.

[424] The United States does not contend that the remand determination is not covered by Korea's Request for Establishment of a Panel.

[425] Document WT/DS464/1, Section V.4.

[426] Ibid. Section V.

> out an express temporal condition or limitation on the measures that can be identified in a panel request. Indeed, in *US – Upland Cotton*, where the issue was raised in the context of measures that had expired prior to the panel proceedings, the Appellate Body explained that "nothing inherent in the term 'at issue' sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired". In *EC – Chicken Cuts*, the Appellate Body stated that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel." Nevertheless, the Appellate Body also stated in that case that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".[427] (footnotes omitted)
>
> As a further argument to support its view that Review 9 could not fall within the Panel's terms of reference, the United States relies on the Appellate Body's statement in *EC – Chicken Cuts* that "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel", and that only in "certain limited circumstances" will measures enacted subsequent to a panel's establishment fall within the Panel's terms of reference. According to the United States, the circumstances of this case, including the fact that it is a compliance proceeding, do not justify the inclusion of Review 9 in the Panel's terms of reference. As the United States itself recognizes, however, in *EC – Chicken Cuts*, the Appellate Body did not rule that Article 6.2 categorically prohibits the inclusion, within a panel's terms of reference, of measures that come into existence or are completed after the panel is requested. Rather, the Appellate Body noted explicitly that, in certain circumstances, such measures could be included in a panel's terms of reference. Moreover, whereas the statement in *EC – Chicken Cuts* to which the United States refers was made in the context of original WTO proceedings, we are dealing here with Article 21.5 proceedings. As we explained earlier, the requirements of Article 6.2 must be adapted to a panel request under Article 21.5, and the scope and function of Article 21.5 proceedings necessarily inform the interpretation of the Article 6.2 requirements in such proceedings. The proceedings before us present circumstances in which the inclusion of Review 9 was necessary for the Panel to assess whether compliance had been achieved, and thereby resolve the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings".[428] (footnotes omitted)

7.249. We are guided by these findings, and agree that Article 6.2 of the DSU does not impose any express temporal condition or limitation on the measures that can be identified in a panel request. We also agree that measures enacted subsequent to the establishment of the panel may, in certain circumstances, fall within a panel's terms of reference.[429] Whereas the Appellate Body in *US – Zeroing (Japan) (Article 21.5 – Japan)* attached importance to the fact that the proceedings in that case were brought under Article 21.5 of the DSU, nothing in the Appellate Body's Report suggests that a similar approach may not be adopted in other specific circumstances. Considering the circumstances of the present case, we observe that there is a very close nexus between the remand determination and the measures expressly cited in the request for the establishment of the Panel. In particular, the remand determination supplements and reaffirms the USDOC's original determination of disproportionality, and is restricted to that issue. In these particular circumstances, we consider that the remand determination is covered by our terms of reference, despite the fact that it was not in existence at the time that this Panel was established.

7.250. Having found that the USDOC's remand determination is properly before us, we now examine Korea's claim that the redetermination suffers from the same analytical flaw as the

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[427] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 121.

[428] Ibid. para. 125.

[429] Furthermore, it is not necessary to explicitly identify every challenged measure in the panel request, provided that a measure not explicitly mentioned has "a clear relationship to a measure that is specifically described [in the request], so that it can be said to be 'included' in the specified measure". Such a condition may be satisfied where, for example, the measure not explicitly referred to in the request amends a measure that is explicitly identified, without changing the essence of that original measure (Appellate Body Reports, *Chile – Price Band System*, paras. 126-144; *EC – Chicken Cuts*, paras. 156-159).

original determination. We have already explained that, in order to properly find that Samsung was granted tax credits in disproportionately large amounts, the USDOC should have shown that Samsung received more tax credits than it would have been expected to receive, taking account of all factors having a bearing on the amount of tax credit that Samsung was entitled to claim. Just as in the original determination, the USDOC failed to undertake this type of relational analysis in its remand determination.[430] The USDOC compared Samsung's situation to that of other companies, but failed to compare the amounts received by Samsung with any benchmark indicative of what Samsung would have been expected to receive, taking account of all factors having a bearing on that benchmark, were the subsidy distributed proportionately. For this reason, we find that the remand determination is inconsistent with Article 2.1(c) of the SCM Agreement.

7.6.2.4.3 Whether the USDOC took account of the two factors set forth in the final sentence of Article 2.1(c)

7.251. We begin our analysis of Korea's claim by reviewing the following findings of the panel in *US – Countervailing Measures (China)*:

> A fourth aspect of China's claim under Article 2 of the SCM Agreement concerns the final sentence of Article 2.1(c). The question before the Panel is whether the factors in the final sentence of Article 2.1(c), namely "the extent of diversification of economic activities within the jurisdiction of the granting authority" and "the length of time during which the subsidy programme has been in operation", must be taken into account by an investigating authority in every Article 2.1(c) analysis.
>
> With regard to the ordinary meaning of the final sentence of Article 2.1(c), we are of the view that the use of the term "shall" clearly connotes an obligation. Indeed, the term is defined as "has a duty to; more broadly, is required to". The decision by the drafters of the SCM Agreement to use the term "shall" instead of terms such as "should" or "may" is significant.
>
> With regard to the context of Article 2.1(c) more broadly, as we have seen above, subparagraph (c) concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise. In this context, we consider the last sentence of Article 2.1(c) to function as a safeguard that keeps in check this flexibility. Indeed, where economic activities within the jurisdiction of the granting authority are less diversified, the use of a subsidy programme by a limited number of certain enterprises may nonetheless lead to a finding of non-specificity. Use by a limited number of certain enterprises may similarly lead to a finding of non-specificity where the subsidy programme has been in operation for a limited period of time only.
>
> In light of the above, the Panel agrees with the finding of the panel in *US – Softwood Lumber IV* that taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly. Similarly, the panel in *EC – Countervailing Measures on DRAM Chips* did not find it unreasonable for an investigating authority to not include an *explicit* statement that these factors had been taken into account. In *US – Softwood Lumber IV*, however, the panel found that a certain statement of the investigating authority indicated that these factors had been taken into account implicitly.[431]

7.252. We agree with these findings. There is no doubt that the duration and economic diversification factors set forth in Article 2.1(c) of the SCM Agreement are mandatory, in the sense that an investigatory authority must ("shall") take account of them whenever a finding of *de facto*

[430] The United States suggests that the USDOC's analysis was limited by Korea's failure to provide certain requested information (United States' first written submission, paras. 393 and 399). Korea asserts that Korea supplied all information that the Department requested that was reasonably available to it. (Korea's second written submission, para. 278).We note that there was no finding by the USDOC that Korea failed to provide necessary information, in the sense of Article 12.7 of the SCM Agreement, nor any application of facts available under that provision. Accordingly, we do not consider that Korea's alleged failure to provide certain requested information is relevant to our evaluation of Korea's claim.

[431] Panel Report, *US – Countervailing Measures (China)*, paras. 7.250-7.256. (footnotes omitted)

specificity is made. Although it may be reasonable for an investigating authority to not include an *explicit* statement that these factors had been taken into account in its determination, there must in any event be some means of determining from the determination that the authority did take them into account. The phrase "taking account of" was addressed by the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*. The Appellate Body found that this phrase calls for "active and meaningful consideration".[432] Although this finding was made in the context of Article 2.2 of the Agreement on Technical Barriers to Trade, we see no reason why this finding should not guide our interpretation of the (similar) phrase "account shall be taken" in the context of Article 2.1(c) of the SCM Agreement. We shall therefore consider whether the USDOC's determination indicates that the USDOC gave active and meaningful consideration to the two factors at issue.

7.253. Regarding the length of time during which the subsidy programme has been in operation, the United States asserts that the USDOC's record contains references to the fact that the RSTA Article 10(1)(3) program began in 1982. One such reference identified by the United States relates to the USDOC noting, in a brief description of the RSTA Article 10(1)(3) programme, that the Government of Korea had "reported" that the programme was first introduced in that year.[433] The other reference concerns the description of the programme provided by the Government of Korea in its Questionnaire Response.[434] These references therefore pertain to statements made by the Government of Korea, and do not indicate that the USDOC undertook any active and meaningful consideration of the duration of the programme in the context of its determination of *de facto* specificity.

7.254. Regarding the extent of economic diversification, the United States refers to the fact that, because Korea was unable to provide data setting out the distribution of RSTA Article 10(1)(3) subsidies by industry and sector[435], the USDOC found that "the information on the record is not sufficient to evaluate predominance or disproportionality on an industry basis".[436] The United States also asserts that the USDOC was in any event aware of the publicly known fact that Korea is one of the wealthiest and most diversified economies in the world – a fact that Korea neither raised nor contested.[437] The United States observes in this regard that the record indicates that Korea is a member of both the Organization for Economic Cooperation and Development (OECD) and G20, and chaired a recent G20 summit[438], and that the RSTA Article 10(1)(3) R&D tax credit programme had nearly 12,000 participants.[439] We do not doubt that such evidence may be of potential relevance to the extent of economic diversification within Korea. However, a series of isolated references to potentially relevant evidence again placed on the record by the Government of Korea does not indicate that the USDOC undertook active and meaningful consideration of this factor in the context of its determination of *de facto* specificity.

7.255. For the above reasons, we find that the USDOC's determination of *de facto* specificity failed to take account of the two mandatory factors referred to in the final sentence of Article 2.1(c) of the SCM Agreement.

7.6.3 Whether the USDOC properly determined regional specificity in respect of RSTA Article 26

7.256. 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

[432] Appellate Body Report, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.218.
[433] *Washers* CVD Preliminary Determination, 77 Fed. Reg. at 33187, (Exhibit KOR-85).
[434] See, e.g. GOK April 9, 2012 QR at App. Vol. at II-75, 108, (Exhibit KOR-75) (BCI).
[435] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12. Korea was unable to provide this information, on the grounds that it did not compile data for RSTA Article 10(1)(3) along industry and sector lines (Ibid.).
[436] Ibid.
[437] The United States refers, for example, to Panel Report, *US – Softwood Lumber IV,* para. 7.124 (finding that the USDOC took into account the "publicly known fact" that Canada is a highly diversified economy when the USDOC noted that the vast majority of companies and industries in Canada do not receive benefits under the programmes in question).
[438] GOK April 9, 2012 QR at Ex. Gen02 (PR-56) at "Minister's Forward", (Exhibit USA-27).
[439] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 12; Final Samsung CVD Calculation Memo, Attachment 7, (Exhibit USA-26) (BCI).

that the RSTA Article 26 tax credit scheme is regionally specific pursuant to Article 2.2 of the SCM Agreement. Article 2.2 provides:

> A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It 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.

7.257. Korea challenges various aspects of the USDOC's determination. First, Korea suggests that the RSTA Article 26 scheme is non-specific according to Article 2.1(b), and therefore cannot be found to be specific under Article 2.2. Second, Korea contends that the subsidy recipients under the Article 26 scheme are not "enterprises" located within a designated geographical region. Third, Korea asserts that there is no "designated geographical region" for subsidization under the Article 26 scheme. Fourth, Korea submits that the USDOC in any event failed to establish that the tax credits were only available to "certain enterprises" within the alleged "designated geographical region". We address each of these claims below.

7.6.3.1 Relationship between Article 2.1(b) and Article 2.2

7.6.3.1.1 Main arguments of the parties

7.258. Korea suggests that the eligibility requirements for RSTA Article 26 are "objective criteria and conditions" within the meaning of Article 2.1(b), and thus non-specific by virtue of that provision.[440] We understand Korea to argue that a subsidy programme deemed non-specific under Article 2.1(b) cannot be deemed specific under Article 2.2.

7.259. The United States asserts that Korea's interpretation has no grounding in the text of Article 2, since Article 2.2 provides that subsidies limited to designated regions "shall be specific". The United States observes that the panel in *EC and certain member States – Large Civil Aircraft* stated:

> There is no indication in the text of the SCM Agreement that a finding of specificity under Article 2.2 is somehow subject to further examination under Article 2.1(b). There is thus no basis for the inference of a hierarchy … and a reading of the provisions of Article 2 as potentially conflicting in this manner is to be avoided.[441]

7.260. The United States also contends that Korea's interpretation would make Article 8.2(b) redundant. The United States observes that 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 added). The United States recalls that the panel in *EC and certain member States – Large Civil Aircraft*, when dealing with a similar argument, observed that such 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".[442]

7.6.3.1.2 Evaluation by the Panel

7.261. Korea makes a simple assertion that because the eligibility requirements for RSTA Article 26 are "objective criteria and conditions" within the meaning of Article 2.1(b), and because RSTA Article 26 "fully meets the requirements of Article 2.1(b)", "the tax credits are not specific". Korea does not discuss the relationship between Articles 2.1(b) and 2.2, nor support its assertion with any analysis of the text of these provisions. We see no basis to conclude that a finding of non-specificity under Article 2.1(b) should trump, or exclude, a finding of regional specificity under Article 2.2. The text of these provisions does not suggest that there is any hierarchy between them. In addition, we note that the panel in *EC and certain member States – Large Civil Aircraft* found that "[t]here is no indication in the text of the SCM Agreement that a finding of specificity

[440] Korea's first written submission, paras. 322-327.
[441] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1233.
[442] Ibid. para. 7.1234.

under Article 2.2 is somehow subject to further examination under Article 2.1(b)".[443] We agree with this finding, and similarly consider that Article 2.2 operates independently of Article 2.1(b). In these circumstances, we decline to find that the RSTA Article 26 subsidies are necessarily non-specific because of the operation of Article 2.1(b) of the SCM Agreement, irrespective of the application of Article 2.2.

7.6.3.2 Whether RSTA Article 26 imposes any limitation on the geographical location of enterprises

7.6.3.2.1 Main arguments of the parties

7.262. Korea denies that RTSA Article 26 imposes any limitation on the geographical location of certain "enterprises". Korea asserts that the only geographical limitation in RSTA Article 26 is the limitation on the investments that give rise to the tax credits. Korea asserts that an "enterprise" located anywhere in the territory of Korea is eligible to receive the Article 26 tax credits to the extent that it makes qualifying investments outside of the designated "overcrowding control region".

7.263. Korea asserts that although the Appellate Body has not provided a detailed interpretation of this provision, it has confirmed that Article 2.2 is focused on limitations as to the location of the *enterprises* benefiting from the subsidy. Korea refers in this regard to statements by the Appellate Body in *US – Carbon Steel (India)*.[444] Korea notes that the ordinary meaning of the term "enterprise" is "[a] business firm, a company", as has been confirmed by the Appellate Body.[445] Korea asserts that, based on its ordinary meaning, the term "enterprise" refers to the overall business organization having legal personality and not to particular operations, facilities or investments of such enterprise.[446] Korea notes the United States' reliance on the compound term "certain enterprises" and the definition of this term in the chapeau of Article 2.1 as extending to an industry or group of enterprises.[447] Korea contends that the fact that the term may encompass more than one business firm or company does not mean that the term is also intended to cover just parts of those companies or firms, such as their facilities or investments. On the contrary, the fact that the drafters expressly referred to aggregate forms of enterprises in the definition of "certain enterprises" but did not refer to sub-divisions of such enterprises, strongly suggests that they did not intend the term to be expansive in both directions.[448]

7.264. The United States refutes Korea's suggestion that the Article 26 programme addresses the "use" of a subsidy. The United States contends that Article 26 instead ties eligibility to the geographic location of the underlying facilities. The United States argues that the fact that the geographical restriction in RSTA Article 26 is addressed to the location of the facilities, as opposed to the head office of the subsidy recipient, is of no moment, since Article 2.2 does not impose a "head office" test when establishing the location of the recipient enterprises. The United States contends that an enterprise or industry can be "located" in a variety of places – including where its investments and facilities are located. The United States notes that, in *EC and certain member States – Large Civil Aircraft*, Airbus received numerous subsidies in Spain that were found to be regionally specific, based on the location of Airbus-owned facilities in various designated regions – and not the location of its headquarters.[449] The United States suggests that if a "head office test" were accepted, Members could readily circumvent the SCM Agreement by imposing geographic restrictions at the level of assets and investments, as opposed to the head office of recipients.[450]

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[443] Panel Report, EC and certain member States – Large Civil Aircraft, para. 7.1233.

[444] Appellate Body Report, *US – Carbon Steel (India)*, footnote 1011 to para. 4.375. Korea also referred the Panel to Appellate Body Report, *U.S. – Anti-Dumping and Countervailing Duties (China)*, para. 413.

[445] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373 (referring to Shorter Oxford English Dictionary, 6th ed., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 841).

[446] Korea's second written submission, paras. 354-355.

[447] U.S. response to Panel question 3.2, paras. 142-143.

[448] Korea's second written submission, para. 350.

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

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

7.265. The United States also submits that the term "enterprise" is broad enough to include a firm's facilities or investments. The United States observes that the term "enterprise" is part of the compound term "certain enterprises", which is defined in the chapeau of Article 2.1 as "an enterprise or industry or group of enterprises or industries". The United States asserts that this term therefore encompasses a wide variety of economic structures and activities. The United States suggests that a firm, industry or group thereof may be "located" in a variety of places, including the site of head office, branch, manufacturing facility, or other asset or investment. According to the United States, the fact that the term "certain enterprises" encompasses the term "industries" renders it particularly inappropriate to draw formalistic distinctions about location.

7.6.3.2.2 Evaluation by the Panel

7.266. Korea notes that the text of Article 2.2 focuses on limitations concerning the geographical location of certain "enterprises". Korea interprets "enterprises" as companies or businesses having legal personality.[451] Korea contends that there are no limitations on such enterprises under RSTA Article 26. Korea asserts that the RSTA Article 26 tax credits are available to any enterprise that meets the qualifications of that scheme, without regard to where the enterprise is located. Korea contends that an Article 26 recipient enterprise can be located anywhere within Korea, even within the Seoul "overcrowding control region". Korea asserts that Article 26 merely imposes a geographical limitation on the use of the subsidized activity, which is restricted to investments in facilities outside of the Seoul overcrowding region. In other words, Korea claims that the geographical restriction pertains to the location of the *facilities* acquired in the context of the RSTA Article 26 scheme, rather than the *enterprises* acquiring those facilities.[452]

7.267. We are not persuaded that the application of Article 2.2 should hinge on the distinction drawn by Korea between an "enterprise" (as defined by Korea) and the "facilities" of such an enterprise. Read in isolation, the term "enterprise" means "a business or company".[453] The term "business" includes the notion of "commercial activity".[454] An enterprise's "commercial activities" may be broad in scope, ranging from research and design through to production, sales and servicing. 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". Nor is there anything in the meaning of these terms to suggest that the relevant "commercial activities" should each have separate legal personalities.

7.268. Furthermore, even if the meaning of the term "enterprise" were limited to a business or company with legal personality, as suggested by Korea, Article 2.2 applies in respect of subsidies that are limited to "certain enterprises" within a designated geographical region. The chapeau of Article 2.1 provides that the phrase "certain enterprises" includes "an enterprise or industry or group of enterprises or industries". Viewed in this context, the term "enterprise" must be interpreted more broadly than suggested by Korea. This is because an "industry or group of enterprises or industries" would never meet the definition of "enterprise" proposed by Korea, because such entities are not companies or businesses with legal personality. The fact that these entities are nevertheless explicitly deemed to constitute "certain enterprises" by Article 2.1 of the SCM Agreement must mean that Korea's interpretation of the term "enterprise" is overly restrictive.

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[451] Korea's second written submission, para. 356.

[452] Korea asserts that the United States has consistently defined, in its free trade agreements, the term "enterprises" as an "entity constituted or organized under applicable law …, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization" (Korea's response to Panel question No. 5.10, para. 34). Korea observes that there is no reference in this definition to an entity's facilities. As explained above in section 7.4.3, we are 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.

[453] Oxford Dictionaries, last accessed on 02/10/2015 <http://www.oxforddictionaries.com/definition/english/enterprise>. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373 (referring to *Shorter Oxford English Dictionary*, 6th ed., A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 841).

[454] Oxford Dictionaries, last accessed on 02/10/2015 <http://www.oxforddictionaries.com/definition/english/business>.

7.269. An industry is not a business or company with legal personality, and yet it can be a "certain enterprise" within the 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. The fact that Article 2.2 does not exclude that an industry (i.e. "certain enterprise" in the same area of manufacturing) may be "located within a designated geographical region" suggests 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. In the context of an industry, therefore, a "facility" would constitute the "certain enterprise" within the meaning of Article 2.2. There is nothing in Article 2.2 to suggest that a narrower approach should be adopted when the recipient is an individual enterprise.[455]

7.270. Furthermore, even if Korea were correct in arguing that the term "enterprise" should be interpreted narrowly to mean a business or company with legal personality, we consider that a business or company may be "located" in a variety of places, including the site of its head office, branches, manufacturing facilities, or other assets or investments.[456] The verb "locate" includes "tak[ing] up business in a place", "establish[ing] oneself … in a place", and "be[ing] situated".[457] A company headquartered in London but with a manufacturing facility in Liverpool effectively has two locations: one in London, and one in Liverpool. It is established, or situated, in both cities. In our view, a subsidy programme that imposes limits in respect of the geographic location of any one of these would fall within the scope of Article 2.2.

7.271. We find support for rejecting Korea's narrower approach to the scope of Article 2.2 in the findings of the panel in *EC and certain member States – Large Civil Aircraft*. That panel found that certain Spanish subsidies for Airbus "facilit[ies]"[458] in designated parts of Spain were specific by virtue of Article 2.2. The panel found that these subsidies were specific under Article 2.2 because they were "provided to enterprises in designated geographical regions".[459] We acknowledge that the panel in that case was not required to address the precise legal issue currently before us.[460] Nevertheless, we consider it relevant that the panel appears to have found specificity under Article 2.2 of the SCM Agreement on the basis of the recipients' physical presence in the designated regions. In doing so, the panel either considered that the facilities, etc. in the designated regions of Spain could be treated as an "enterprise" within the meaning of Article 2.2, or the panel considered that the Airbus enterprise was located in those regions by virtue of that

[455] Korea suggests that the reference to "facilities" in (the now expired) Article 8.2(c) of the SCM Agreement means that the drafters intended to distinguish "facilities" from "enterprise". We are not persuaded by this argument, since the very same provision also contains the term "firms". The logic of Korea's argument would suggest that a "firm" should also not be treated as an "enterprise", and yet Korea accepts that a "firm" falls within the definition of "enterprise". See Korea's second written submission, para. 350.

[456] We note that the term "located" is expressed in the past tense, possibly suggesting that the enterprise must already be located in the designated geographical region at the time that the subsidy is provided in order for Article 2.2 to apply. Korea did not pursue this temporal issue when we raised it in Panel question No. 5.10. The United States asserted in its response to that question that the timing of when the enterprise received the subsidy has no bearing on whether the subsidy is regionally specific. The United States notes that the goal of the subsidy programme may be to stimulate companies to "locate" for the first time in that region. The United States also asserts that the timing question is in any event not presented in the facts of this case, since the qualifying investments had already been made by the time that the tax credits were claimed, i.e. by the time that the tax credit subsidies were granted. We consider that there is merit in these arguments by the United States. Although in its comments on the U.S. arguments Korea contested the United States' assertion that the location of an enterprise can include a site that is undetermined at the time the subsidy is granted and where facilities may be constructed in the future, Korea did not specifically address these arguments. Nor did Korea specifically address the temporal issue raised in the Panel's question. Korea's comments were primarily concerned with the issue of whether or not "facilities" were equivalent to "enterprises".

[457] The verb "locate" is defined in relevant part as "[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." 1 *New Shorter Oxford English Dictionary* 1614 (1993) (Exhibit USA-48).

[458] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1207-7.1211.

[459] Ibid. para. 7.1235.

[460] This point is made by Korea at para. 38 of its comments on the United States' response to Panel question No. 5.11. Korea also suggests at para. 39 of those comments that the facts are different in the present case, because the RSTA Article 26 subsidies are broadly available across 98% of the territory of Korea. We disagree that any difference in coverage should mean that the essence of the legal approach to Article 2.2 adopted by the panel in *EC and certain member States – Large Civil Aircraft* is not relevant in the present case.

enterprise establishing itself in those regions through its facilities. Most importantly, the panel did not reject the application of Article 2.2 on the basis that the regional facilities were not businesses or companies having legal personality, as Korea's approach suggests it should have done.

7.272. Korea suggests that Article 2.2 was actually applied by the panel on the basis of the location of the recipient *company*, Airbus Spain, in a territory (Spain) within the jurisdiction of the granting authority (European Regional Development Fund (ERDF)).[461] Korea refers in this regard to the panel's statement that the relevant subsidies were co-financed by the ERDF, an institution with Europe-wide jurisdiction. Korea suggests that the ERDF's Europe-wide jurisdiction meant that the relevant geographically designated region was the whole of Europe, including Spain. Korea's position is not persuasive, though, because the subsidies were co-financed by the ERDF and the Spanish authorities. Given the co-financing, the panel addressed Article 2.2 regional specificity at two levels.[462] The panel only turned to regional specificity in respect of the ERDF's involvement after noting that the European Union did not challenge the application of Article 2.2 in respect of the Spanish authorities' involvement in the subsidies. The panel specifically concluded that the subsidies *provided by the Spanish authorities* were "provided to enterprises in designated geographical regions within the territory of the respective granting authorities".[463] This finding, therefore, applies only to the involvement of the *Spanish* authorities in the subsidization of the *Spanish* facilities. It has nothing to do with the location of the Airbus enterprise within the territory of the ERDF. In respect of ERDF's involvement, the panel appears[464] to have accepted the United States' argument that subsidies under the ERDF, which is a *regional* development fund, are necessarily limited to "certain enterprises located within a designated geographical region within the jurisdiction of the granting authority".

7.273. Furthermore, we note that the broader purpose of the specificity provisions suggests that Article 2.2 should be interpreted to apply to any subsidy that is contingent on considerations regarding geographical location. Specificity is concerned with the potential for governments to distort trade through interference in the allocation of resources.[465] Subsidies that are generally available are not specific because, being available to all operators, they do not distort the allocation of resources among those operators. The purpose of Article 2.2 is to cover 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. The fact that Korea refers to RSTA Article 26 as alleviating "serious geographical imbalances"[466] and addressing "developmental concerns"[467] confirms that the underlying rationale of the scheme is to direct resources towards the development of particular geographical regions other than the Seoul overcrowding region. Accordingly, the 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.

7.274. Finally, we note Korea's argument that RSTA Article 26 "is essentially a zoning regulation, and any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy".[468] This argument is not persuasive. First, Article 2.2 is concerned with the specificity, rather than the legality of subsidies. Thus, the fact that a subsidy is specific by virtue of Article 2.2 of the SCM Agreement does not mean that the subsidy is somehow "illegal", as suggested by Korea. Second, the 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

[461] Korea's second written submission, para. 357.
[462] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1235-7.1236.
[463] Ibid. para. 7.1235.
[464] Ibid. para. 7.1236.
[465] According to p. 198 of the WTO 1996 World Trade Report, "[t]he SCM text is predicated on the potential of specific subsidies to be trade distorting. Indeed, the more closely targeted a subsidy in terms of intended beneficiaries, the more concentrated will be its relative price effect. In many circumstances, this could be taken to imply a higher probability that the subsidy is distorting and less justifiable economically. A subsidy to a single industry, for example, rather than to many industries could impart a narrow advantage that does not reflect action in the face of a well defined market failure. The more broadly based subsidy recipients are defined, then, the more "spread out" and shallower will be the likely subsidy impact."
[466] Korea's first written submission, para. 318.
[467] Ibid. para. 319.
[468] Korea's oral statement at the first meeting of the Panel, para. 90.

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.

7.6.3.3 Designated geographical region

7.6.3.3.1 Main arguments of the parties

7.275. Korea submits that the exclusion of a small area from the otherwise generally available tax credits provided under RSTA Article 26 does not establish regional specificity under Article 2.2 of the SCM Agreement. Korea contends that a subsidy that is available for 98% of the land mass of Korea is functionally equivalent to a subsidy that is available for 100% of the land mass. It subsequently explained that the point that Korea makes is that where, as in this case, there is no identifiable demarcation between the area in which a subsidy may be used and the broader jurisdiction of the granting authority, and the degree of overlap between the two is almost total, there is no "designation" of a geographical region and there is effectively no limitation as to the geographical location of the enterprises.[469]

7.276. Korea further contends that, under Article 2.1 of the SCM Agreement, the designation of a class of subsidy recipients must be "explicit". Korea notes that the Appellate Body has interpreted this to mean that the designation must be "express, unambiguous, or clear from the context of the relevant instrument, and not merely 'implied' or 'suggested'".[470] Korea asserts that the only geographical area explicitly designated in RSTA Article 26, i.e. the Seoul "Overcrowding Control Region", is an area designated as an *exception* to the general availability of the tax credit, rather than as an area designated for receipt of a subsidy. Korea contends that nowhere in RSTA Article 26 or in Article 23(1) of the Enforcement Decree of the RSTA is there any express, unambiguous, or clear designation of a geographical region that is eligible for these tax credits. At most, some remainder – the rest of the country except for the overcrowding control region of the Seoul Metropolitan Area – might be said to be "implied" or "suggested" as a "region" eligible for subsidies. Korea also contends that the term "designate" means that the designation must be made affirmatively, rather than by implication or exception.

7.277. The United States disagrees with Korea's argument that because the RSTA Enforcement Decree speaks only of the region that is excluded (i.e. the Seoul overcrowding area), there is no explicit designation of a geographical region. The United States asserts that Article 2.2 does not require that any geographic region be designated "explicitly", as Korea suggests. The United States notes that Korea draws this alleged requirement from the text of Article 2.1(a), rather than Article 2.2. The United States observes that Article 2.2 does not contain the word "explicit". The United States asserts that if the drafters of Article 2.2 had intended to impose such a requirement, they could have easily done so. The United States also suggests that Korea's argument would effectively limit Article 2.2 to situations of *de jure* specificity. The United States asserts that 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.[471] The United States notes that 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.[472]

7.278. Furthermore, regarding the fact that the Article 26 programme covers 98% of the territory of Korea, the United States asserts that there is no basis for Korea's assertion that larger regions (which are subject to "exclusions" such as the Seoul overcrowding area) should be exempted from the disciplines of Article 2.2. The United States observes that the panel in *US – Anti-dumping and Countervailing Duties (China)* found that the term "designated geographical region" can encompass "*any* identified tract of land within the jurisdiction of a granting authority", and need not have a formal administrative or economic identity.[473] According to the United States, it would be particularly inappropriate to overlook the geographic limitation imposed here. The excluded

[469] Korea's second written submission, para. 365.
[470] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 372.
[471] Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, para. 9.134.
[472] Ibid. para. 9.134.
[473] Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, paras. 9.140-9.144. (emphasis added)

area is the most densely populated area of Korea, and accounts for a substantial portion of Korea's economy.[474]

7.6.3.3.2 Evaluation by the Panel

7.279. We begin by addressing Korea's "exception" argument, which is based on Korea's assertion that the only area explicitly designated through affirmative identification in RSTA Article 26 is the area excluded from the subsidy scheme. We observe that there is no requirement in Article 2.2 that the designation of the relevant geographical area for subsidization should be "explicit". This requirement is only found in Article 2.1(a). As noted above, a previous panel has found that Article 2.2 operates independently of Article 2.1. The inclusion of the word "explicitly" in the text of Article 2.1(a) therefore has no bearing on the interpretation of Article 2.2.

7.280. Korea asserts that the meaning of the term "designate" (in Article 2.2) requires an affirmative identification of the relevant geographical region, rather than identification through implication or suggestion. Korea refers in this regard to the definition of that term advanced by the United States[475], whereby "designate" means "[p]oint out, indicate, specify…[c]all by name or distinctive term; name, identify, describe, characterize". 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 designation might also be accomplished through less direct means that nevertheless make the region known.[476] 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".[477] 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.

7.281. In addition, we recall[478] that the purpose of Article 2.2 is to cover 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. 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.

7.282. Korea also argues that the excluded Seoul Metropolitan Area accounts for only 2% of Korea's land-mass, and that a subsidy available for 98% of the territory is "functionally equivalent" to a subsidy that is available for 100% of the territory. We note that Article 2.2 refers simply to a "geographical region" that has been designated. The phrase "geographical region" is not qualified in any way. This suggests that the designation of *any* geographical region – no matter how small or how large – would suffice to trigger the application of Article 2.2.[479] We find support for our approach in the findings of the panel in *US – Anti-Dumping and Countervailing Duties (China)*. That panel found that:

> [T]he text [of Article 2.2] on its own would appear to allow any identified tract of land within the jurisdiction of a granting authority to be a "designated geographical region" in the sense of Article 2.2 of the SCM Agreement.

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[474] United States' first written submission, para. 430; United States' second written submission, para. 297.

[475] United States' first written submission, fn 502 (referring to *The New Shorter Oxford English Dictionary*, (Exhibit USA-31), p. 645).

[476] The online Oxford dictionary defines "indicate" as "point out, show" (Oxforddictionaries.com, Oxford University Press, accessed 24 September 2015 <http://www.oxforddictionaries.com/definition/english/indicate>).

[477] GOK questionnaire response, (Exhibit KOR-75), p. 142.

[478] See para. 7.273. above.

[479] Korea asserts that such an approach would be "too extreme", and would mean that Article 2.2 covers subsidies provided to enterprises making investments anywhere in the United States, except within one of its national parks (Korea's second written submission, paras. 367 and 368). We 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. We also recall that Members enjoy broad policy space under the WTO Agreement, and need not necessarily pursue policy objectives through subsidization.

7.283. Korea observes that the facts before the *US – Anti-Dumping and Countervailing Duties (China)* panel differed from those in the present case. Korea also observes that the issue in the present case was "substantially different" from the issue raised in these proceedings.[480] We do not disagree. However, the panel provided a legal interpretation of the phrase "designated geographical region" that is not dependent on the facts of that case, or on the precise issue at hand. Since the panel's legal interpretation is based on a specific part of the text of Article 2.2, there is no reason why that interpretation should not afford guidance whenever that text is considered in subsequent WTO dispute settlement proceedings.

7.6.3.4 Certain enterprises

7.6.3.4.1 Main arguments of the parties

7.284. Korea submits in the alternative that, even if the Article 26 programme did impose limitations on eligibility based on the enterprise's location in a designated geographical region, the USDOC failed to show that eligibility was limited to "certain enterprises" in that designated region. Korea notes that the chapeau of Article 2.1 defines the term "certain enterprises" as "an enterprise or industry or group of enterprises or industries."[481] As defined in Article 2.1, the term "certain enterprises" necessarily refers to a subset of enterprises. Therefore, according to Korea, a determination under Article 2.2 requires not only a finding that the subsidy is limited to a designated geographical region, but also that the subsidy is limited to "certain enterprises" within that geographical region. Korea contends that the Article 26 scheme is actually available to *all* enterprises within the relevant region, and therefore not limited to *certain* enterprises only. Korea further notes that the United States' position is internally inconsistent. Korea explains that if the United States relies on the definition of "certain enterprises" in Article 2.1 to interpret Article 2.2, as it does in response to the Panel's questions, it must accept the full implications that flow from the application of that definition.[482] In particular, the United States must accept that transposing the definition of "certain enterprises" from Article 2.1 to Article 2.2 necessarily means that only subsidies that are limited to a subset of enterprises located within a designated geographical region are specific for purposes of Article 2.2.

7.285. The United States asserts that a similar argument was rejected by the panel in *EC and certain member States – Large Civil Aircraft*, on the basis that it would require specificity "on a double basis" within Article 2.2.[483] The United States notes that the panel suggested that the approach proposed by Korea would render Article 2.2 redundant: "[i]f a national authority grants a subsidy to a subset of enterprises within its territory, whether that subset of enterprises is located in a designated region or not, such a subsidy would, by definition, already be specific under Article 2.1."[484] The United States also notes that the *EC and certain member States – Large Civil Aircraft* panel found that Korea's interpretation would make Article 8.2(b) redundant.[485] The United States further observes that the panel in *US – Anti-dumping and Countervailing Duties (China)* rejected the "double basis" interpretation of Article 2.2, for essentially the same reasons as the panel in *EC and certain member States – Large Civil Aircraft*.[486]

7.6.3.4.2 Evaluation by the Panel

7.286. We do not accept Korea's argument that specificity must be established on a double basis, i.e. that the subsidy must be both (i) limited to a designated geographical region and (ii) limited to only a subset of enterprises within that region. Korea's double specificity argument would create redundancy with both Articles 2.1(a) and 8.2(b) of the SCM Agreement. We are guided in this regard by the findings of the panel in *EC and certain member States – Large Civil Aircraft*, which addressed the issue thoroughly in the following terms:

> Article 2.2 is not particularly clearly drafted. It could be understood, based on the text alone, as establishing specificity on the basis of a geographical limitation on the

[480] Korea's second written submission, para. 365.
[481] Ibid. para. 372.
[482] Ibid. para. 373 (referring to U.S. response to Panel question 3.2, paras. 142-143).
[483] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1223.
[484] Ibid. paras. 7.1224-7.1225.
[485] Ibid. para. 7.1226.
[486] Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, paras. 9.127-9.139.

recipients ("within a designated region"), which is the United States' position. It could also be understood to establish specificity on the double basis posited by the European Communities – "certain", i.e. not all, enterprises, "within a designated region". While the text, standing alone, is not unambiguous in this respect, when the text is considered in its context and in light of its object and purpose, it is clear to us that Article 2.2 is properly understood to provide 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.

We recall that the European Communities argues that under Article 2.2 of the SCM Agreement, only a subsidy that is limited to *certain* enterprises within a designated geographical region within the jurisdiction of the granting authority shall be specific. The European Communities' proposed interpretation would entail that, in order to be specific, a subsidy granted by a regional authority must not only be limited to a designated region within the territory of the granting authority, but must in addition be limited to only a subset of enterprises within that region. However, if a national authority grants a subsidy to a subset of enterprises within its territory, whether that subset of enterprises is located in a designated region or not, such a subsidy would, by definition, already be specific under Article 2.1.

...

Thus, the European Communities' proposed reading of Article 2.2 merely replicates the standard set out in Article 2.1(a), and thereby makes Article 2.2 redundant.

...

The European Communities appears to recognize that its reading of Article 2.2 has the effect of making it redundant of Article 2.1(a), but dismisses this as a "structural overlap", which it describes as "not uncommon" in treaty-making. However, in our view, there is a perfectly reasonable reading of Article 2.2 which avoids this problem, and we consider it appropriate to eschew a reading of that provision which raises it. On this basis alone, we consider the European Communities' proposed interpretation of Article 2.2 to be unsatisfactory, as it fails to give full effect to the text of Article 2 as a whole.

In addition, as the United States points out, the European Communities' reading of Article 2.2 also creates a redundancy with Article 8.2(b). Although Article 8.2(b) has expired (pursuant to the provisions of Article 31 of the SCM Agreement), it did form part of the original "traffic light" architecture of the SCM Agreement, and thus provides us with important context for understanding the intended scope of other provisions. Article 8.2(b) specifically rendered assistance to disadvantaged regions within the territory of a Member non-actionable, as long as that assistance met certain criteria. One of those criteria was that the assistance be "non-specific (within the meaning of Article 2) within eligible regions." Under the European Communities' reading of Article 2.2, a regional subsidy that is not "limited to certain enterprises" within the region is not specific. Thus, the European Communities' reading of Article 2.2 would have rendered Article 8.2(b) redundant and unnecessary from the outset. Moreover, Article 8.1(b) provided that subsidies which were specific within the meaning of Article 2, but which met all the conditions of Article 8.2, would be non-actionable. Thus, Article 8.2(b) carved out as non-actionable regional development subsidies which, presumably, would otherwise have been actionable, in part because they were specific. Given that the establishment of particular types of subsidies as non-actionable under Article 8, including assistance to disadvantaged regions, was a significant achievement of the Uruguay Round negotiations, an interpretation of Article 2.2 which would have rendered one of the key provisions of Article 8 in this regard redundant and useless from the outset makes no sense to us, and we reject such an interpretation.[487] (footnotes omitted)

[487] Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1223-7.1226.

7.287. The potential redundancy of Article 8.2(b) of the SCM Agreement was also explained by the panel in *US – Anti-Dumping and Countervailing Duties (China)* in the similar terms.[488]

7.288. We agree with the findings of the *EC and certain member States – Large Civil Aircraft* and *US – Anti-Dumping and Countervailing Duties (China)* panels. The reference to "certain" enterprises, read in isolation, is not unambiguous. However, consideration of the text in its context and in light of its object and purpose, makes it clear 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.

7.6.3.5 Conclusion

7.289. For the above reasons, we reject Korea's claim that the USDOC's determination that the RSTA Article 26 tax credit scheme is regionally specific is inconsistent with Article 2.2 of the SCM Agreement.

7.6.4 Whether the USDOC should have determined that RSTA Article 10(1)(3) and Article 26 tax credit subsidies were tied to Samsung's production of digital appliances

7.6.4.1 Main arguments of the parties

7.6.4.1.1 Korea

7.290. Korea submits[489] that the USDOC's calculation of Samsung's subsidy margins for RSTA Article 10(1)(3) and Article 26 tax credits, on the basis of the total tax credits received for expenditures on all products divided by the total value of Samsung's sales of all products, was inconsistent with the United States' obligation under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement not to impose a countervailing duty in excess of the estimated subsidy determined to have been granted on the manufacture, production or export of the investigated product. Korea submits that the USDOC improperly took account of tax credits that Samsung received on products outside of the Digital Appliances business unit (which was responsible *inter alia* for the production of LRWs). Korea asserts that, because certain tax credits were tied to digital appliances[490], the proper calculation of Samsung's subsidy margins for both the Article 10(1)(3) and Article 26 programmes should have used those tax credits (i.e. those received on digital appliances) for the numerator, and Samsung's sales of digital appliances, including LRW, as the denominator.

7.291. Korea submits that both Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 draw a direct link between the subsidy that may be countervailed and the subsidization received by the exported product. According to Korea, therefore, countervailing action cannot be taken against a subsidy or bounty that has been conferred on some other product that is not subject to the investigation. Korea contends that the investigating authority's obligation to determine – based on an objective analysis and positive evidence – the amount of a countervailable subsidy that is attributable to the merchandise being investigated, and not to any "non-subject" merchandise, has been repeatedly affirmed by WTO panels and the Appellate Body. Korea refers in this regard to the findings of the panel in *US – Lead and Bismuth II*, and of the Appellate Body in *US – Countervailing Measures on Certain EC Products*. Korea also observes that the panel in *China – Broiler Products* emphasized the proactive role that the investigating authority must take in "ascertain[ing] the precise amount of subsidy attributed to the imported products under investigation".

7.292. Korea submits that the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement by determining that the subsidy amount would only be limited to tax credits for digital appliances if the relevant tax credits were "tied" to production and sales of those products through the granting authority's prior knowledge of "the intended use" of the tax

[488] Panel Report, *US – Anti-dumping and Countervailing Duties (China)*, paras. 9.130-9.133.
[489] Korea's main arguments are set forth at paras. 277-303 of its first written submission.
[490] See, for example, para. 281 of Korea's second written submission ("Since the DOC was able to tie the R&D expenses of the Digital Appliance Division to washers, then it necessarily (and logically) follows that the Article 10(1)(3) (and Article 26) tax credits generated by those very same R&D expenses can also be tied to the Digital Appliance Division").

credits. Korea submits that the USDOC's application of its "tying" requirement was impermissible because Samsung submitted data and documentation to demonstrate that the subsidy in fact benefited the production or sale of a particular product or category of products. Korea contends that the USDOC verified that R&D expenses incurred in the Digital Appliances business unit benefited all of the products within that division, including LRWs. Korea asserts that the USDOC's refusal to consider that information, and to use it to calculate the proper numerator and denominator in determining Samsung's subsidy margin, is inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

7.6.4.1.2 United States

7.293. The United States[491] submits that the USDOC appropriately found that these subsidies were bestowed on Samsung on an "untied" basis, and divided the total amount of benefit over the adjusted total sales of all products manufactured in Korea. The United States contends that RSTA Article 10(1)(3) is not an "R&D subsidy" to the extent that it does not require that the tax savings that a company receives be used for a particular activity, much less R&D activity.[492]

7.294. The United States notes that neither Article VI:3 of the GATT 1994 nor Article 19.4 of the SCM Agreement dictate precisely how the rate of subsidization is to be calculated. The United States asserts that because the GATT 1994 and the SCM Agreement do not give significant guidance on what methodologies should be employed for calculating subsidy rates, this is an issue that an administering authority will therefore need to examine and determine. The United States suggests that, in determining an appropriate approach, an investigating authority may nonetheless derive some guidance from certain provisions, such as Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement, which suggest that the facts relating to the granting authority's bestowal of the subsidy are a key consideration in determining the existence and amount of subsidization.[493] According to the United States, 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, an investigating authority 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.[494] The United States contends that, in other cases, an investigating authority may determine that it is appropriate to attribute a subsidy to a particular product. An authority 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 authority 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.[495] The United States notes that the use of both approaches is reflected in Annex IV of the SCM Agreement, which informs a serious prejudice analysis under Article 6.1. Regarding the treatment of subsidies as "tied", the United States notes that the Informal Group of Experts (IGE) established by the SCM Committee on Subsidies and Countervailing Measures[496] developed recommendations to address when a subsidy is "tied" for purposes of Annex IV:3. The United States observes that 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

[491] The main arguments of the United States are set forth at paras. 433-484 of its first written submission.

[492] United States' response to Panel question No. 5.2, para. 6.

[493] United States' first written submission, paras. 445-446; United States' second written submission, paras. 301-302.

[494] United States' first written submission, para. 447.

[495] Ibid. para. 448.

[496] 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)).

> giver, and so acknowledged, prior to or concurrent with the subsidy's bestowal.[497] (emphasis added)

7.295. The United States further observes that, 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".[498]

7.296. The United States also observes that, in respect of Article 3.1(a) prohibited export subsidies, footnote 4 of the SCM Agreement refers to a subsidy being "in fact tied to" actual or anticipated export performance. The United States asserts that the Appellate Body has confirmed that 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*.[499] (emphasis added)

7.297. The United States contends that the USDOC's approach is consistent with this contextual guidance afforded by the IGC and the Appellate Body. In particular, the USDOC found that "the GOK had no way to know the intended use at the time the company was authorized to claim the tax credits, nor can the recipient company acknowledge receipt of the subsidy prior to or concurrent with its bestowal".[500] The United States observes that the RSTA legislation did not specify any product-specific tie, and eligibility criteria were not limited by product type. Moreover, the structure, architecture, and design of the RSTA subsidy programs did not reflect a product-specific tie. Under the RSTA, 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.[501] Samsung's tax return did not indicate that any tax credits were tied to any particular merchandise or facilities.[502] Samsung admitted this in its questionnaire responses, stating that "*the tax return did not specify the merchandise for which this reduction was to be provided*".[503] The United States submits that the fact that Samsung purported to have certain underlying documentation showing expenditures in connection with particular products is of no moment, as "these documents do not form the basis for bestowal and are not included in the annual tax returns that the company files with the Korean tax authorities".[504]

7.298. The United States asserts that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require investigating authorities to treat subsidies as "tied" based on their alleged use and effects. The United States contends that Korea's position would convert the inquiry into the amount of the subsidy benefitting the subsidized product into a speculative inquiry into "uses" and effects of a subsidy, rather than the means by and terms on which the Member bestows the subsidy.

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[497] IGE Report, Recommendation 6, (Exhibit USA-29), para. 10

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

[499] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1049.

[500] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), pp. 41-42.

[501] United States' second written submission, paras. 303, 314-318; United States' first written submission, paras. 479-482.

[502] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 42.

[503] Samsung April 9, 2012 Questionnaire Reponse (QR) at Ex. 24, (Exhibit KOR-72), p. 2; see also ibid. at Ex. 22, p. 1.

[504] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 42.

7.6.4.2 Main arguments of third parties[505]

7.299. China asserts that the relevant jurisprudence leaves no doubt as to the obligations imposed on an investigating authority under WTO law when it comes to determining, based on an objective analysis and positive evidence, the amount of a countervailable subsidy that is attributable to the merchandise being investigated. China is of the view that investigating authorities are indeed obliged, under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, to receive and carefully examine data and documentation submitted by interested parties in order to determine the precise amount of a given countervailable subsidy that is actually attributable to the merchandise being investigated. China contends that a careful examination of all relevant factors, including the data and documentation submitted by interested parties, is needed for an investigating authority to be able to determine the precise degree to which a given subsidy is a "genuine and substantial cause" of a particular market effect observed for the merchandise being investigated.[506]

7.300. The European Union considers that Articles VI:3 of the GATT 1994 and 19.4 of the SCM Agreement require Members to accurately determine the per unit subsidy amount found to exist with respect to the product under investigation and not impose countervailing duties exceeding that amount. That being said, the European Union further notes that, in practice, it may be very difficult to identify precisely the amounts that a company has received for the particular production or sale of the product concerned, especially when the company in question manufactures and sells a variety of products not covered by the investigation and which are made in the same production line. Likewise, when the subsidy found to exist is not granted on a product basis, but rather on a company basis, it may also be difficult to identify what portions were used by the company for manufacturing the product concerned as opposed to other products. In this respect, if the subsidy is clearly tied in law or in fact to the production or sale of a particular product, this may allow the investigating authority to allocate the amounts received by the company to those specific products and, thus, calculate the specific subsidisation for the product concerned. However, if the subsidy is not tied to any particular product (such as e.g. a tax reduction in the income tax of a company in a given year), it may be presumed that the company allocated this benefit across its entire production. The European Union does not take a position on whether the Article 10(1)(3) and Article 26 tax credits were only received by Samsung with respect to its digital appliances (and thus including LRW) or whether they were granted with the express purpose to benefit only domestic production and sales. A relevant question for the Panel to examine, however, appears to be whether RSTA Articles 10(1)(3) and 26 confer a subsidy with respect to a single or a variety of different products or whether they are granted on a company basis, provided that certain activities (such as investments on R&D or business assets) are conducted.[507]

7.6.4.3 Evaluation by the Panel

7.301. Korea's claim is based on Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, which provide that the amount of countervailing duty should not exceed the amount of per unit subsidization. In the *Washers* countervailing investigation, the USDOC found that tax credit subsidies bestowed pursuant to RSTA Articles 10(1)(3) and 26 are not tied to any particular product. The USDOC therefore allocated these subsidies across all products, by dividing the total amount of Samsung's tax credits by the value of sales by Samsung for all products.

7.302. Korea contends that the subsidies are R&D subsidies[508], and that the tax credits generated pursuant to R&D expenditures in the Digital Appliances business unit are tied to the production of Digital Appliances products, including LRWs. Korea contends that because the tax credits are provided as a result of R&D activities undertaken by Samsung, and because the tax credits would have the effect of retroactively reducing the cost of those R&D activities[509], Samsung could tie the tax credits to the underlying R&D activities, and the products in respect of which they were

[505] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[506] China's third party submission, paras. 108-109.
[507] European Union's third party submission, paras. 84-86.
[508] Korea's response to Panel question No. 5.2, para. 2.
[509] Korea's response to Panel question No. 5.16, para. 37.

undertaken.[510] Korea submits that the USDOC should therefore have calculated the amount of R&D undertaken by Samsung's Digital Appliances division, and allocated only the tax credits claimed in respect of that R&D to Digital Appliances (including LRWs).

7.303. Korea's claim is based on an erroneous characterisation of the nature of the subsidy at issue. Korea contends that RSTA Article 10(1)(3) provides for R&D subsidies, because the resultant tax credits retroactively reduce the cost of the R&D activities that gave rise to those tax credits.[511] We disagree with Korea's characterisation. The relevant subsidies in the present case are the tax credits. These tax credit subsidies are not R&D subsidies. 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. 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.[512] Korea's argument that the relevant tax credit subsidies are tied to Digital Appliance products (and therefore LRWs) overlooks the fact that the cash acquired by Samsung as a result of the tax credit subsidy may be spent by Samsung on any product. Samsung acknowledged this in its questionnaire responses, stating that "the tax return did not specify the merchandise for which this reduction was to be provided".[513] This is further confirmed by Korea's statement that "[t]he cash that is saved by paying less in taxes than otherwise would be the case *can then be spent on any activities that the taxpaying company elects*".[514] Thus, 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. It is Samsung's discretion regarding the use of the cash resulting from the tax credit subsidy that justifies the USDOC's treatment of that subsidy as untied, and therefore the allocation of that subsidy across the sales value of all products.

7.304. Korea argues that the "effect" of the tax credit is to spur the particular investment that results in the earning of the credit.[515] Korea also contends that the "effect" of the availability of the tax credit should be distinguished from a company's use of the "proceeds of the tax credit".[516] We are not persuaded by Korea's arguments, since they continue to reflect an erroneous characterisation of the subsidy at issue. It 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, i.e. at the time that revenue is foregone or not collected. Since the benefit of that subsidy may be used in any way that the recipient company sees fit, 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. The 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 expenditures and the amount of tax credit cash (if any) used by Samsung for the production of Digital Appliance products.[517]

7.305. Korea's failure to properly characterize the subsidy at issue, and the benefit conferred thereby, also undermines its reliance on the fact that the USDOC verified R&D costs specific to Samsung's Digital Appliance business unit in the parallel anti-dumping investigation. In an anti-dumping investigation, an authority may need to construct a normal value on the basis of

[510] Korea's second written submission, paras. 288-297.
[511] Korea's response to Panel question No. 5.2, paras. 3 and 4.
[512] Korea asserts at para. 3 of its response to Panel question No. 5.2 that the tax credit "is effectively the same as giving cash to a company equal in amount to the tax credit amount".
[513] Samsung April 9, 2012 QR at Ex. 24, (Exhibit KOR-72), p. 2; see also ibid. at Ex. 22, p. 1.
[514] Korea's response to Panel question No. 5.2, para. 6. (emphasis added).
[515] Ibid.
[516] Ibid.
[517] Korea accuses the USDOC of applying an "irrebuttable presumption" (Korea's second written submission, para. 286). Korea asserts that 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*". This argument misses the point, since 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.

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. However, this costing exercise has nothing to do with the amount – and destination – 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. We recall that Samsung was free to spend its tax credit cash as it saw fit, irrespective of the particular products for which the eligible R&D expenditures giving rise to those tax credits were undertaken.[518]

7.306. The above analysis applies *mutatis mutandis* to Korea's claim regarding the USDOC's allocation of the RSTA Article 26 tax credit subsidies. Those subsidies were conferred at the time that the tax credits were claimed and granted, and Samsung was free to spend that tax credit cash as it saw fit.

7.307. For the above reasons, we reject Korea's claim that the USDOC's failure to tie the RSTA Article 10(1)(3) and 26 tax credit subsidies to Digital Appliance products is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

7.6.5 Whether the Article 10(1)(3) subsidy amount should have been determined by reference to Samsung's worldwide sales

7.6.5.1 Main arguments of the parties

7.6.5.1.1 Korea

7.308. Korea claims[519] that in order to calculate the *ad valorem* rate of subsidization for Samsung's receipt of tax credits under Article 10(1)(3), the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement by utilizing a denominator that was inconsistent with the numerator. Korea complains that the USDOC limited the denominator to the sales value of products produced in Korea, whereas the numerator included all tax credits. Korea submits that because the R&D activities giving rise to the tax credits would have benefited Samsung's global production activities, the denominator should have included the sales value of all products that benefited from the tax credits. Korea contends that the USDOC's use of a denominator that did not include the value of all sales that benefited from the underlying R&D activities was to artificially inflate the *ad valorem* rate of subsidization, contrary to the requirement of Article VI:3 of the GATT 1994, carried over into Article 19.4 of the SCM Agreement, that "[n]o countervailing duty shall be levied [...] 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." Korea submits that the Appellate Body stated in *US – Softwood Lumber IV* that "the 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".[520]

7.309. Korea asserts that, in its final determination in the *Washers* countervailing investigation, the USDOC applied "a presumption that government subsidies benefit domestic production".[521] The USDOC also found that Samsung had not rebutted that presumption, since it had not "demonstrated that the express purpose of these tax credits is to benefit not only domestic production, but also production that occurs outside of Korea".[522] Korea submits that the USDOC's reliance on a presumption that the subsidies benefitted only Samsung's domestic production

[518] In its second written submission, Korea refers to the USDOC verifying that R&D expenses incurred in the Digital Appliances division "benefited" all of the products within that division, including LRWs (Korea's second written submission, paras. 291 and 296). Korea subsequently clarified, in its response to Panel question No. 5.15, para. 36, that this reference to "benefit" was not intended to mean "benefit" within the meaning of Article 1.1(b) of the SCM Agreement. This clarification 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.

[519] Korea's main arguments are set forth at paras. 304-315 of its first written submission.

[520] Appellate Body Report, *US – Softwood Lumber IV*, para. 164, fn 196.

[521] Korea refers to *Washers* CVD I&D Memorandum, p. 52 (KOR-77). (footnotes omitted)

[522] Ibid.

violated its obligations under the SCM Agreement. Korea contends that there is no basis for any such presumption in the SCM Agreement. Korea submits that the question of which sales and production benefit from a particular subsidy is a question of fact, and the investigating authority is obliged to make its determination on the basis of an "in-depth examination" of "positive evidence".[523] Korea asserts that the USDOC failed to do this. Korea also contends that the presumption applied by the USDOC was fully rebutted by Samsung, both by showing that the results of its R&D (which gave rise to the tax credit) in fact benefited its worldwide sales and production, and by showing that the USDOC had previously analysed this identical issue on two separate occasions and had determined on each occasion that the Article 10(1)(3) tax credits benefited Samsung's global production.

7.6.5.1.2 United States

7.310. The United States submits[524] that there is no basis for Korea's assertion that the USDOC was required to include in the denominator the sales value of products manufactured outside Korea. The United States asserts that Korea's argument that the underlying R&D activities affected manufacturing facilities operated by Samsung affiliates in other parts of the world is not grounded in the SCM Agreement or the GATT 1994. The United States asserts that the USDOC was not required to trace the possible indirect effects of subsidies overseas.

7.311. The United States submits that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require Members to take into account the sales value of products manufactured outside the territory of the subsidizing Member when calculating subsidy rates. According to the United States, the language of these provisions suggests a focus on production activity occurring within the territory of the granting Member. The United States asserts that these provisions do not address possible overseas knock-on effects from these subsidies.

7.312. The United States also contends that Members generally grant subsidies to generate economic benefits within their borders. The United States suggests that for a subsidy provided by a Member to a recipient within its territory to be deemed to be attributable to production occurring elsewhere would require specific facts supporting such a unique conclusion. The United States asserts that, on the facts of this case, the USDOC explained that it was not appropriate to attribute subsidies to overseas production, since eligibility is restricted to Korean companies and nothing in the legislation or enforcement decree suggests an intent to subsidize production outside Korea. As the USDOC stated, "there is no indication in the statutory provisions that a company could claim a tax credit on, for example, R&D conducted outside of Korea or a facility located outside of Korea".[525] The United States observes that Korea concedes that Samsung only claimed tax credits for R&D work conducted in Korea.[526] The United States also points to statements made by the Government of Korea 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".[527] According to the United States, there was no evidence that the granting Member intended to subsidize overseas production, and no connection between the structure and operation of the subsidy programme and overseas production.

7.313. The United States asserts that Korea's argument that the USDOC failed to "match" the elements in the numerator and denominator rests on a flawed premise – namely, that the inquiry hinges on the possible indirect effects of subsidies overseas, rather than the structure and design of the subsidy programme itself. The United States contends that Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement do not require an effects-based tracing analysis. The United States asserts that the USDOC was not required to chase down the supposed overseas effects of R&D activities conducted in Korea, and in any event Korea has made no showing that these effects existed. According to the United States, Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that the purpose of countervailing duties is to offset the bestowal of subsidies. Subsidies can only be bestowed to the extent that they exist. Yet, in the

[523] Korea refers to Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[524] The main arguments of the United States are set forth at paras. 485-501 of its first written submission.
[525] *Washers* Final CVD I&D Memo, (Exhibit KOR-77), p. 52.
[526] Korea's first written submission, para. 313.
[527] GOK April 9, 2012 QR at App. Vol. 108 (emphasis supplied) (Exhibit KOR-75); Washers Final CVD I&D Memo at 52 (Exhibit KOR-77); United States' first written submission, para. 490; United States' second written submission, para. 349.

view of the United States, Korea would premise the calculation of a subsidy rate on R&D activities that occur distinct from and prior to the existence or bestowal of a subsidy.[528] Moreover, the United States contends that Korea fails to address the troubling implications of its effects-based approach. Investigating authorities would be required to conduct a jurisdiction-by-jurisdiction inquiry into how R&D activities affect production across the globe. The United States argues that 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.[529]

7.314. The United States also submits that Korea wrongly criticizes the USDOC for its alleged use of a presumption in favour of attributing subsidies to domestic production only. The United States asserts, as a threshold matter, that an investigating authority is not barred from employing methodologies that are not expressly addressed in the text of the WTO Agreement. The United States further observes that WTO panels and the Appellate Body have repeatedly endorsed the use of presumptions where they are reasonable and rebuttable.[530] The United States contends that, in any event, this presumption had no bearing on the outcome, as the facts amply confirmed that the subsidy was not bestowed on overseas production.[531]

7.6.5.2 Main arguments of third parties[532]

7.315. China recalls that the Appellate Body expressly recognized in *US – Softwood Lumber IV* that the elements taken into account in the numerator of a subsidy calculation must match those taken into account in the denominator. China is concerned that USDOC appears to have established a *presumption* that government subsidies benefit only domestic production, which applies in the absence of positive evidence to the contrary. China considers it important not to discount the possibility that subsidies paid by a government may, under specific factual circumstances, benefit certain segments of a recipient's worldwide production of a product and may not extend to other segments. However, where a subsidy benefits a product manufactured by a recipient, an investigating authority may not simply presume that the subsidy benefits only a specific segment of that production. Rather, the investigating authority may only determine that the benefits are limited in this manner if, and to the extent, there is positive evidence to support a finding that the benefit is, *in fact*, limited to a subset of the recipient's global production of the product. According to China, therefore, absent findings based on positive evidence, the total amount of the subsidy should be spread over the total volume of sales.[533]

7.316. The European Union suggests that the Panel may find it relevant to examine whether the Article 10(1)(3) tax credits were in law or in fact limited to benefit production or sales carried out in Korea. Whilst it appears that the subsidy was granted with respect to R&D activities conducted in Korea, this does not necessarily mean that the subsidy benefitted only Samsung's domestic production, as the results of those activities could materialise in Samsung's total production (thus including exports).[534]

7.6.5.3 Evaluation by the Panel

7.317. Korea challenges the USDOC's decision to limit the denominator to the sales value of products produced by Samsung in Korea. Korea's claim is based on its assertion that, as a matter of fact, the R&D activities giving rise to the tax credits benefited Samsung's global production

[528] United States' second written submission, para. 348.
[529] Ibid. para. 354.
[530] The United States refers in this regard to Appellate Body Report, *US – Lead and Bismuth II*, para. 62, and Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.75. The United States observes that, on appeal, the Appellate Body noted that both parties concurred in the panel's finding with respect to the use of this presumption, and observed that in *US – Lead and Bismuth II* "we found this practice permissible under the SCM Agreement, so long as the presumption was not irrebuttable". (Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 84).
[531] United States' opening statement at the first substantive meeting, para. 66.
[532] If a third party is not included in this section, it is because it did not make detailed arguments to the Panel regarding the issue at hand.
[533] China's third party submission, paras. 112-114.
[534] European Union's third party submission, para. 86.

activities.[535] Korea contends[536] that if certain revenue attributable to Samsung's R&D activities is to be excluded from the denominator because it pertains to products produced by Samsung's subsidiaries outside of Korea, then the subsidy benefit attributable to those R&D activities should also be excluded from the amount of subsidy in the numerator.[537] Korea contends that the United States' arguments "fail[] to address the real issue, which is whether the R&D activities that Samsung conducted in Korea benefited the production of washers that Samsung produced in its overseas subsidiaries".[538]

7.318. We disagree that the "real issue" concerning the USDOC's allocation of the benefit conferred by RSTA Article 10(1)(3) tax credit subsidies hinges on the effects of the R&D activities that gave rise to those subsidies. As explained above, the subsidies at issue are the tax credits provided to Samsung in Korea.[539] The benefit of that subsidy is the tax credit cash that Samsung (including its affiliate companies) does not have to spend on taxes. That benefit 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. The benefit conferred by the tax credit subsidies does not, therefore, have to be allocated across revenue from Samsung's overseas production operations simply because such operations – to use Korea's terminology – "benefited" from the underlying R&D activities. The 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.

7.319. Korea also argues, in respect of the tax credit subsidies, that the USDOC was not entitled to rely on any presumption that those subsidies only benefit Samsung's domestic production operations. The United States contends that it is logical to presume (rebuttably) that a Member grants a subsidy to benefit domestic production.[540] WTO panels and the Appellate Body have already endorsed the use of presumptions where they are reasonable and rebuttable. In *US – Lead and Bismuth II*, for example, the Appellate Body accepted that investigating authorities are entitled to rebuttably presume, in administrative reviews, that a benefit continues to flow from an untied, non-recurring financial contribution.[541] In *US – Countervailing Measures on Certain EC Products*, the panel found that "it is a normal and accepted practice … for the importing Member to presume that a non-recurring subsidy will provide a benefit over a period of time, which is normally presumed to be the average useful life of assets in the relevant industry".[542] In the *Washers* countervailing investigation, the recipients of the tax credit subsidies (i.e. Samsung and its Korean affiliates) only produced in the territory of the subsidizing Member.[543] The USDOC was therefore entitled to presume that the tax credit subsidies only benefited Samsung's domestic production operations. Furthermore, the presumption applied by the USDOC was rebuttable. The

[535] See, for example, Korea's first written submission, where Korea asserts that "the R&D performed by the Digital Appliance business unit – for which Samsung received the RSTA 10(1)(3) tax credits on which the numerator was calculated – benefited Samsung's global production of digital appliances" (Korea's first written submission, para. 308).

[536] Korea's first written submission, paras. 304-309 (referring in turn to Samsung's arguments before the USDOC set forth in Exhibits KOR-77 and United States Department of Commerce, Case brief of Samsung Electronics, Co. Ltd., investigation No. C-580-869 (2 November 2012), (Exhibit KOR-90)).

[537] Korea asserts that the USDOC included Samsung's revenue from sales of products produced outside of Korea in the denominator in an earlier proceeding (see, for example, Korea's second written submission, paras. 319-322). The United States contends that the USDOC had simply made a mistake based on erroneous reporting of data by Samsung (see, for example, United States' oral statement at the second meeting of the Panel, para. 71). Since this case is concerned with the USDOC's actions in the *Washers* countervailing investigation, we shall confine our analysis to that case.

[538] Korea's comments on the United States' response to Panel question No. 5.1, para. 3.

[539] See the United States' response to Panel question No. 5.1, and Korea's comments thereon, which make it clear that the tax credit subsidies were received by Samsung (including its Korean affiliates), which produces LRWs in Korea. There is no suggestion by Korea that the recipients of the tax credit subsidies produced LRWs outside of Korea. In response to Panel question No. 5.1, which asked whether the entity that received subsidies "engages in production and/or sales outside of Korea", Korea only references overseas production carried out by Samsung's overseas affiliates. In addition, Samsung reported in its questionnaire responses that it "performed all LRW production operations at its Gwangju, Korea facility" (Samsung April 9, 2012 QR, at 3, Ex. 1, (Exhibit USA-100)).

[540] United States' first written submission, para. 498.

[541] Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

[542] Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.75. On appeal, the Appellate Body noted that both parties concurred in the panel's finding with respect to the use of this presumption, and observed that in *US – Lead and Bismuth II* "we found this practice permissible under the SCM Agreement, so long as the presumption was not irrebuttable" (Appellate Body Report, *US – Countervailing Measures on Certain EC Products,* para. 84).

[543] See fn 505 above.

USDOC's regulations provide in this regard: "If it is demonstrated that the subsidy was tied to more than domestic production, the [USDOC] will attribute the subsidy to multinational production".[544] In 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 1993.[545] We also consider that the USDOC was entitled to conclude that neither Samsung nor Korea had rebutted that presumption. As discussed above, the fact that the underlying R&D activities may have been beneficial to the production operations of Samsung's overseas subsidiaries does not mean that the benefit conferred by the tax credit subsidies also passed through to those overseas operations.

7.320. For the above reasons, we reject Korea's claim that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by limiting the denominator to the sales value of products produced by Samsung in Korea when allocating the benefit conferred by RSTA Article 10(1)(3) tax credit subsidies.

8 CONCLUSIONS AND RECOMMENDATION(S)

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to the anti-dumping measures,

i. the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, by applying the W-T comparison methodology to transactions other than those constituting the patterns of transactions that the USDOC had determined to exist in the *Washers* anti-dumping investigation;

ii. Korea failed to establish that the United States 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;

iii. the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation, by merely focusing on the difference between the margin of dumping calculated using the W-W comparison methodology and the margin calculated using the W-T comparison methodology and failing to consider whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping;

iv. Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation by failing to explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology;

v. Korea failed to establish that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 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;

vi. the DPM is inconsistent "as such" with Article 2.4.2 of the Anti-Dumping Agreement, because it applies the W-T comparison methodology to non-pattern transactions when the aggregated value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account for 66% or more of the value of total sales;

[544] 19 CFR § 351.525(b)(7), (Exhibit USA-24).

[545] Korea also alleges that the USDOC's approach in the *Washers* countervailing investigation is inconsistent with its decision in the earlier *Refrigerators* case to include the sales revenue from Samsung's global production operations in the denominator. The present claim concerns the USDOC's conduct in *Washers*. We therefore confine ourselves to what the USDOC did in the *Washers* countervailing investigation.

vii. the DPM is inconsistent "as such" with the second sentence of Article 2.4.2, because in applying the "meaningful difference" test, the DPM focuses on the difference between the margin of dumping calculated with the W-W comparison methodology and the margin calculated using the W-T comparison methodology or the mixed comparison methodology. The DPM fails to provide for any consideration of whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping;

viii. Korea failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 when, having concluded that the W-W comparison methodology cannot appropriately take into account the observed pattern of significantly different prices, it does not also consider whether the relevant price differences could be taken into account appropriately by the T-T comparison methodology;

ix. the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish "a pattern of export prices which differ significantly among different purchasers, regions or time periods";

x. Korea failed to establish that the United States' use of "systemic disregarding" under the DPM is "as such" inconsistent with the second sentence of Article 2.4.2;

xi. Korea failed to establish that the United States' use of "systemic disregarding" under the DPM is "as such" inconsistent with Article 2.4;

xii. the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with Article 2.4.2 of the Anti-Dumping Agreement;

xiii. the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with Article 2.4 of the Anti-Dumping Agreement;

xiv. the USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation;

xv. the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation;

xvi. the United States' use of zeroing when applying the W-T comparison methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994;

b. With respect to the countervailing measures,

i. the USDOC's original and remand determinations of disproportionality are inconsistent with Article 2.1(c) of the SCM Agreement;

ii. the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take account of the two mandatory factors referred to in the final sentence of that provision in its determination of *de facto* specificity;

iii. Korea failed to establish that the USDOC's determination of regional specificity in respect of the RSTA Article 26 tax credit scheme is inconsistent with Article 2.2 of the SCM Agreement;

iv. Korea failed to establish that the USDOC's failure to tie the RSTA Article 10(1)(3) and 26 tax credit subsidies to Digital Appliance products is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994;

v. Korea failed to establish that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by limiting the denominator to the sales value of products produced by Samsung in Korea when allocating the benefit conferred by RSTA Article 10(1)(3) tax credit subsidies.

8.2. For the reasons also set forth in this Report, the Panel declines to make any findings regarding the allegations of WTO-inconsistency set forth in paragraphs 102, 103 and 111-117 of Korea's second written submission, concerning the USDOC's use of average export prices rather than actual export prices in calculating standard deviation and the USDOC's alleged "sufficiency test", respectively.

8.3. We do not consider it necessary to address Korea's claims against zeroing under Articles 1 and 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in the *Washers* anti-dumping investigation, in "subsequent connected stages" and "as such". Nor is it necessary to address Korea's claims against zeroing in "subsequent connected stages" of *Washers* under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. It is also not necessary for us to address Korea's "as applied" and "ongoing conduct" claims concerning the DPM.

8.4. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994, they have nullified or impaired benefits accruing to Korea under those agreements.

8.5. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under those Agreements.

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