WORLD TRADE ORGANIZATION

WT/DS464/R/Add.1

11 March 2016

(16-1425)

Original: English

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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS464/R.

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ANNEX A-1

UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA
(DS464)

WORKING PROCEDURES OF THE PANEL (AS AMENDED)

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. Non-confidential summaries shall be submitted no later than ten days after the date of a request from a Member, or the date the written submission in question is submitted to the Panel, whichever is later, unless a different deadline is established by the panel upon written request of a party showing good cause.

3. The parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall meet in closed session. The parties, and Members who have notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all the members of its own delegation and shall ensure that each member of its own delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings and the submissions of the parties.

Submissions

6. Before 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, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event, no later than in its first written submission to the Panel. If Korea requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Korea shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. 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. Where such exception has been granted, the Panel shall accord the other party a period of time for comments, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of an exhibit is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of it into a WTO working language. The Panel may grant reasonable extensions of time for the translation of such exhibit upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Korea could be numbered KOR-1, KOR-2, etc. If the last exhibit in connection with the first submission was numbered KOR-5, the first exhibit of the next submission thus would be numbered KOR-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including in writing prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Korea to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Korea presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Korea. If the United States chooses not to avail itself of that right, the Panel shall invite Korea to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement, and should make available the final version of its closing statement if that statement was prepared in writing prior to being presented at the meeting, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than in responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each executive summary submitted by each party of opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages each. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 4 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 2 CD-ROMS/DVDs and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft

Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to XXXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA (DS464)

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

1. These procedures apply to any business confidential information (BCI) that a party wishes to submit to the Panel that was previously treated by the U.S. Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute, entitled Large Residential Washers from the Republic of Korea (A-580-868 and C-580-869). However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in one or both of the investigations at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Korea and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations at issue in this dispute.

4. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorization letter referred to in paragraph 2. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in paragraph 2 to grant such authorization. If an entity refuses to grant the authorization referred to in paragraph 2, a party may bring the situation to the attention of the Panel.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

7. Where a party submits a document containing BCI to the Panel, the other party or any third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement

will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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ANNEX B

ARGUMENTS OF KOREA

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ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. This dispute concerns the protectionist and unlawful conduct of the USDOC in its final anti-dumping and countervailing duty determinations in the proceedings entitled *Large Residential Washers from Korea* (*Washers*) and in other measures of general and prospective application by which the USDOC applies anti-dumping duties to imported products. The *Washers* anti-dumping measure at issue in this dispute is one of many so-called "targeted dumping" determinations that the USDOC has issued in recent years. The sudden and dramatic increase in the USDOC's resort to the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is designed to circumvent the recommendations and rulings of the DSB prohibiting the use of "zeroing" in the calculation of dumping margins. The USDOC also misinterpreted and misapplied the relevant provisions of the SCM Agreement in its simultaneous countervailing duty investigation.

II. STANDARD OF REVIEW

2. This Panel is required to apply the standard of review set forth in Article 11 of the DSU. In conducting its assessment, the Panel must interpret the relevant provisions of the GATT 1994, the Anti-Dumping Agreement, and the SCM Agreement in accordance with the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and determine whether the USDOC's actions are consistent with the relevant provisions of the covered agreements. The Panel is also required to review the factual components of the USDOC's determination. In doing so, the Panel must conduct a "critical and searching" analysis and an "in depth" examination of the USDOC's determination.

III. THE EVOLUTION OF THE USDOC'S INTERPRETATION AND APPLICATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

3. The most significant aspect of the evolution of the USDOC's approach to the interpretation and application of the second sentence is the inextricable linkage between the USDOC's approach to "targeted dumping" and the history of "zeroing" in WTO dispute settlement. When the United States first implemented Article 2.4.2 in U.S. law following the completion of the Uruguay Round Agreements, it adopted an approach to "targeted dumping" and the interpretation of Article 2.4.2 that in important respects was faithful to that provision. However, after the Appellate Body's successive rulings that the USDOC's use of zeroing was WTO inconsistent, the United States radically changed its approach to "targeted dumping". This change was an effort to avoid the effect of the Appellate Body's zeroing jurisprudence.

IV. THE UNITED STATES ACTED INCONSISTENTLY WITH ARTICLES 2.4 AND 2.4.2 OF THE ANTI-DUMPING AGREEMENT BOTH "AS SUCH" AND "AS APPLIED" IN THE *WASHERS* INVESTIGATION BY APPLYING "ZEROING" IN W-T COMPARISONS

A. Introduction

4. By disregarding the results of intermediate W-T price comparisons when calculating the aggregated margin of dumping for the product as a whole and for the exporter, the USDOC runs afoul of the basic principles of the Anti-Dumping Agreement and of the GATT 1994, such as the definitions of "dumping", "margin of dumping", "product", and "injury", as interpreted in numerous panel and Appellate Body reports. These decisions dispositively hold that zeroing is not permitted in the context of any anti-dumping proceeding, regardless of the particular price comparison methodology that is applied to calculate the margin of dumping for the product as a whole and for each exporter. This is because the Appellate Body has conclusively interpreted the concept of "dumping", which by virtue of Article 2.1 applies with the same meaning to the entire Anti-Dumping Agreement, as a product-wide and exporter-specific concept. The Appellate Body has found ample contextual support for this interpretation in Articles 2.4, 2.4.2, 3.1, 5.8, 6.10, 9.3

and 9.5 of the Anti-Dumping Agreement, and has categorically rejected the contrary interpretation that dumping could ever occur at the transaction-specific level.

B. The Concepts of "Dumping" and "Margins of Dumping" Are Product-Wide and Exporter-Specific, and Apply Consistently throughout the Entire Anti-Dumping Agreement

5. The USDOC considers that recourse to the W-T comparison methodology provided for under the second sentence of Article 2.4.2 somehow permits the inference that dumping may occur at the transaction-specific level. This untenable position allows the USDOC to disregard non-dumped transactions when aggregating intermediate comparison results for the purposes of calculating the weighted average margin of dumping for each product and exporter. The transaction-specific construct applied by the United States when margins of dumping are calculated with recourse to the W-T comparison methodology finds no basis in the Anti-Dumping Agreement, as interpreted in previous panel and Appellate Body reports. The Appellate Body has specifically addressed – and categorically rejected on numerous occasions – the argument that the concepts of "dumping" and "margin of dumping" could possibly occur at the transaction-specific level. The Appellate Body has conclusively ruled that the terms "dumping" and "margins of dumping" are exporter-specific and product-wide concepts, and they must be interpreted in a consistent and coherent fashion throughout the entire Anti-Dumping Agreement.

C. Articles 2.4.2 and 2.4 Require Aggregation of All Results of Intermediate Comparisons when Calculating the Margin of Dumping

6. While it is permissible to undertake multiple comparisons between normal value and export price at an intermediate stage, the Appellate Body has found that Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement require that investigating authorities aggregate the results of all such intermediate comparisons when calculating the product-wide and exporter-specific margins of dumping, regardless of the comparison methodology that is being applied. Thus, the use of zeroing in W-T comparisons under the second sentence of Article 2.4.2 is inconsistent with the requirement that the results of all intermediate comparisons be aggregated when the investigating authority establishes the margin of dumping for the product as a whole and for each exporter. It is also inconsistent with the "fair comparison" requirement of Article 2.4, because it artificially inflates the margins of dumping.

D. The Appellate Body Has Rejected the USDOC's Contention that Zeroing is Permissible under the W-T Comparison Methodology

7. The Appellate Body has consistently rejected the USDOC's position that dumping may somehow occur at the transaction-specific level whenever the comparison methodology at issue calls for a comparison between normal value and the prices of individual export transactions in *US – Softwood Lumber V (Art. 21.5 – Canada)*, *US – Zeroing (EC)*, *US – Zeroing (Japan)*, *US – Stainless Steel (Mexico)* and *US – Continued Zeroing*. The Appellate Body conclusively found that the application of zeroing under the W-T comparison methodology in administrative reviews was inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because it led to the assessment of duties in excess of the amount of the anti-dumping margin for the product as a whole.

E. Nothing in the Text of the Second Sentence of Article 2.4.2 Suggests that Dumping Is a Transaction-Specific Concept

8. The second sentence of Article 2.4.2 allows investigating authorities to compare "a normal value established on a weighted-average basis" to "prices of individual export transactions" when three cumulative conditions are met. First, the investigating authority must identify "a pattern of export prices". Second, the investigating authority must identify a pattern of export prices that "differs significantly among purchasers, regions or time periods". Third, the investigating authority must provide an "explanation … as to why differences in export prices cannot be taken into account appropriately" by the two symmetrical comparison methodologies that an investigating authority must "normally" apply under the first sentence of Article 2.4.2 (the W-W and T-T comparison methodologies). These textual elements suggest that, just like elsewhere in the Anti-Dumping Agreement, a margin of dumping cannot be established at the transaction-specific

level, and the results of intermediate comparisons may not be disregarded when establishing the margin of dumping.

F. The Use of Zeroing in W-T Comparisons Is "As Such" Inconsistent with Articles 2.4 and 2.4.2, Second Sentence, of the Anti-Dumping Agreement

1. The Use of Zeroing in W-T Comparisons under the Second Sentence of Article 2.4.2 Is a Measure Challengeable "As Such"

9. The USDOC's use of zeroing in the W-T comparison methodology under the second sentence of Article 2.4.2 is attributable to the United States; it has the precise content as evidenced in numerous original investigations and administrative reviews by the USDOC; and finally, the USDOC has consistently and systematically applied zeroing whenever calculating margins of dumping with recourse to the methodology provided for under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.

2. The Use of Zeroing in W-T Comparisons Is "As Such" Inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement

10. The use of zeroing invariably results in the USDOC disregarding or artificially reducing 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" inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, and as a consequence is also "as such" inconsistent with Articles 2.1 of the Anti-Dumping Agreement, and Article VI:1 of the GATT 1994.

11. Moreover, Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to be "impartial, unbiased, and even-handed" when comparing normal value and export price. The use of the zeroing methodology invariably leads to the results of intermediate W-T comparisons being disregarded or artificially reduced to zero, thus increasing the resulting margins of dumping and making an affirmative dumping determination more likely. For this reason, just like in the context of any other anti-dumping proceeding, the use of zeroing is "as such" inconsistent with Article 2.4 of the Anti-Dumping Agreement.

12. 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 under the second sentence of Article 2.4.2. To that extent, 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.

G. The Application of the Zeroing Methodology in the Original *Washers* Determination and in Subsequent Connected Stages of *Washers* Is Inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement

13. The USDOC's use of zeroing in its final anti-dumping duty determination in the *Washers* investigation resulted in the USDOC disregarding or artificially reducing to zero the results of W-T comparisons undertaken at the intermediate stage when establishing the margin of dumping applicable for the product under consideration for each investigated exporter. The USDOC's final anti-dumping duty determination in Washers is inconsistent "as applied" with Articles 2.4 and 2.4.2, second sentence, of the Anti-Dumping Agreement. As a consequence, the application of the zeroing methodology in *Washers* is also inconsistent "as applied" with Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

14. Korea also challenges the USDOC's use of zeroing in subsequent connected stages of the Washers proceedings, as ongoing conduct. Any such use of zeroing by the USDOC will be inconsistent with Article 2.4, Article 2.4.2, Article 2.1, and Article 9.3 of the Anti-Dumping Agreement, as well as Articles VI:1 and VI:2 of the GATT 1994.

V. 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, BOTH "AS APPLIED" IN THE *WASHERS* INVESTIGATION AND AS "ONGOING CONDUCT" OR "AS SUCH" IN RESPECT OF THE CURRENT "DIFFERENTIAL PRICING" METHODOLOGY

A. Overview of the Obligations for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement

15. A normal value calculated on a weighted average basis may be compared to prices of individual export transactions if the investigating authority find that there are "export prices which differ significantly", and that those differing export prices constitute "a pattern", and explain why applying either one of the comparison methodologies set forth in the general rule would not permit such differences to be "taken into account appropriately". The text and context of Article 2.4.2 make clear that if all three of these conditions are satisfied in a given case, the exception is to be applied only to those transactions that have met the criteria for application of the W-T comparison methodology.

B. The USDOC's Methodology for Invoking the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement in the *Washers* Investigation Failed to Comply with the Requirements of that Provision

1. The USDOC Acted Inconsistently With the Second Sentence of Article 2.4.2 in the *Washers* Investigation by Relying Solely on Quantitative Criteria to Invoke the Exception to Article 2.4.2

16. As the term, "a pattern", is used in the second sentence of Article 2.4.2, the significantly differing prices found to exist in sales to a purchaser, or in a given region or time period must not be the result of some random or exogenous cause, but rather in fact must reflect what reasonably can be inferred to be targeting conduct. This conclusion is reinforced by the requirement in Article 2.4.2 that the prices differ not only by customer, region or time period, but also that they differ "significantly". Outside the context of Article 2.4, it can be seen that when the Anti-Dumping Agreement uses the word "significant" or "significantly", it does so with the intent of conveying a meaning that is qualitative as well as, or instead of, quantitative.

17. Contrary to the ordinary meaning of the terms "pattern" and "significantly", and contrary to its own analysis in its initial implementation of the second sentence of Article 2.4.2, in the "targeted dumping" analysis applied in *Washers*, the USDOC applied its so-called "pattern test" and "gap test" as purely quantitative tests. The USDOC applied these tests mechanically, and then it analysed only the quantitative differences among those average prices; the USDOC never examined the reasons for the alleged "pattern" of "significant" price differences that it found to exist.

2. The USDOC Acted Inconsistently With the Second Sentence of Article 2.4.2 in the *Washers* Investigation by Failing to Provide an Adequate Explanation

18. It is important to note the high standard for justifying the use of a W-T comparison methodology: the second sentence requires a determination that the W-W and T-T comparison methodologies *cannot* take into account appropriately the relevant pattern of significantly different prices. In other words, the W-T comparison methodology is not permitted if there is any way in which the W-W or T-T comparison methodology can produce a dumping margin calculation in which the pattern of significantly differing prices to the purchaser (or region, or time period) in question can be taken into account appropriately.

19. In *Washers*, the USDOC made no pretence of meeting this explicit requirement of the second sentence of Article 2.4.2. After finding the existence of "targeting" through a mechanical application of its "pattern test" and "gap test", the USDOC compared the respondents' dumping margins using the W-W comparison methodology (without any zeroing) and the W-T comparison methodology (with zeroing). Because this comparison yielded what the USDOC considered to be a "material difference" or a "meaningful difference", it concluded that it must apply the

W-T comparison methodology to all sales for both respondents. These "explanations" are facially inadequate to meet the high standard that the second sentence of Article 2.4.2 imposes. Indeed, the USDOC's statements are wholly conclusory and provide no explanation at all.

3. The USDOC Acted Inconsistently with Article 2.4.2 in the *Washers* Investigation by Applying the W-T Comparison Methodology to All of the Respondents' Sales

20. The structure and language of Article 2.4.2 confirm that the limited exception set forth in the second sentence only authorizes the application of the W-T comparison methodology to those transactions determined to have met the criteria for invocation of the exception, and not to all export transactions.

21. By using the mandatory term "shall", the general rule articulated in the first sentence of Article 2.4.2 reflects a clear and strong preference for the use of either the W-W or T-T comparison methodologies in every anti-dumping investigation. In contrast, by using the term "may", the exception set forth in the second sentence of Article 2.4.2 is never mandatory. Rather, it merely provides investigating authorities with the discretion to apply the W-T comparison methodology, assuming all three conditions for invoking it have been established.

22. It naturally follows from this structure that the exception in Article 2.4.2 should be limited in application to those transactions that have justified its use, while the remainder of the export transactions at issue, which have not met those conditions, should be subject to one of the two symmetrical methodologies that otherwise would apply to all export transactions under the general rule established by the first sentence of Article 2.4.2. Indeed, a contrary interpretation would be tantamount to granting investigating authorities unbridled discretion that could lead to the exception swallowing the rule.

C. The Repetition of These Same Three Errors in Subsequent Connected Stages of the *Washers* Investigation Is Ongoing Conduct that Is Inconsistent with Article 2.4.2 of the Anti-Dumping Agreement

23. The USDOC continues to commit the same three errors identified above in the application of its so-called "differential pricing" methodology. The Appellate Body has established that Members may challenge, as ongoing conduct, the repetition of the same WTO-inconsistent behaviour in successive determinations by which duties are calculated and maintained over time. Although the original anti-dumping determination in the Washers investigation was based on the USDOC's application of its *Nails II* test, the USDOC's application of its differential pricing methodology in subsequent connected stages of the Washers proceedings will result in a repetition of the same three errors. Accordingly, Korea challenges as ongoing conduct the repetition of the same three errors described above in subsequent connected stages of the *Washers* proceedings. Any such repetition of these errors by the USDOC will be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement for the same reasons as set forth above.

D. The Differential Pricing Methodology Is Inconsistent, As Such, with the Second Sentence of Article 2.4.2 of the Anti-Dumping Agreement

1. The Differential Pricing Methodology Is a Rule or Norm of General and Prospective Application

24. The differential pricing methodology is not only a measure challengeable in WTO dispute settlement "as applied" or as "ongoing conduct", but also a measure that can be challenged "as such", because the differential pricing methodology is a rule or norm of general and prospective application. The differential pricing methodology is expressed in several determinations in written form. Furthermore, the USDOC made public the SAS Code for the differential pricing methodology and even requested public comments on it. These developments in written form clearly show that the differential pricing methodology is a rule or norm of general and prospective application. Even if these developments are considered not to be expressed in the form of a written document, the differential pricing methodology is a rule or norm of general and prospective application that can be challenged "as such".

2. The Differential Pricing Methodology Enshrines the Same Unlawful Interpretations of Article 2.4.2 as the USDOC Applied in the *Washers* Investigation

25. The differential pricing methodology relies solely on quantitative criteria to determine whether there exists a pattern of export prices which differ significantly by purchaser, region or time period. By refusing even to consider respondents' proffered reasons for the observed price differences, and by relying exclusively on a mathematical analysis, the USDOC policy of invoking the second sentence of Article 2.4.2 under the differential pricing methodology without properly determining whether the mathematical differences in prices constitute a "pattern" of prices that differ "significantly" is inconsistent "as such" with Article 2.4.2 of the Anti-Dumping Agreement.

26. The USDOC employs the differential pricing methodology without providing an adequate explanation. As was true in *Washers*, the "explanation" that the USDOC provides under the differential pricing methodology as to why the pattern of significant price differences "cannot be taken into account appropriately" by the use of either the W-W or T-T comparison methodologies is facially inadequate. Under the differential pricing methodology, if a sufficient number of sales pass the numerical thresholds including the "Cohen's *d* test" and "ratio test", the USDOC concludes without any further analysis or explanation that the W-W comparison methodology cannot take into account the observed pattern of significantly different prices whenever the respondent's dumping margin using the W-W comparison methodology (without zeroing) and the W-T comparison methodology (with zeroing) yields what the USDOC considers to be a "meaningful difference".

27. The differential pricing methodology, like the methodology applied in *Washers*, also leads the USDOC to apply the exceptional W-T comparison methodology to sales that do not meet the criteria for invoking the exception. Unlike the *Nails II* test applied in *Washers*, however, which had no threshold, the USDOC now applies the exception to all U.S. sales in any instance where more than 66 percent of the U.S. sales have been found to constitute a pattern of prices that differ significantly by purchaser, region or time period under the Cohen's *d* test.

3. The Differential Pricing Methodology Does Not Identify "a Pattern of Export Prices Which Differ Significantly Among Different Purchasers, Regions or Time Periods"

28. The differential pricing methodology does nothing more than measure the amount of price variation that can be found within an exporter's sales. An amount of price variation, however measured, does not serve to reveal "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The differential pricing methodology does not identify patterns of significant price differences that might exist among different purchasers, regions or time periods. In fact, notwithstanding its name, the differential pricing methodology bears essentially no relationship to any concept of "patterns" of export prices which "differ" among "different" purchasers, regions, or time periods. Instead, it aggregates random, unrelated price differences of every possible type and combination, and simply asserts that the accumulated price variation constitutes a "pattern".

29. For example, the ordinary meaning of the second sentence indicates that a "pattern of prices which differ significantly" may arise among different purchasers, among different regions, or among different time periods. It may not arise among *combinations* of purchasers, regions or time periods. Such "cross-category" combinations bear no relationship whatsoever to the requirement of a "pattern" of export prices which "differ significantly" among "different" purchasers, regions or time periods.

4. The "Systemic Disregarding" in the Differential Pricing Methodology Is Inconsistent with the Anti-Dumping Agreement

30. The use of "systemic disregarding" in the result of the W-W comparison, where the USDOC "set total dumping margin to zero" in the W-W comparison subset if the absolute value of the sum of the negative dumping margin is larger than the sum of the positive dumping margin, is also inconsistent with the Anti-Dumping Agreement and the GATT 1994. As opposed to the "fair comparison" obligation under Article 2.4 of Anti-Dumping Agreement, this "systemic disregarding",

similar to the original zeroing, unlawfully inflates the dumping margin and makes a positive determination more likely, by ignoring the negative dumping margins. This "systemic disregarding" method also contravenes the "product as a whole" concept of dumping margins. Furthermore, this unreasonable inflation through the "systemic disregarding" runs afoul of the object and purpose of the second sentence of Article 2.4.2.

VI. THE USDOC'S FINAL SUBSIDY DETERMINATION FOR SAMSUNG IS INCONSISTENT WITH THE SCM AGREEMENT AND WITH ARTICLE VI:3 OF THE GATT 1994

31. As with its erroneous determination in the parallel anti-dumping investigation of *Washers,* the USDOC also misinterpreted and misapplied the relevant provisions of the SCM Agreement. The USDOC not only misunderstood the Korean Government's legitimate policy tools, but also misconstrued the relevant provisions of SCM Agreement. Overall, the USDOC disregarded relevant factors that are essential to determine the existence of a countervailable subsidy, as well as the proper calculation of countervailing duty margins.

A. The USDOC's Finding that Samsung Received a "Disproportionately Large Amount" of the Total Benefit that the Government of Korea Provided under RSTA Article 10(1)(3) Is Inconsistent with Articles 1.2 and 2.1(c) of the SCM Agreement

32. RSTA Article 10(1)(3) provides that a Korean company can earn – and Samsung received – a tax credit equal to 40 percent of the amount by which its R&D expenditures during the tax year exceeded the average of its R&D expenditures in the four previous years. While Samsung claimed on its 2011 tax return a larger amount of the tax credit than the average amount claimed by other Korean companies, the amount of the credit that Samsung earned for that year was automatically determined by using one of the two statutory formulas available to all Korean companies to determine their Article 10(1)(3) tax credits.

33. Nonetheless, the USDOC found that the tax credit that Samsung claimed on its 2011 tax return under RSTA Article 10(1)(3) was specific to Samsung. In this process, the USDOC relied exclusively on the third of four factors that Article 2.1(c) enumerates as possible bases for a finding of *de facto* specificity – namely, "the granting of disproportionately large amounts of subsidy to certain enterprises." This determination was based solely on the fact that the tax credit claimed by Samsung on its 2011 tax return constituted a larger percentage of the total RSTA Article 10(1)(3) credit than the average credit claimed by each other Korean company.

34. As was made clear by the Appellate Body in previous disputes, Article 2.1(c) requires an inquiry as to "whether 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." Here, the USDOC made no such inquiry into whether the amount of tax credits received by Samsung differed from the allocation "that would be expected to result if the subsidy were administered in accordance with the conditions for eligibility for that subsidy."

35. Indeed, there was never any issue as to whether "the conditions for eligibility" under RSTA Article 10(1)(3) were properly applied to Samsung. To the contrary, the record shows – and the USDOC has never contested – that Samsung calculated the amount of its tax credit for tax year 2010 in the manner required by the methodology and criteria of RSTA Article 10(1)(3).

36. The USDOC had no evidence of a 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)." This constitutes a clear violation of the United States' obligations under the SCM Agreement.

37. The evidence on the record shows that Samsung received a "proportionate" amount of the tax credit because it determined the amount of the credit that it earned using the same calculation formula available to all other Korean companies. The fact that its credit, in an absolute sense, was larger in amount than the average credit amount received by all other Korean companies did not

render it disproportionate in light of the much larger investments that it made that generated its credit.

38. The USDOC's determination is further invalidated by the USDOC's failure to address the two mandatory factors in the third sentence of Article 2.1(c).

B. The USDOC's Finding that Samsung Failed To "Tie" the Tax Credits that It Received under RSTA Articles 10(1)(3) and 26 to Subject and Non-Subject Merchandise Is Inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement

39. Despite the requirement of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement that countervailing duties be limited to the amount of subsidies provided on the production and sale of LRW, the USDOC improperly attributed a significant portion of the tax credits that Samsung received on products other than LRW to LRW. The proper calculation of Samsung's subsidy margins for both the Article 10(1)(3) and Article 26 tax credits should have used Samsung's tax credit received on digital appliances, including LRW, for the numerator and Samsung's sales of digital appliances, including LRW, as the denominator, in order to calculate the margin for the product under investigation.

40. The USDOC, however, calculated Samsung's subsidy margin based on the company's sales of all products and on tax credits bestowed on all of Samsung's products. The USDOC's margin calculation, therefore, relied overwhelmingly on credits earned by Samsung for eligible expenditures that benefitted the production and sale of products other than digital appliances, including LRW. The result was a dramatic inflation of the subsidy margins.

41. The USDOC's stated reason for refusing to receive, let alone examine or verify, Samsung's data and documentation showing that only a tiny portion of its total Article 10(1)(3) and Article 26 tax credits were earned and claimed on the production of digital appliances, including LRW, was its rule that it would allocate a subsidy to one or more specific products only upon a showing that the subsidy was "tied" to the production or sale of such products. The USDOC's use of a "tying" requirement is simply impermissible where, as here, data and documentation are submitted to demonstrate that the subsidy in fact benefited the production or sale of a particular product or category of products.

42. The evidence on the record shows that the USDOC had at its disposal information that would have enabled it to determine the amount of tax credit that benefited the production and sale of the merchandise subject to the investigation. Its refusal to consider that information, and to use it to calculate the proper numerator and denominator in determining Samsung's subsidy margin, constitutes a clear violation of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

C. The USDOC's Finding that the Tax Credits that Samsung Received Under RSTA Article 10(1)(3) Benefited Only the Products that It Produced and Sold in Korea Is Inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement

43. In its final determination in the *Washers* investigation, the USDOC, reversed its previous rulings and determined for the first time that the alleged subsidy benefitted only Samsung's domestic production. This reasoning of the USDOC, however, simply misconstrues the nature of the Article 10(1)(3) tax credits.

44. The core issue is whether the benefit of in-Korea R&D activity accrues to the company's worldwide production and sales. In the case of R&D activity, the resulting benefit is not limited to the location where the R&D is conducted. Rather, the results of R&D will normally benefit all operations of the company, wherever located, as Samsung demonstrated to the USDOC. The USDOC's reference to an absence of any "application and/or approval documents" does not fit the facts of the Article 10(1)(3) process.

45. The USDOC's limitation of the denominator to Korean sales was impermissible because: (a) it was based on a presumption not authorized by the SCM Agreement; (b) the USDOC failed to

make an objective assessment of this issue based on positive evidence; (c) the reasons given by the USDOC are demonstrably inaccurate and thus fail the requirement of an adequate explanation of its determination; and (d) to the extent that the USDOC relied on its presumption, that presumption 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 benefitted Samsung's worldwide sales and production.

46. The determination of the USDOC on this issue, therefore, constitutes a clear violation of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

D. The Tax Credits that Samsung Received Under RSTA Article 26 Do Not Constitute Specific Subsidies within the Meaning of Article 2 of the SCM Agreement

47. The USDOC's determination that the tax credits were specific to a geographical region is erroneous and inconsistent with the United States' obligations under Article 2 of the SCM Agreement. In all respects, RSTA Article 26 is a legitimate policy tool pursued by the Korean government, as essentially a zoning measure, to address the particular social problems associated with the overconcentration of growth in the Seoul metropolitan area. RSTA Article 26 does not in any way attempt to distort trade.

48. The RSTA Article 26 eligibility criteria are fully consistent with the principles of non-specificity in Article 2.1(b) of the SCM Agreement. The eligibility criteria are neutral, and do not favour some enterprises over others. The criteria are clearly spelled out and are objective. The amount of the subsidy is also objectively calculated. Eligibility is automatic, and there is strict adherence to the eligibility criteria. As the operation of RSTA Article 26 fully meets the requirements of Article 2.1(b) of the SCM Agreement, the tax credits are not specific.

49. Furthermore, the tax credits provided in Article 26 are not "limited to certain enterprises located within a designated geographical region", either by the terms of Article 26, or in its application. Rather, the credits are generally available to any enterprise that meets the qualifications of that Article, without regard to where the enterprise is located. An enterprise located anywhere in Korea, including within the "overcrowding control region" of the Seoul Metropolitan Area, is entitled to the tax credit for any qualifying investment made by that enterprise anywhere else in Korea.

50. Even if the USDOC had determined that RSTA Article 26 imposes limitations on eligibility based on the enterprise's location in a designated geographical region, the determination of regional specificity in this case fails under Article 2.2.The RSTA Article 26 tax credits are generally available to all enterprises in that geographical region and, therefore, are not limited to "certain enterprises". It is particularly inappropriate to define a "designated geographical region" that constitutes 98% of a Member's total territory. This constitutes no identifiable demarcation between the "designated geographical region" and the broader jurisdiction of the granting authority.

51. Therefore, the tax credits provided under Article 26 are not specific under the principles of Articles 2.1(a) and 2.1(b) of the SCM Agreement and do not constitute subsidies limited to certain enterprises located within a designated geographical region within the meaning of Article 2.2 of the SCM Agreement. The USDOC determination to the contrary constitutes violation of these provisions of the SCM Agreement.

E. The Imposition and Maintenance of Countervailing Duties on Imports of Washers Produced by Samsung Are Inconsistent With Articles 10 and 32.1 of the SCM Agreement

52. The USDOC's imposition of countervailing duties on Samsung is also inconsistent with Article 10 of the SCM Agreement. Moreover, the imposition of countervailing duties on Samsung also violates Article 32.1 of the SCM Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF KOREA

I. USDOC'S WTO INCONSISTENT "ZEROING" METHODOLOGY

A. Past Appellate Body Reports Apply Equally In This Case

1. Korea submits that the nine prior AB reports addressing the USDOC's zeroing methodology, properly understood, are largely dispositive of the question of whether zeroing is permitted in any context of any anti-dumping proceeding, regardless of the particular price comparison methodology. Although the Appellate Body may not have ruled on the specific scenario of the application of the second sentence yet, the logic of the prior AB rulings – that "dumping" margins must reflect the product as a whole, and must reflect all of the exporter's prices whether or not they are below normal value – applies with equal force under the second sentence. Indeed, the Appellate Body has also explicitly rejected the contention that zeroing is permissible under the W-T comparison methodology.

2. The USDOC's zeroing methodology has nothing to do with choosing a comparison methodology; rather, the USDOC's zeroing methodology is employed as the very last step of calculating the overall dumping margin. The second sentence says nothing about calculating the ultimate dumping margin, and therefore cannot justify the zeroing methodology.

3. Although the United States argues that the second sentence is an exception, this provision's character as an exception does not justify the use of zeroing. There is simply no authority in the Anti-Dumping Agreement or the AB rulings to support the U.S. argument that an "exception" allows the use of zeroing. The second sentence allows the use of the W-T comparison method, and says nothing about zeroing. Everything about the second sentence – indeed, everything about Article 2.4 as a whole, including Article 2.4.2 – deals exclusively with the intermediate comparison stage of calculating a dumping margin.

B. There Is No "Mathematical Equivalence"

4. The Appellate Body has already rejected the mathematical equivalence argument *twice*, for the reason of the logical flaw in the U.S. argument – the reliance on assumptions that create the equivalent results. If one simply changes those assumptions made by the United States, the equivalence collapses and the two comparison methods yield different results. The U.S. assertion that the W-W and W-T comparison methods will always yield identical results is therefore simply not factually correct.

5. In further support of these prior AB findings, Korea has provided an expert affidavit by Professor Thomas J. Prusa, provided as exhibit KOR-93. His affidavit explains why the alleged mathematical equivalence is completely a construct of the narrow U.S. view about how to calculate dumping margins under the exceptional method. Importantly, Professor Prusa *also* specifically disproves the U.S. argument that mathematical equivalence can be seen in the specific facts of the *Washers* original investigation. Korea has therefore established conclusively that, as a factual matter, there is no mathematical equivalence.

6. Korea has also demonstrated how and why the U.S. legal argument to justify zeroing fails. The U.S. legal argument of the need to "unmask" rests on several false premises. First, the U.S. argument implicitly assumes the second sentence is about obtaining higher dumping margins. That assumption is simply wrong. The zeroing methodology as employed by the USDOC does not contribute to "unmasking" targeted dumping, because zeroing is not used to determine whether there is a "pattern of prices which differ significantly." Next, the U.S. argument assumes that without zeroing, the W-T comparison has no purpose. Again, this assumption is simply wrong because there is no mathematical equivalence and because the USDOC assumes the only purpose of a W-T comparison is to focus on how the "individual export transactions" are aggregated into a single dumping margin. To the contrary, there are other reasons the authority would use the

W-T comparison to allow more careful consideration of the export prices that differ significantly. Once the authority is considering individual export transactions, a different form of weighted average normal value might well make sense. For example, the authority might switch from an annual average normal value to a monthly average normal value.

7. Finally, the U.S. argument that Article 2.4.2 requires an investigating authority to adopt identical basis for calculating normal value between W-W and W-T is simply wrong. Article 2.4.2 does not tie the hands of the investigating authority in the manner suggested by the United States. There are legitimate reasons why an investigating authority might wish to change its approach to normal value.

8. As importantly, the Appellate Body has effectively already rejected the U.S. argument that the W-W and the W-T comparison methodology have to utilize the exact same normal value. Indeed, when offered the explicit chance to rule that the calculation of normal value was required to be the same under W-W and W-T (when applying the second sentence), the Appellate Body declined to do so in two different cases.

C. There Is No Need To Turn To Negotiating History

9. The U.S. argument that the negotiating history supports the use of zeroing when implementing the second sentence should also be rejected. First, because the terms of Article 2.4.2 are unambiguous, resort to negotiating history is not needed. Second, although the United States asserts that this provision is a "compromise," the United States has not provided any evidence that the second sentence was adopted as a compromise. Indeed, the real compromise was to put the term "fair comparison" into the Anti-Dumping Agreement, not "zeroing." If the drafters of the Anti-Dumping Agreement had intended to allow the use of zeroing in the second sentence, they would have included the term in the text or more clearly expressed this wish. The U.S. FWS suggests that, during the negotiations, Japan supported the concept of zeroing when implementing the second sentence. Japan flatly rejects the notion that Japan supported the use of zeroing in the implementation of the second sentence. The same can be said of Hong Kong's position.

II. USDOC'S WTO-INCONSISTENT USE OF ARTICLE 2.4.2

A. The United States Has Misinterpreted The Pattern Clause

10. The text requires the analysis to be based on the actual "export prices" themselves. It is the "export prices" that must "differ significantly," not the averages of those export prices. There is no textual basis to disregard certain differences as "meaningless," while focusing on other differences as somehow being "meaningful." The U.S. approach creates bias in the conclusions being drawn by understating the variance.

11. The text also requires the analysis to consider the export prices "among different purchasers, regions or time periods." These three categories are each analytically distinct, and are separated by the disjunctive "or." Moreover, the purpose of these categories is not simply to accumulate differences into an undifferentiated group, but rather to identify price differences within each category that might constitute a "pattern" of such differences within that category. That "dumping" requires consideration of the product as a whole does not mean that price differences can be combined into an undifferentiated group.

12. Pursuant to the second sentence, the process to determine whether the price differences really are "significant" and actually constitute a "pattern" should be both qualitative and quantitative. The USDOC never actually tests any aspect of the prices other than their magnitude – whether they are "large" price differences, rather than whether the differences are meaningful or notable price differences. Prices do not differ "significantly" if the differences are simply the natural and completely expected reactions to normal commercial considerations. Korea is not arguing that the authority must consider the exporter's subjective intent. Rather, the issue is whether price differences are "significant" in the specific context of a particular industry and particular market situations.

13. The text also requires that the export prices that differ significantly within each category must collectively constitute "a pattern." The frequency of export prices that "differ" is the starting point but not the ending point of a proper analysis of "pattern." There have to be enough prices that "differ significantly" to reasonably preclude the possibility of random price differences. In this regard, the factual context, such as normal commercial conditions, does matter. A better description of what the USDOC does is to test for the number of prices that differ. Another problem is the U.S. argument that both higher and lower prices can be part of the "pattern." The United States allows a "pattern" to be any collection of differing prices that exceeds some minimal threshold based on the number of transactions.

1. Inconsistencies in the *Washers* original investigation

14. There are several problems in the *Washers* original investigation. First, the USDOC calculated standard deviations based on average export prices, not the actual "export prices" themselves. Second, the USDOC improperly found the export prices to "differ significantly" by using the average prices, which necessarily made the standard deviations smaller, arbitrarily increasing the possibility of finding a pattern. Third, the USDOC made no effort to consider the reasons for price differences, instead dismissing such arguments. Fourth, the USDOC improperly found the "pattern" to include all sales, and applied the exceptional method even to non-patterned sales.

15. To document these errors in more detail, Korea has provided an expert affidavit by Professor Prusa explaining and confirming these problems. First, the affidavit stresses that the *Nails* test is "biased towards finding evidence of targeted dumping." Second, the affidavit documents the effect of this bias. If the biased approach was corrected in the *Washers* original investigation, the USDOC could not have found the "pattern" because about 98% of the export sales had prices that did not differ significantly.

16. In addition, there is no evidence that the USDOC actually tested for a "sufficient volume" in any of its calculations in the *Washers* original investigation. The USDOC never explicitly found or explained why it deemed so few export sales to be "sufficient volume."

2. Inconsistencies in the differential pricing methodology

17. The differential pricing methodology is also inconsistent with the second sentence. First, the USDOC improperly ignores the necessary distinctions among the groups, combining them all into an undifferentiated group. Second, the USDOC improperly finds the export prices to "differ significantly," making no effort at all to consider the reasons for price differences, instead dismissing such arguments out of hand. Third, the USDOC improperly finds the "pattern" to include all sales whenever more than 66% of the transactions pass the threshold test, and therefore applies the exceptional method to all sales in that situation. Finally, the USDOC finds prices to "differ significantly" relying on a misuse of the Cohen's *d* test, without reflecting the actual distribution in the prices – that Professor Cohen himself and other scholars have warned against.

18. To be clear, although the USDOC is trying to create the illusion of statistical validity, the Cohen's *d* test simply measures and standardizes the size of a difference between two mean values. The Cohen's *d* test is not a measurement of significance. Professor Cohen himself and a generation of scholars have stressed the importance of context and avoiding "mindless rigidity" in using the Cohen's *d* test. The United States has extensively studied the market for large residential washers. There is nothing "significant" in this market – nothing that is meaningful or noteworthy – about prices that vary over time, across customers, and across regions in this particular industry. Nor is there anything significant about prices being lower during a well-known holiday season sale period.

B. The United States Has Misinterpreted the Explanation Clause

19. Merely showing the difference of the results between W-W (without zeroing) and W-T (with zeroing) does not meet the textual obligation of "explanation." The investigating authority must provide the specific reason and "explain" why it must resort to the exceptional comparison method, and why it was not possible at all to account for these differences using the normal comparison methods. The use or non-use of zeroing cannot constitute a permissible "explanation"

because even a comparison between W-W with zeroing and W-W without zeroing will produce different results, even if the sales in both groups were the same.

20. The text also specifies that the authority "cannot" use the normal comparison methods. That using the normal comparison method might be more burdensome does not matter; rather, it must not be possible to use the normal comparison methods. The authority must explain why the normal methods are not sufficient to allow "appropriate" use of those methods.

21. The term "appropriate" requires the explanation to address why in a particular case the particular price differences are such that they cannot "be taken into account appropriately" through this normal comparison method. This phrase also requires some qualitative assessment of the objective circumstances of a particular product and industry. The text of the second sentence adds the term "appropriately" because even after all the adjustments for price comparability have been made, there still might be circumstances where price differences can be taken into account "appropriately" without the need to resort to the exceptional W-T comparison method.

22. The United States also ignores the express obligation to provide an "explanation" with reference to both of the normal comparison methods. The last part of the second sentence explicitly references the use of either W-W or T-T comparisons, requiring the authority to address both methods.

1. Inconsistencies in the *Washers* original investigation

23. The United States has confirmed that its "explanation" in the *Washers* original investigation consisted entirely of its findings that the overall dumping margins differed between W-W without zeroing and W-T with zeroing. There are two problems. First, the USDOC made no effort to explain why any differences could not be taken into account "appropriately.. Rather, the USDOC assumed without any explanation that if there was a difference in the overall margin, then the difference necessarily could not be taken into account. Second, the United States also argues that the "differences resulted in a change from a determination of no dumping to an affirmative determination of dumping." These differences are really just the difference between a margin based on zeroing and a margin not based on zeroing.

2. Inconsistencies in the differential pricing methodology

24. Under its differential pricing methodology, the USDOC continues to look exclusively to the differences in the margin and considers no other factors. The USDOC applies the same 25% threshold in every case regardless of the facts and regardless of how small the change in the margin might be. Even tiny shifts in the margin will be considered meaningful if they are larger than this fixed 25% threshold. Again, the USDOC continues to ignore the requirement to address the T-T comparison method in its explanations.

C. The United States Has Misinterpreted The Scope of The Exception

25. The United States incorrectly argues that no matter how few transactions meet the conditions, the exception can apply to all transactions. First, it ignores the logical relationship between a basic rule and an exception. Second, it ignores the textual reference to "such differences." Third, the Appellate Body in *US-Zeroing (Japan)* definitely stated that the phrase "individual export transactions" refers "to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited." The U.S. interpretation ignores this key finding.

1. Inconsistencies in the *Washers* original investigation

26. There is no dispute that the USDOC applied the W-T comparison method with zeroing to all of the sales by both of the Korean respondents, despite the fact that in the final determination in the *Washers* original investigation, the USDOC confirmed that the vast majority of the transactions – more than 90% – were found not to be "targeted."

2. Inconsistencies in the differential pricing methodology

27. Under the differential pricing methodology, the USDOC also does not properly limit the application of the W-T comparison method to those transactions found to meet the conditions. In the differential pricing methodology, if more than 66% of the sales pass the Cohen's *d* test, then the USDOC subjects all sales to the W-T comparison method with zeroing. This feature is part of the measure – the differential pricing test – that is used consistently in every USDOC original investigation and administrative review.

D. The United States Improperly Engages In Systemic Disregarding

28. Under the differential pricing methodology, the USDOC often creates subsets, applying a W-W comparison without zeroing to one subset and a W-T comparison with zeroing to the other subset. The USDOC sets any such negative margins in the W-W subset equal to zero, and ignores them when determining the overall margin of dumping. This systemic disregarding necessarily inflates the overall dumping margin, contrary to the concepts of "product as a whole." This systemic disregarding of negative margins is essentially a new form of WTO-inconsistent zeroing. The generic SAS code for differential pricing shows this methodology. And, the SAS code used in the preliminary determination in the *Washers* administrative review confirms the use of this generic SAS code.

E. Korea Has Properly Challenged The Differential Pricing Methodology

29. "As Such": Korea has summarized the substantial amount of evidence already provided to this Panel to demonstrate both (1) the precise content and (2) the general and prospective application of the differential pricing methodology. The evidence of the measure's general and prospective application thus occurred between March 2013 and December 2013, and then continued throughout all of 2014 and into early 2015. The evidence continues to accumulate to this day. Nothing in the Appellate Body decisions indicates that this Panel must ignore evidence of continuing application of a measure during the pendency of a dispute. If this Panel accepts the U.S. logic that since a measure might change it cannot be challenged, the Panel would make virtually it impossible to challenge any WTO-inconsistent measure "as such" or more generally. Such an approach would limit panels to the past application of a measure, and preclude any challenge to the ongoing measure. It makes no sense to open such a "back door" to allow WTO-inconsistent measure to escape meaningful review that might prevent the occurrence of future disputes.

30. The United States confuses the key distinction between applying the same differential pricing methodology in every instance, and what remedy is applied in each particular case given the results of the application of the methodology. The best analogy is the WTO dispute over zeroing. The fact that zeroing does not always show up in the results does not mean there is no zeroing methodology that may be challenged "as such." To the contrary, zeroing was challenged and found to be inconsistent "as such" with the Anti-Dumping Agreement. The same logic applies here.

31. "Ongoing Conduct": Korea raised an "ongoing conduct" claim because Korea knew that the differential pricing methodology would be applied to the Korean exporters in the first administrative review of the anti-dumping order. Precisely as Korea anticipated, the USDOC applied the differential pricing methodology in exactly the same manner in the preliminary determination recently announced in the *Washers* administrative review in March 2015. Korea is not seeking to challenge the differential pricing methodology as a future measure that has not yet occurred. Rather, this challenge is to the well-defined and consistently applied differential pricing methodology that already exists.

32. "As Applied": Korea's point about the preliminary determination in the *Washers* administrative review being subject to challenge "as applied" simply notes that the differential pricing methodology has in fact been applied yet again. First, the application occurred in the context of the very anti-dumping order that is the subject to this dispute. Although the USDOC has not yet published its final determination, that final determination will occur during the pendency of this dispute, before the Panel has to issue any findings. Second, the differential pricing methodology was very much subject to the consultations. The United States does not claim that

the differential pricing methodology applied in the preliminary determination in the *Washers* administrative review was in any way different. Third, although it is true that the differential pricing methodology does not *yet* have the same long, drawn-out history that the zeroing methodology has had in the WTO, as the United States notes in its argument, it is precisely these long, drawn-out disputes that Korea seeks to avoid. It would be contrary to Article 3.3 of the DSU and the principle of the "prompt settlement" of disputes to avoid the issue now.

III. THE USDOC'S CVD DETERMINATION IS INCONSISTENT WITH THE GATT 1994 AND THE SCM AGREEMENT

A. The USDOC's "Disproportionately Large Amount" Analysis Is Inconsistent With Article 2.1(c) of the SCM Agreement

33. The USDOC's continuing reliance upon the fact that Samsung received 24% of the total tax credit amounts to the mere conclusion that it received both a "large" amount and a "large proportion" of the total amount. The United States contends that the mere size of Samsung's credit compared to the size of the credit received by other companies speaks for itself because the size is "significant." However, size alone cannot be the measure of disproportionality, especially where the benefit is directly proportionate to the amount of the eligible investment.

34. The United States refuses to say what a "proportionate" amount would have been or what would have been expected under all the circumstances, which is a strong indication of the fundamental infirmity in its position. The United States also fails to explain why the USDOC would have expected the tax credits to be distributed "more evenly across the program's 11,764 recipients." In this regard, it wrongly equates an expected distribution with a more level distribution among all recipients.

35. In *U.S. – Large Civil Aircraft (2nd complaint)*, the United States contended that it was not possible to determine whether a subsidy was larger than it should be without first determining the relationship of the relative size of the subsidy compared to the total subsidy awarded to other recipients, i.e., the "first ratio," to some other measure of relative importance or significance. This relational concept requires use of a "second ratio." The United States stated that, "the numerator of the second ratio must consist of some information about Boeing, such as its size as measured by annual revenue, while the denominator must consist of comparable information about the group of recipients of the alleged subsidy as a whole."

36. The United States in *EC and certain member States – Large Civil Aircraft* continued to maintain its position that disproportionality could only be measured by use of a second ratio. The Appellate Body agreed with the United States that disproportionality could only be evaluated using a second ratio. Although, the Appellate Body rejected the second ratio that the United States proposed, the Appellate Body insisted on the need for an appropriate ratio before it could find that a subsidy was not disproportionately large. However, the USDOC failed to provide in the *Washers* case the type of evidence that both the Appellate Body and a Panel have found is essential in order to evaluate the issue of disproportionality.

37. The United States next contends that Korea has incorrectly asserted that RSTA Article 10(1)(3) provides tax credit benefits pursuant to a common formula. However, the United States impermissibly conflates the formula that a company uses to calculate the tax credit that it earns in a particular year with the amount that a company may claim on its tax return. The latter amount may be affected by tax planning considerations, including the effects of carry forward provisions and minimum tax requirements. However, these unrelated tax law provisions do not affect the amount of the Article 10(1)(3) tax credit that a company earns in a particular year, which is calculated using a formula that is common to all taxpayers. Moreover, there is no evidence that Korea designed or enacted this program to benefit large companies generally or Samsung specifically. Rather, Article 10(1)(3) benefits every company in the same way that invests in R&D activities, regardless of its size.

38. A WTO Panel found that the requirement in the final sentence of Article 2.1(c) is not dependent upon whether an interested party raised the relevance of the two factors - "length of time" and "diversification." Moreover, there is no question that Samsung raised the "length of

time" and "diversification" issues, but the USDOC failed to respond to them in its I&D Memorandum or in any other document, as required by WTO jurisprudence.

39. The United States' reliance on the findings in its redetermination upon remand from the U.S. Court of International Trade must also fail because, inter alia, the amount that a particular company claims on its tax return as a credit under Article 10(1)(3) is, in significant part, a function of tax planning. In fact, the percentage amount of the tax reduction that Samsung derived from Article 10(1)(3) is integrally related to the amount of tax credits that it earned and claimed on a wide variety of unrelated programs.

B. The USDOC Was Able To Tie Samsung's Tax Credits To Washer Production

40. The fatal flaw in the USDOC's calculation of the countervailing duties attributable to the tax credit benefits that Samsung received under Article 10(1)(3) and Article 26 is that it calculated the tax credit benefit that Samsung received on all of the products that it produced, not just the large residential washers that it produced, and then allocated a pro rata portion of that benefit to washers. As a result, the USDOC violated Article VI:3 and Article 19.4 by not calculating the tax credit that Samsung earned that was attributable solely to the washers that it produced in its Digital Appliance Division. Had the USDOC complied with its WTO obligations, it would have determined that the tax credits that Samsung received on its production of washers provided a *de minimis* benefit of less than 1% *ad valorem*.

41. Thus, the USDOC made no effort "to ascertain the precise amount of subsidy attributable to the imported products under investigation" as required by the Appellate Body. Nor did it "take all necessary steps to ensure" that the countervailing duty did not exceed the amount of the benefit that the tax credit conferred on Samsung's washers. Nor did it "actively seek out pertinent information."

42. The USDOC instead chose to remain passive based on an irrebuttable presumption that the tax credits could not be tied to a particular product category unless the intended uses of the tax credits "were known to the subsidy giver (in this case, the GOK) and so acknowledged prior to or concurrent with the bestowal of the subsidy." Under Korea's tax credit laws, it was impossible for Samsung to satisfy this requirement, which made the USDOC's presumption irrebuttable. This is 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. However, the Appellate Body in *US – Countervailing Measures on Certain EC Products* has stated that an irrebuttable presumption may not be used in an investigation.

43. The very same types of records that the USDOC relied upon in the *Refrigerators* and *Washers* anti-dumping investigations formed the basis for Samsung's calculation of the eligible expenditures that entitled it to claim tax credits under Articles 10(1)(1), 10(1)(2) and 10(1)(3). It is clear from these records that Samsung could tie its eligible expenditures directly to the Digital Appliance Division.

44. Even if the USDOC's requirement does not constitute an impermissible and irrebuttable presumption, ample evidence shows the WTO-inconsistency of the USDOC's refusal to allow Samsung to demonstrate that it could tie its Article 10(1)(3) and Article 26 tax credits to the eligible expenditures made by its Digital Appliance Division. First, on the date that Samsung filed its tax return for tax year 2010, Korea's National Tax Service had the legal ability to know exactly which tax credits were earned on those investments made by Samsung's Digital Appliance Division. There is no dispute that Samsung maintained these records, which the USDOC refused to examine when Samsung presented them at the verification of its questionnaire responses. There is also no dispute that the Korean tax authorities could have examined these records at any time, either before or after Samsung filed its tax return. Second, the United States cannot articulate what purpose would have been served by requiring Samsung to submit these records to the Korean tax authorities, or a summary of them, at the same time as it filed its tax return. Third, when Samsung did submit evidence of its "tying" of expenditures under Articles 10(1)(1) and 10(1)(2), which showed that the expenditures were made on R&D activities other than those related to washers, the USDOC refused to examine that evidence.

45. The United States nevertheless asserts that the SCM Agreement does not require it to "trace which portions of the total subsidies were related to underlying expenditures in Samsung's Digital Appliance business unit." However, the USDOC's analysts in fact had traced R&D expenditures on digital appliance products to the books and records of the Digital Appliance Division on two separate occasions. Accordingly, all of these circumstances meant that the USDOC could not ignore the evidence Samsung provided and offered to provide, which allowed the tying that Article VI:3 and Article 19.4 require.

C. The Calculation of the Denominator Should Include The Sales Value Of Global Production, Not Just Production In Korea

46. In its countervailing duty investigation in the *Refrigerators* case, the USDOC used Samsung's global sales value, not the value of its sales within Korea, in order to calculate the *ad valorem* benefit of the Article 10(1)(3) tax credit. In contrast, in the *Washers* investigation, the USDOC reversed its position and found, without any factual basis, that the very same types of R&D investments and resulting tax credits benefited only Samsung's local production and sales.

47. The United States' claim that "Korea offers no evidence of these supposed overseas effects" is contradicted by the USDOC's own findings in the *Refrigerators* subsidy investigation, where the USDOC found that R&D activities had effects on overseas production both with respect to R&D tax credit programs and R&D grant programs. The United States should not be allowed to escape the consequences of its own inconsistent findings.

48. The United States contends that Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 "do not require Members to take into account products manufactured outside the territory of a subsidizing Member when calculating subsidy rates." This assertion is simply wrong because it violates the matching principle and, for this reason, the United States is unable to identify any investigation or administrative review in which the USDOC has held that the benefits of a countervailable subsidy may never benefit overseas production. Moreover, if the United States' position were correct, then the denominator that it would use to calculate the subsidy margin for any particular program could never be a company's worldwide sales of its global production. However, as noted above, in the *Refrigerators* subsidy investigation, the USDOC used Samsung's global sales, not its local sales, on numerous occasions.

49. The United States argued in its FWS that it would have been too burdensome for the USDOC to trace the effects of R&D subsidies. This argument is contradicted by the USDOC's use in the *Refrigerators* subsidy investigation of the global sales denominator, as well as by the USDOC's findings in both the *Washers* and *Refrigerators* anti-dumping investigations that the R&D activities that Samsung conducted in Korea benefited worldwide production and sales.

D. The Tax Credits That Samsung Received Under RSTA Article 26 Do Not Constitute Specific Subsidies Within The Meaning Of Article 2.2 Of The SCM Agreement

1. It is without dispute that RSTA Article 26 does not impose limitations on the location of the enterprises receiving the subsidies

50. RSTA Article 26 subsidies are available to enterprises located anywhere in Korea. The provisions of Article 26 and the Enforcement Decree do not specify, either *de jure* or *de facto*, any limitations on the location of the enterprises receiving the subsidy. The enterprises earning the tax credits may be located anywhere in Korea.

2. The United States seeks to improperly expand the scope of Article 2.2 of the SCM Agreement

51. Article 2.2 of the SCM Agreement is not intended to be a broad "catch all," as the United States would have it, but rather, is narrowly concerned with geographical limitations on the location of the enterprises that are eligible to receive the subsidy. Other types of limitations are addressed by Article 2.1, which covers a different range of circumstances that could lead to a finding of specificity. Article 2.2 is very precise in defining the type of limitations that it addresses. Unlike Article 2.1 which broadly addresses limitations on the enterprises receiving the subsidy,

Article 2.2 is specifically and exclusively concerned with limitations on the location of the enterprises. Article 2.2 is further narrowed by specifying that the limitations must be related to the geographical location of the enterprises.

52. The Appellate Body interpreted the term "enterprise" to mean "[a] business firm, a company." The United States appears to rely on the compound term, "certain enterprises," and the definition of this term provided in the chapeau of Article 2.1. However, 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, as argued by the United States. In addition, Article 6.1(c) indicates that the term "enterprise" refers to a business organization that maintains its own accounting and reports its own operating profits and losses. Such description would not be fitting for facilities or investments. Moreover, paragraph (e) of the Illustrative List of Export Subsidies refers to the "exemption, remission or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises." The use of the term "enterprise" in this context also denotes an operating business organization. Indeed, this paragraph indicates that an enterprise is an entity capable of directly paying taxes and social welfare charges.

53. Importantly, the SCM Agreement draws an express distinction between "enterprises" and "facilities." Article 8.2(c) is specifically addressed to "assistance to promote adaptation of existing facilities to new environmental requirements." The drafters, therefore, used the term "facilities" when they intended to refer to particular operations or manufacturing plants that belonged to an enterprise. Article XVII of the GATT 1994 also uses the term "enterprise" to refer to the broader business organizations maintained or established by States. The reference is to the overall business organization and not to particular operations or investments of such enterprise.

3. The United States fails to demonstrate that RSTA Article 26 "designates" a geographical region where enterprises receiving the subsidy must be located

54. RSTA Article 26 does not designate or affirmatively identify a geographical region within the jurisdiction of the granting authority. To the extent that Article 26 designates any geographical region, it designated the region where investments will not be granted a subsidy.

55. Even if it were possible to designate the geographical region by implication -- a conclusion that is difficult to reconcile with the ordinary meaning of "designate" -- no such geographical region is designated by Article 26. The area outside the overcrowding control region of the Seoul Metropolitan Area constitutes 98% of Korea's land mass. The area essentially overlaps with the jurisdiction of the granting authority. It has no physical or natural features, or character, that distinguishes it as a "geographical region."

56. Korea is not putting forward a "size" defense as the United States inaccurately describes it. Rather, Korea's point is that, where there is no identifiable demarcation between the area in which a subsidy may be used and the broader jurisdiction of the granting authority, and where the degree of overlap between the two is almost total, there is effectively no limitation as to the geographical location of the enterprises.

4. The United States does not adequately respond to the policy concerns raised by Korea

57. Under the U.S. interpretation, subsidies provided for any investment made anywhere in the vast majority of a country's territory would be considered to be regionally specific. The U.S. position is too extreme, runs completely counter to the concept of "specificity," and yields outcomes that could not have been intended by the drafters of the SCM Agreement.

58. 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. The U.S. approach to Article 2.2 would constrain WTO Members from pursuing policies to relieve over-congestion and income disparity in large urban areas, a problem that is common to most developing, and some developed, countries. Such limitations could not have been

intended by the drafters and would have a "chilling effect" on what are sensible and increasingly necessary policies given the growing number of megacities.

59. The circumvention concerns raised by the United States are also unjustified. Where a program allows investments essentially throughout the complete jurisdiction of the granting authority, there is effectively no limitation on the recipients of the subsidy. A further safeguard against circumvention is that eligibility under such programs would have to be subject to objective criteria, like RSTA Article 26. Any express limitations that do not meet the requirements of Article 2.1(b) of the SCM Agreement could give rise to a finding of *de jure* specificity under Article 2.1(a). Similarly, any indication that a program is *de facto* specific could be examined under Article 2.1(c). Accordingly, the circumvention concerns alluded to by the United States do not arise.

5. The U.S. position is internally inconsistent

60. The United States has argued that Article 2.2 does not require that the subsidy be limited to a subset of enterprises located with the designated geographical area. In its FWS, the United States simply chose to ignore the term "certain" from Article 2.2, as well as the definition of "certain enterprises" in the chapeau of Article 2.1, and instead argued that the subsidy that is available to all enterprises within a designated geographical region is nonetheless specific.

61. Yet, in responding to the Panel's questions, the United States relies heavily on "certain enterprises" in Article 2.1 and applies it to Article 2.2. The chapeau of Article 2.1 defines the term "certain enterprises" as "an enterprise or industry or group of enterprises or industries." As defined in Article 2.1, the term "certain enterprises" necessarily refers to a subset of enterprises. Otherwise, subsidies provided to all enterprises would be specific under Article 2.1(a).

62. Thus, if the United States relies on the definition of "certain enterprises" in Article 2.1 to interpret Article 2.2, then it must accept the full implications that flow from the application of that definition. 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.

ANNEX B-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

1. The U.S. Department of Commerce ("DOC") has been using its new targeted dumping methodologies to circumvent WTO rulings that prohibit the zeroing methodology for all purposes. The DOC also applied the SCM Agreement arbitrarily and misunderstood the Korean government's legitimate policy tools.

2. The issues of zeroing and targeted dumping are closely related, but distinct issues. The U.S. has tried to blur these two issues, by arguing that since the second sentence of Article 2.4.2 of the Anti-Dumping Agreement ("the second sentence") is an exception, the use of zeroing is somehow the inevitable and exclusive remedy for targeted dumping. The U.S. has basically two arguments. First, the Appellate Body ("AB") has never before ruled on the application of W-T pursuant to the second sentence. Second, because of mathematical equivalence, the second sentence must allow zeroing.

3. Although the AB may not have ruled on this specific scenario yet, the logic of prior AB rulings – that "dumping margins" must reflect the product as a whole, and must reflect all of the exporter's prices, both dumped and non-dumped, applies with equal force to the second sentence. The use of zeroing in the context of targeted dumping ignores the same basic principles the AB has repeatedly applied to find zeroing WTO-inconsistent in all other contexts. The U.S. has provided no explanation of how the need to "unmask" allegedly targeted dumping in any way changes these basic principles.

4. The basic mechanism of zeroing is the same in all three comparison methods – W-W, T-T, and W-T – and thus, zeroing under all three of these comparison methods has been found to be WTO-inconsistent. There is no basis in the text of Article 2.4 or the AB interpretation of that provision to support the "exception" argument by the U.S. government.

5. The U.S. argues that W-T is an exception to W-W and T-T, and therefore, by logical extension, W-T should "lead to results that are systemically different." This argument seriously misconstrues the AB's findings. The AB has never said that the results of the symmetrical comparison methods (W-W and T-T) and the unsymmetrical comparison method (W-T) have to be different. Rather, the AB was merely addressing the logic of certain interpretative arguments made by the parties in those earlier disputes.

6. The U.S. further argues that without systemically different results, the second sentence cannot unmask targeted dumping and would thus be inutile. W-T is a different method, but that does not mean the outcome must be different. The outcome may or may not be different, depending on the facts and assumptions used. Also, the fact that W-T is a different method does not mean that the method necessarily needs to include the use of zeroing. The comparison methods employed in both T-T and W-T are basically identical in the sense that individual export prices are compared in both methods. Thus, if the use of zeroing is prohibited in the T-T comparison method that focuses on individual export prices, the use of zeroing in the W-T comparison method that also focuses on individual export prices must be prohibited as well.

7. Although the U.S. devotes much of its argument to mathematical equivalence, this argument has repeatedly been rejected by the AB. The U.S. makes specific assumptions that yield equivalence. But if one simply changes those assumptions, the equivalence collapses and the two comparison methods yield different results. Korea provides two expert opinions and actual examples from the *Washers* investigation that support the AB's findings.

8. Professor Thomas J. Prusa explains why the alleged mathematical equivalence is based wholly on assumptions the U.S. makes about how to apply the second sentence. He then gives several examples of alternative methods that do not yield equivalent AD margins. He also disproves the U.S. argument of equivalence in the specific facts of the *Washers* investigation. Professor Prusa and Ms. Anya Naschak show, using actual *Washers* price data, that once U.S. assumptions on calculating margins under different scenarios are changed, the equivalence disappears. The results confirm that under the same set of assumptions that the DOC consistently

uses in its standard administrative review methodology, the margins in the *Washers* investigations were different under the two comparison methods.

9. Even if the two comparison methods led to the same margin, the second sentence still does not become inutile. The exception in the second sentence allowing use of the "prices of individual export transactions" can also be given meaning through more detailed adjustments to ensure price comparability pursuant to the overarching obligation of "fair comparison" under Article 2.4.

10. The U.S. argues that the past AB decisions do not apply to this dispute, mainly because the DOC had never applied W-T in the context of the second sentence. But these prior AB findings in no way depend on the DOC having actually applied the second sentence. Again, the AB stated that the principles that "dumping margins" must reflect the product as a whole and must reflect all of the exporter's prices apply with equal force to the entire Anti-Dumping Agreement.

11. With respect to targeted dumping issue, Article 2.4.2, the second sentence requires three conditions. First, the investigating authority must find a "pattern" based on actual export prices that differ "significantly," not just a finding that export prices differ in some way that does not amount to a "pattern" and is not "significant." Second, the investigating authority must provide an "explanation" of why the W-T method is necessary, not just a statement that the result is different. Third, the investigating authority must limit the W-T comparison method to those sales that have actually met the conditions for invoking this exceptional method. The DOC violated all of these conditions in both its old *Nails* test and the current differential pricing test.

12. Both the *Nails* and differential pricing tests apply a purely mechanical and unfair methodology, contrary to the correct interpretation of the terms "pattern" and "significant." Such mechanical and overbroad tests are clearly inconsistent with the second sentence as well as Article 2.4.

13. Prices may "differ" but these differences do not constitute a "pattern" and do not differ "significantly" if the differences simply reflect normal commercial considerations such as price fluctuations of raw materials. The proper inquiry therefore must involve both qualitative and quantitative aspects, unlike the fixed quantitative methodology that is employed by the U.S. in its *Nails* and differential pricing tests. For example, in its *Nails* test, the DOC compressed the actual prices into a handful of average prices, and then ignored the actual export prices themselves. By doing so, the DOC found a pattern that did not exist at all because it was not reflective of actual prices. To explain this error, Korea submitted a second affidavit by Professor Prusa.

14. The U.S. claims that it does consider qualitative aspects. In reality, however, the U.S. attempts to identify small differences in prices as being "significant" without providing any meaningful reasons to support its claim. Contrary to U.S. arguments, Korea is not suggesting that the investigating authority must consider the exporter's subjective intent in setting prices. The issue under the second sentence is the pattern of prices that differ significantly and what those differences mean. If the prices differ for normal commercial reasons, then those prices do not constitute a "pattern" of prices that "differ significantly" within the meaning of the second sentence.

15. The DOC did not and still does not provide any meaningful explanation pursuant to the second sentence. The main U.S. argument is that the DOC has fulfilled the obligation of explanation by simply comparing the result of the W-T comparison method with zeroing and the result of the W-W method without zeroing. However, selective application of the zeroing methodology does not fulfill the obligation of "explanation." The investigating authority must provide the specific reason why it must resort to the "exception," as well as why it was not possible at all to account for these differences using the normal comparison methods. Korea emphasizes that the DOC has made no effort whatsoever to explain why the use of a T-T comparison cannot appropriately take into account such price differences.

16. There is no textual basis for the DOC to punitively apply the W-T comparison with zeroing to all of the transactions, whether or not they met the conditions under the second sentence. To defend its flawed interpretation of the term "pattern," the U.S. twists the issue by saying that a "pattern" necessarily involves all of the transactions, including those with higher prices and lower prices. In *Washers*, the DOC found about 90% of the sales by the Korean exporters not to satisfy the criteria for imposing the W-T comparison, but still imposed both the W-T comparison and the zeroing remedy to all the sales. However, the AB in *US-Zeroing (Japan)* clearly stated that it read "the phrase 'individual export transactions' in that sentence as referring to the transactions that fall within the relevant pricing pattern."

17. The differential pricing test artificially raised the possibility of finding a pattern by combining the purchasers, place, and time periods. This approach violates the plain language of the second sentence, which explicitly sets the categories with the conjunction "or": the pattern must exist for either purchasers, or for regions, or for time periods. Contrary to what the second sentence instructs, the DOC accumulates price differences from each category even when individually they would not meet the second sentence. The DOC then aggregates all three categories to create the appearance of meeting the second sentence criteria even when, in fact, they have not been met.

18. Furthermore, the DOC has invented a new type of zeroing when using the W-W comparison, which Korea refers to as "Systemic Disregarding." In the differential pricing test, the DOC disregards the negative margin of the W-W comparison and assigns a zero instead, when transactions fall between 33% and 66%. The negative margin comes from transactions not meeting the criteria of the second sentence.

19. The differential pricing test is a mandatory measure that is inconsistent "as such" with the second sentence. Korea showed how this measure meets each of the three elements identified by the AB. To further prove its claim, Korea provides an expert opinion by Ms. Anya Naschak, a former DOC official, on the nature and application of the new differential pricing test that confirms its precise content and consistent application in every case since its adoption. It specifically addresses and debunks the U.S. argument that the SAS code for the test may change from case to case.

20. Moreover, Korea has presented more than just a string of cases that coincidentally repeat the same actions. Korea is providing Exhibit KOR-95 showing all DOC decisions after the adoption of the new differential pricing test in March 2013. There were 138 proceedings where DOC had any need to test U.S. prices and thus had any reason to apply the test. Of those 138 proceedings, the DOC applied the test in all 138 proceedings – in 100 percent of those instances.

21. The U.S. confuses the distinction between, first, applying the same differential pricing test in every instance and, second, what remedy is applied in each particular case given the results of the application of the test. What remedy is applied may vary from case to case, but the test itself is identical in every case and is applied without exception or variation when the DOC determines that there are prices to be tested.

22. The differential pricing test also constitutes ongoing conduct that should be reviewed by this Panel. Korea's panel request specifically identified this test as one of the measures subject to the dispute, and also specifically included among its claims a challenge to the "ongoing practice" concerning targeted dumping and differential pricing.

23. Turning to the subsidy claims, Korea submits that the DOC's finding that Samsung received a "disproportionately large" amount of the total benefit under RSTA Article 10(1)(3) is inconsistent with Articles 1.2 and 2.1(c) of the SCM Agreement. While Samsung claimed on its 2011 tax return a larger amount of the tax credit than the average amount claimed by other Korean companies, the amount of the credit that Samsung received was solely determined based on the statutory formula. The U.S. approach replaces Article 2.1(c)'s "disproportionality" analysis with an absolute size analysis. However, the subsidy was proportionate to the amount of its investment. Any other company that made a similar sized investment would have received the same tax credit benefit. Therefore, the subsidy cannot be disproportionate.

24. Moreover, as was made clear by the AB in *US – Large Civil Aircraft*, an investigating authority conducting a "disproportionately large amount" analysis under Article 2.1(c) must compare the *actual* allocation of the subsidy to what would otherwise be *expected* if the statutory scheme were to be followed as it is stipulated. In its investigation, the DOC failed to conduct the inquiry that the AB has required. The test articulated by the AB in *US – Large Civil Aircraft* requires the investigating authority to compare the allocation against a second ratio reflecting the expected distribution of the subsidy as determined by the conditions of eligibility. The U.S. strongly contended in that case that a second ratio was required, but here the U.S. has abandoned the very test that it sought in *Large Civil Aircraft*. Furthermore, the DOC also failed to conduct the economic diversification and duration of the program analyses that are mandatory under Article 2.1(c).

25. Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement both require that countervailing duties be limited to offsetting the amount of subsidies *provided to the product subject to investigation*. The DOC simply disregarded this clear requirement. As a result, the DOC improperly attributed to washers a portion of the tax credits that Samsung received which were attributable to investments benefiting the production of *products other than* washers.

26. An accurate calculation of Samsung's subsidy margin for both the Article 10(1)(3) and Article 26 tax credits should have used Samsung's tax credit received on its Digital Appliance investments, including its large residential washers ("LRW") investments, in the numerator and Samsung's sales of Digital Appliances, including LRW, in the denominator, in order to calculate the *ad valorem* margin for the product under investigation. Because all of the information was readily available during the investigation, an accurate calculation would have been easy and simple. The DOC, however, refused to examine the detailed documentation of all of Samsung's R&D expenses and facilities investments. Instead, it calculated Samsung's *ad valorem* subsidy margin using the tax credits bestowed on *all* of Samsung's products in the numerator and its sales of *all* products in the denominator. The DOC's final margin calculation, therefore, assigned to subject merchandise a substantial amount of the tax credits earned by Samsung for eligible expenditures that benefitted the production and sale of products *other than* digital appliances.

27. The DOC's stated reason for refusing to receive, let alone examine or verify, Samsung's data and documentation was that it would allocate a subsidy to one or more specific products only upon a showing that the subsidy was "tied" to the production or sale of such products. Korea finds it ironic that the U.S. takes the position that it must be able to tie a subsidy to a particular product while at the same time it refuses to examine evidence that such tying can be made.

28. The DOC's finding that the Article 10(1)(3) tax credits benefited only the products that Samsung produced and sold in Korea is also inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. It is common sense that the results of R&D will normally benefit all operations of a company, wherever located, as Samsung demonstrated to the DOC. Before the *Washers* Final Determination, the DOC had determined that the R&D activities which rise to the Article 10(1)(3) tax credits benefited Samsung's worldwide sales and production. The DOC then changed its position with no supporting rationale.

29. Where, as here, it is determined that a subsidy is granted to a manufacturer to develop a particular product, the numerator in a countervailing duty investigation of that product would be the full amount of the subsidy. To calculate the *ad valorem* margin, that numerator would be divided by the total value of the recipient's sales of that product, regardless of where the product was produced or manufactured, and regardless of where the product was sold (the denominator). If the denominator were to consist only of some subset of the company's total sales of that product, the use of such a smaller denominator, relating to a different universe of sales than the universe included in the numerator, would artificially inflate the subsidy margin.

30. As regards regional specificity, the tax credits that Samsung received under RSTA Article 26 do not constitute specific subsidies within the meaning of Article 2.2 of the SCM Agreement. By the plain language of Article 2.2, in order for a subsidy to be specific, access to the subsidy must be "limited." In addition, this limitation must concern the location of the enterprises that are eligible to receive the subsidy, and the location must be a geographical region that is designated. RSTA Article 26 does not meet any of these requirements. RSTA Article 26 does not impose any type of limitation. It offers tax benefits to "domestic corporation[s]" across numerous industries. All such Korean enterprises have access to RSTA Article 26 subsidies, and these enterprises may be located anywhere in Korea's territory, and would still be eligible to receive RSTA Article 26 subsidies.

31. The accompanying Enforcement Decree identifies the "investments" that are eligible for the tax benefits as "business assets" that are located outside of the "overcrowding control region." Thus, to the extent that RSTA Article 26 incorporates a limitation, it is on the *investments* that give rise to the tax credits, not the location of the *enterprise* that benefits from the subsidy.

32. Korea further notes that Article 2.2 refers to "a designated geographical region within the jurisdiction of the granting authority." A "geographical region" is a subpart or subdivision of a larger, territorial unit. In considering the relevant "geographical region," one must take care to ensure that the subdivision at issue does not encompass the broader territorial unit of which it is a part. While there is necessarily overlap between the two, there will be a point in which the two may be so co-extensive that one can no longer reasonably refer to them as two units. It is also important to note that the "geographical region" under Article 2.2 must be a "designated" region. Designation is an act of identification by the granting authority. And it is done affirmatively, not by implication or suggestion.

33. The territory outside the overcrowding control region of the Seoul Metropolitan Area cannot constitute a "designated geographical region within the jurisdiction of the granting authority" because it constitutes 98 percent of Korean total landmass. Not only is this not a limitation pursuant to Article 2.2 of the SCM Agreement, but there is also no identifiable demarcation

between this geographical region and the broader jurisdiction of the granting authority. The degree of overlap is almost total and, thus, there is effectively no distinction between the area in which qualifying investments may be made and the jurisdiction of the granting authority of the tax credit program. 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.

34. Korea further notes that Article 2.2 states that a subsidy must be "limited to certain enterprises" to be specific. While the U.S. suggests that the interpretative issues surrounding the term "certain enterprises" have been definitively resolved, the fact is that previous disputes have been determined under completely different sets of facts and the AB has not yet examined the type of issue Korea raises.

35. Finally, Korea submits that the imposition and maintenance of countervailing duties on imports of washers produced by Samsung are inconsistent with Articles 10 and 32.1 of the SCM Agreement.

ANNEX B-4

EXECUTIVE SUMMARY OF THE CLOSING ORAL STATEMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

Madame Chair and Distinguished Members of the Panel,

1. We would like to thank the Panel for a productive two days of meetings. We hope our answers today have helped clarify the issues and we look forward to your further questions. In closing, we would like to highlight a few key points.

2. On the issue of zeroing, we note the U.S. still has not addressed the overarching principles of the AB jurisprudence on zeroing. Instead, the U.S. focuses on drawing what it calls "logic extensions" from certain isolated statements. But in doing so, the U.S. argument ignores the important overarching principles the AB has applied. That is precisely why so many third parties agree with Korea that the logic of prior AB rulings condemning zeroing in all other contexts also applies to condemn zeroing in the context of the second sentence.

3. We also note that the U.S. has not and cannot prove mathematical equivalence. The U.S. agrees mathematical equivalence is "critical," and that the U.S. must show that it applies "in all cases." What these admissions mean is that when mathematical equivalence fails, the entire U.S. interpretative argument also fails. The AB has already found repeatedly that equivalence depends on the assumptions made. The U.S. has tried to defend those assumptions, but the U.S. arguments are based entirely on arguments about what an authority might reasonably choose. But those choices by the authority are not required by the text of Article 2.4.2. The authority could – consistently with Article 2.4.2 – make other choices and that is the point. The U.S. cannot show that Article 2.4.2 explicitly precludes these other choices, and so any equivalence based on those choices must fail. Korea has shown just that point, both in general and in the context of the *Washers* investigation.

4. Based on these arguments, we believe that the Panel must conclude that the DOC's use of zeroing is inconsistent with the Anti-dumping Agreement. The Panel should also conclude that the DOC's interpretation and application of the second sentence, apart from zeroing is also, inconsistent with the Anti-dumping Agreement.

5. The one point on which all parties agrees is that this case represents the very first time a WTO panel will render a decision concerning the actual application of the second sentence. It is for this reason that Korea urges the Panel to reach a clear decision on this issue, and when doing so to base its analysis on the actual text of the second sentence. Korea is forced to reiterate this obvious legal point because the U.S. interpretation ignores key terms of the second sentence.

6. Take the term "significantly." The U.S. adopts a purely quantitative interpretation. Indeed, under the U.S. approach as long as a particular category of prices is more than some portion of a standard deviation from the average selling price, the second sentence has been met. However, the actual meaning of the word "significantly" in all three languages makes clear that the analysis require more than application of a numerical criterion. Context is absolutely required. Prices in the fourth quarter of the year may actually be more than one standard deviation below those of earlier in the year, but such difference is not significant for the purposes of the second sentence if prices for the raw materials used to produce the merchandise decreased by an even greater amount. In its opening statement the U.S. stated emphatically that the reason for the difference in prices does not matter. Such an interpretation of the second sentence is contrary to the very meaning of "significantly" and therefore cannot be sustained.

7. Turning now to the subsidies issues, we can confidently state that the oral remarks of the U.S. yesterday failed to undermine any of Korea's claims.

8. On the issue of whether Samsung received a disproportionately large amount of the Article 10(1)(3) subsidy, the U.S. incorrectly continues to rely solely on the fact that Samsung

received a much larger amount of the subsidy than any other Korean company. This is the "size defense" of the U.S., not Korea. The problem with this defense is that the U.S. is forced to ignore the position it took in *US – Large Civil Aircraft* where the U.S. stated the following:

> the fact that a company receives more of the subsidy because it engages in more eligible activity cannot amount to a finding that this company has received disproportionately large amounts of subsidy.[1]

9. In the *Large Civil Aircraft* case, Boeing and Spirit had received over 60 percent of the total industrial revenue bond subsidy awarded to all recipients. Yet, the U.S. contended that this was not a disproportionately large amount. The AB agreed, stating that the issue of disproportionality could only be evaluated by comparing the relative size of the subsidy to a "second ratio". This is what the AB meant when it said that the issue of disproportionality is a "relational" concept. In other words, the relative size of a subsidy must be related to something else before one can decide if the subsidy is proportionate or disproportionate.

10. Yet, in its oral statement yesterday, the U.S. failed to acknowledge that the AB endorsed the original U.S. interpretation of Article 2.1(c). Instead, the U.S. has been compelled to ignore that interpretation. The Panel should recognize that the AB's ruling is dispositive. For this reason, the Panel should find that the DOC's finding of disproportionality lacked the type of evidentiary support that the AB has required. No amount of stacked up automobiles can overcome this fatal flaw.

11. On the tying issue, the U.S. ignores two critical points. First, it ignores the AB's holding that an investigating authority has an affirmative obligation to ascertain the precise amount of the subsidy on the investigated product.[2] Second, the U.S. ignores the fact that Samsung maintained and presented to the DOC records that showed the precise amount of R&D expenditures on digital appliances, including washers. All expenses are aggregated at the Digital Appliance level, but Samsung's R&D expenses are first collected on a project-specific basis.

12. The 200 pages of documentation that Samsung presented, but that the DOC's analysts refused to examine, listed every single R&D project conducted by the Digital Appliance division. Had the DOC's analysts examined those records, they would have easily been able to determine that none of the projects pertained to products produced outside the Digital Appliance Division. This was not a difficult task, despite the U.S. contention to the contrary, which it fails to support with any evidence. Rather, it is the type of task that the DOC routinely performs.

13. But, by failing to examine Samsung's detailed records, the U.S. violated the AB's requirement that an investigating authority can impose countervailing duties on only those subsidies that benefit the product under investigation. As noted by the Panel in *China – Broiler Products*, an investigating authority "must actively seek out pertinent information and may not remain passive in the face of possible shortcomings in the evidence submitted."[3]

14. On the denominator issue, the U.S. position defies logic and common sense. When Samsung conducts R&D in Korea, it does not limit the results of the R&D to its Korean production facilities. No rational company would ever restrict the benefits of its efforts to its local facilities when it produces the very same products in overseas facilities. Equally important, the DOC itself stated in the antidumping case on refrigerators that Samsung made in Mexico that:

> As the Department explained in the Preliminary Determination, the R&D expenses incurred by SEC {in Korea} benefitted Samsung's production {in Mexico} of the merchandise under consideration.

15. In light of the DOC's direct acknowledgement that Digital Appliance division R&D expenses incurred in Korea benefit digital appliance production in Mexico, the U.S. had no factual basis in the *Washers* case for claiming that such benefits should not be allocated to both domestic and overseas sales. The DOC's own finding that the R&D projects that Samsung conducted in Korea benefited its overseas production flatly contradicts the position that it has taken in this dispute.

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[1] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 185.
[2] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139.
[3] Panel Report, *China – Broiler Products*, para. 7.261.

16. Finally, Korea has argued that RSTA Article 26 benefits do not meet the regional specificity standard in Article 2.2 because the benefits are not limited "by reason of the geographical location of the beneficiaries."[4] The U.S. has conceded that the eligibility requirements for Article 26 concern the use of the investment and are not tied to the location of the enterprises receiving the benefits.

17. The U.S. incorrectly attempts to portray Korea's claim as involving issues that have already been resolved. However, Article 26 could not be more different from the measure that was found to be regionally specific in *US – Antidumping and Countervailing Duties (China)*. In that case, eligibility was limited to enterprises located within a small industrial park. Article 26 does not have any limitations on the location of the enterprises receiving the subsidy.

18. Even if one considers the limitations on the use of the investment, the contrast could not be sharper. Contrary to what the U.S. suggests, Article 26 does not designate or even identify "any … tract of land". Article 26 simply excludes investments in a minuscule area representing no more than 2% of Korea's total land mass. Any notion that the area excluded should be treated the same way as the area designated for eligibility is simply wrong.

19. The legal theory put forward by the U.S. is too extreme. Under that theory, should the U.S. provide subsidies to enterprises making investments anywhere in its territory, but for Washington, D.C., the subsidies would be considered to be specific under Article 2.2. Korea does not believe that this is the outcome intended under Article 2.2. Article 2.2 does not constrain WTO Members from pursuing policies to relieve over-congestion and income disparity in large urban areas, a problem that is common to most developing, and some developed, countries.

20. That completes Korea's statement, and we thank the Panel for its attention.

[4] Appellate Body Report, *U.S. – Anti-Dumping and Countervailing Duties (China)*, para. 413.

ANNEX B-5

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF KOREA AT THE SECOND SUBSTANTIVE MEETING

I. ANTI-DUMPING ISSUES

A. The U.S. Has Improperly Reintroduced WTO-Inconsistent Zeroing

1. The Appellate Body has repeatedly condemned zeroing in W-W, T-T *and specifically* W-T comparisons as contrary to Articles 2.4, 2.4.2, 9.3 and 11.3 of the AD Agreement. There is nothing in the language of the second sentence that suggests that zeroing should be allowed in that context, when the Appellate Body has found zeroing to violate the AD Agreement under all three comparison methodologies.

2. Korea agrees that the second sentence is an exception to the first sentence of Article 2.4.2. But that exception, by its terms, has to do only with comparison methodologies – that is, the W-T comparison methodology is an exception to the "normal" methodologies of W-W and T-T comparisons.

3. The U.S. tries to stress the "limited nature" of prior Appellate Body decisions, and constructs "logical extensions" from some specific bits of language in those decisions. But under repeated Appellate Body decisions, any finding of "dumping" must be based on the product as a whole for an exporter, and cannot be based on price differences at the level of intermediate comparisons. That is why zeroing is not allowed under any comparison method – including W-T comparisons – because zeroing takes a price difference at the intermediate level out of the context of the product as a whole. That a specific price might be lower than some threshold is not "dumping" and zeroing cannot make it into dumping. The U.S. never explains why or how the application of the W-T methodology in the context of the second sentence overcomes these general principles for finding zeroing to be WTO-inconsistent.

4. Even assuming that the purpose of the second sentence is to "unmask" lower export prices charged to certain purchasers or in certain regions or during certain time periods, the second sentence explicitly does so by the W-T comparison method. The "unmasking" is to be achieved by the second sentence undertaking a more detailed examination of individual export prices.

5. The application of W-T without zeroing *does not always produce the same result* as W-W comparisons without zeroing. The Appellate Body has made this point twice, and the U.S. efforts to distinguish these cases fail. Korea noted that specifically in the case of *Washers*, a different result would be produced if different, namely, monthly, normal values had been used in the W-T comparisons. We also noted that changing other assumptions, such as using individual transaction adjustments rather than average adjustments, can also produce different results. Finally, Korea reinforced these Appellate Body findings with an expert affidavit by a noted scholar of anti-dumping measures. Moreover, we note that the U.S. argument about mathematical equivalence ignores T-T comparisons, which would not be equivalent in virtually all cases.

6. There is nothing in the language of the second sentence of Article 2.4.2 that remotely suggests that, as an exception, the provision should lead to "systemically" different results. The U.S. essentially extrapolates from a single statement from one Appellate Body decision (in *Softwood Lumber V*) to infer a meaning that is not in the Appellate Body's statement itself.

7. The U.S. seems to argue that even if the use of the W-T methodology in the second sentence of Article 2.4.2 *can* produce different results, if it does not do so "systemically" then it is rendered *inutile*. To be *inutile*, a provision must always and everywhere have the same effect as some other provision. By conceding that there are some cases in which a W-T methodology can produce a different result from a W-W methodology without zeroing, the U.S. effectively admits that the second sentence cannot be *inutile*.

8. The purpose of the second sentence of Article 2.4.2 is not to create larger dumping margins, but to examine a pattern of differing prices individually, so as to determine whether those

individual transactions are further below normal value than the average taken as a whole. The U.S. discussed the margin results from the preliminary determination in the *Washers* administrative review. Under certain assumptions there may be equivalent results, but that does not establish that equivalence always occurs. That is why the second sentence is not *inutile*, even without zeroing.

9. Negotiating history is recognized as a very limited tool for interpreting the provisions of a treaty, and thus, it *cannot* be used to contradict the plain meaning of a provision or to supply a meaning that is not even implicit in the treaty's terms. The negotiating history cited by the U.S. does not present a clear statement of the intent of the negotiating parties. What Hong Kong and Japan meant by their statements is far from clear and is not evidence that there was agreement by all members.

10. The language of the second sentence of Article 2.4.2 is clear on its face. It establishes an alternative methodology, namely, W-T, for examining "dumping" where a pattern of significantly differing prices exists. The Appellate Body has repeatedly held, however, that the W-T methodology does not permit zeroing because it is contrary to the requirement that "dumping" be found for the product as a whole. The ambiguous, limited negotiating history cannot be used to permit a methodology that is contrary to the very definition of dumping as set forth in the AD Agreement.

B. The Second Sentence Can Be Invoked Only When Certain Conditions Have Been Met

11. In the *Washers* case – even using the biased *Nails* test – only about 13 percent of the export prices were found to differ at all. An even fewer two percent of export prices would have differed under an unbiased test based on actual export prices. So few export sales and so little explanation does not properly establish a "pattern" of prices that "differ significantly".

12. The U.S. argues that the second sentence does not require the focus to be on individual prices. This approach is not difficult to administer, since the DOC currently uses Korea's approach in its differential pricing test. There is nothing "logical" about using average prices that obscure rather than reveal any "pattern". The U.S. tries to dismiss Professor Prusa's affidavit, but this affidavit is in fact credible "evidence" on which the Panel can rely. The U.S. has provided no other reason to reject this expert statement. Moreover, the U.S. has provided no alternative expert statement. Korea is very confident that any WTO statistician would quickly and easily validate Professor Prusa's basic points and his reliability as an expert on this issue. If the authority chooses to use a standard deviation, it must do so in a manner that makes sense. Ignoring the individual prices and calculating the standard deviation based on average prices makes no sense, as Professor Prusa's expert affidavit explains at some length.

13. Moreover, the *Nails* test addresses only the size of the price differences and disregards the reasons for the price differences. 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.

14. In the *Washers* case, the DOC relied exclusively on the difference in the results between W-W and W-T, and provided no other explanation as to why the W-W comparison would not work. The DOC did not even use the word "appropriately" in its determination, let alone explain why the W-W method could not be used – other than to say the margins were different. And the DOC failed to consider the T-T comparison method at all. The failure to do so ignores the express requirement of the second sentence. The proper reading of the second sentence is that both options must be considered and included as part of the explanation.

15. The U.S. approach renders the "explanation" requirement meaningless. The requirement is not whether W-W and W-T yield different results. The requirement is to "explain" why the W-W method "cannot" take differences into account appropriately. The authority must have some reason other than the effect of zeroing to show that the W-W or T-T comparison cannot address the pattern of prices that differ significantly. It would be circular to allow zeroing itself to justify the use of zeroing.

16. The DOC's application of the exception to be overbroad, since it applies the exception to all transactions and not just to those transactions found to meet the requirements of the exception. Having found alleged targeting for about 10% of the sales, the DOC applied the exceptional

W-T comparison method to all sales, including the almost 90% of the transactions not found to be targeted in any way. The U.S. arguments continue to ignore the text of the second sentence and clear Appellate Body guidance.

C. The Differential Pricing Methodology Is A Measure

17. The U.S. seems to believe that by changing certain aspects of its policy every few years, the U.S. can forever evade any meaningful WTO review. The Appellate Body, however, has recently confirmed that the scope of measures that can be challenged is "broad," and rejected artificial limitations on the scope of challengeable measures.

18. The differential pricing methodology can be challenged "as such". Korea has demonstrated the precise content and general and prospective application of the differential pricing policy. Korea has documented the existence of this measure extensively, providing the standard SAS code that the DOC applies to every case without change, citing hundreds of cases that applied the new policy, and confirming these facts with the DOC's own description of its new policy and with expert testimony. The U.S., on the other hand, has provided no contrary evidence.

19. The differential pricing should be reviewed as "ongoing conduct" precisely because the differential pricing methodology had been adopted, was being applied by the DOC in every case, and Korea knew that this methodology would be applied to any Korean exporters participating in the administrative review process.

20. Korea challenges the differential pricing methodology that has now been applied in the first administrative review "as applied". That methodology existed at the time of the panel request, and has been exhaustively documented.

D. The Differential Pricing Methodology Also Ignores the Key Conditions for Invoking the Exceptional Comparison Method Under the Second Sentence

21. Under the differential pricing methodology, the DOC continues the key WTO inconsistencies from the *Nails* test. The DOC does not properly find a "pattern" of "significant" price differences, relies exclusively on a difference in the size of the dumping margins, and applies the remedy too broadly.

22. The DOC has made the pattern test even worse: nowcollecting random price differences and then deeming them to be a "pattern" without indicating a pattern of what. Differences by purchaser, by region, by time period are accumulated into an undifferentiated mass.

E. It Is Also WTO-Inconsistent To Disregard the Negative Margins When Combining the Separate Results

23. "Systemic disregarding" is a particularly egregious violation. Indeed, the preliminary determination in the *Washers* administrative review provides the most extreme example. For the product as a whole, LG would have had no dumping margin, even when using W-T comparisons and even with the application of zeroing for the W-T comparisons. Yet by ignoring the negative margin for those products subject to the W-W comparisons – setting that potential offset to zero – the DOC has created a "dumping margin" that should not exist.

II. SUBSIDY ISSUES

A. Samsung Did Not Receive a Disproportionately Large Amount of Tax Credit

24. Samsung received a large amount of the total tax credit. The credit that Samsung received was proportionate to the amount of the investment that it made in eligible R&D activities. That is how the tax credit program works; meaning that the more a company spends, the larger the credit that it receives.

25. The U.S. denies that Samsung earned a proportionately large credit, but if it is going to take that position, then it must at least be able to explain the conceptual difference between a proportionately large tax credit amount and a disproportionately large tax credit amount.

26. In both *US – Large Civil Aircraft* and *EC – Large Civil Aircraft*, the U.S. stated that an absolute precondition under Article 2.1(c) to finding that a company had received a disproportionately large amount of a subsidy was the use of a second ratio that would allow the

investigating authority to determine whether a seemingly large subsidy amount was in fact disproportionate to what would be expected. The Appellate Body agreed that disproportionality could not be evaluated without the calculation of two ratios.

27. The Appellate Body found that the first ratio only provides a basis to investigate further the issue of disproportionality so long as the amount of a company's benefit has been calculated in accordance with the conditions of eligibility, which is indisputably the case for Samsung. In the *Washers* case, the DOC relied solely on its first ratio calculation, and the U.S. continues to maintain that position here.

28. The U.S. also contends that the large amount of the subsidy that Samsung received "deviated from what would be expected." Yet, the U.S. continues to be unable to articulate what should have been expected, and the record contains no evidence as to what would be expected other than what Samsung actually received.

B. The DOC Failed to Consider Evidence that Tied Samsung's Investments

29. The fundamental principle that underlies Korea's position is that an investigating authority may only countervail the benefits that a government confers on the merchandise that is the subject of an investigation.

30. Samsung's Digital Appliance Division regards the investments that it makes as equally benefitting all of the products that it produces, and the DOC agreed that the proper way to attribute R&D costs to washers is to treat the Digital Appliance Division's R&D costs as benefitting washers and all other products within the Digital Appliance Division on a *pro rata* basis.

31. Samsung made a *prima facie* showing of its tying ability, which then triggered the DOC's obligation to examine the accuracy of the representations that Samsung made.

32. Nevertheless, the DOC chose to invoke an irrebuttable, and therefore impermissible, presumption that, in order to tie a subsidy to a particular product, the "intended use" of the subsidy must be known to the subsidy giver and "so acknowledged prior to or concurrent with the bestowal of the subsidy."

33. However, the supporting examples of prior knowledge that the DOC provided in its Issues and Decision Memorandum pertained solely to grants and loans, not tax credits. Unlike grants and loans, prior knowledge cannot exist in a tax credit situation where the subsidy giver decides to bestow the benefit automatically when the tax return is filed. In addition, the requirement that Korean taxpayers maintain the tying information, which is available at all times both before and after the tax return is filed, is a completely suitable alternative to the DOC's filing requirement. By focusing solely on what Korea's National Tax Service might constructively, not actually, have known on the date of bestowal, the U.S. impermissibly seeks to avoid its obligation to examine the evidence that supported the tying claim.

C. The Correct Denominator Should Be Samsung's Worldwide Production

34. The R&D activities in which a company engages benefit the production of the merchandise to which the activities apply, no matter where that production occurs. It would be illogical for a company to confine the results and benefits of its R&D activities to its Korean facility and withhold those same benefits from its other facilities around the world.

35. The U.S., in a publicly released Issues and Decision Memorandum in the *Refrigerators* antidumping investigation, stated that Samsung's "Digital Appliance business' related R&D activities benefitted all of its subsidiaries that also produced and sold its digital appliance products." This statement constitutes a conclusive and unqualified statement by the U.S. government that the R&D activities that Samsung conducted in Korea benefited its production in all of its worldwide facilities.

36. The U.S. speculates about a difficult, if not impossible, "tracing exercise" as a practical bar to the use of a worldwide sales denominator. Yet, the DOC did in fact conduct this tracing by concluding that R&D benefits, as it found in the *Refrigerators* antidumping case as well, extended to all production facilities around the world.

D. The Article 26 Tax Credit Is Not a Regionally Specific Subsidy

37. The existence of limitations on the location of the enterprises eligible to receive the subsidy is a necessary element of a finding under Article 2.2. Article 26 imposes no such limitations. The affirmative identification of a geographically distinct area where the enterprises eligible to receive the subsidies must be located is another necessary element, which again is not met by Article 26.

38. Where 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.

39. The term "enterprises" refers to a business firm or company, and not to its facilities. Where the drafters intended to refer to facilities, they did so explicitly, as they did in Article 8.2(c).

40. If an "enterprise" exists everywhere that a recipient has facilities, investments, or local production, then any Korean company that has a sales office or a bank account in Seoul is an enterprise "located" in Seoul and, thus, is ineligible for RSTA Article 26 credits. That is, of course, absurd. RSTA Article 26 does not deny subsidies to an enterprise on the basis of its location.

41. Any express limitations that do not meet the requirements of Article 2.1(b) of the SCM Agreement could give rise to a finding of *de jure* specificity under Article 2.1(a). Similarly, any indications that a program is *de facto* specific could be examined under Article 2.1(c). Thus, the circumvention concerns alluded to by the U.S. simply do not arise.

42. Any sensible reading of the SCM Agreement would not support a conclusion that turns a capital city zoning regulation into an illegal subsidy. A subsidy available for investments made anywhere in a country's territory, except for a national park, would be regionally specific according to the U.S.. Such an extreme outcome could never have been intended by the drafters of the SCM Agreement.

ANNEX B-6

CLOSING ORAL STATEMENT OF KOREA AT THE SECOND SUBSTANTIVE MEETING

1. Madame Chair, distinguished members of the Panel, members of the Secretariat, Korea would like to thank you for the time and attention that you are devoting to assisting the parties in resolving this dispute. Korea would also like to thank our colleagues on the U.S. delegation. We hope to continue working together to find a prompt resolution to this matter.

2. Korea believes that this meeting has been very helpful in clarifying the issues raised under the AD Agreement. Korea has raised issues under the SCM Agreement that are equally important and looks forward to the opportunity to further clarify the issues through the written questions.

3. In our concluding remarks, Korea would like to emphasize a couple of points. This dispute involves the proper interpretation of key treaty provisions. Korea believes that the U.S. interpretations of the AD and SCM Agreements are not permissible interpretations. If the DOC's determinations are to be permitted by the WTO, the seasonal Black Friday sales could be found to be a targeted dumping; a legitimate policy tool of preventing urban sprawl could be found to be a regionally-specific government subsidy. These kinds of WTO-inconsistent measures by a WTO Member are particularly problematic, because legitimate commercial practices are allowed to that Member's domestic industries, but not to foreign exporters, resulting in the distortion of international trade.

4. Concerning the antidumping issues, I recognize that there has already been a lot of discussion. However, I want to make a few additional observations.

5. In its Opening Statement the U.S. side spent quite a bit of time attempting to discredit the integrity of Professor Tom Prusa. This is not right. Professor Prusa is the Chairman of the Economics Department of a major U.S. university whose expertise is the economics of international trade regulation. Professor Prusa has repeatedly been invited by the WTO to speak at different conferences. Professor Prusa is truly an expert in these matters. Moreover, a very major conclusion that Professor Prusa offered to the Panel about DOC's antidumping practice was previously published by Professor Prusa long before he was asked to assist in this case. We are happy to debate with the U.S. side about the legal significance of the factual findings set forth in two Professor Prusa Affidavits offered to the Panel. However, we do not believe it is proper to cast aspersions on Professor Prusa's integrity.

6. In my view, the lasting image about antidumping issues over the last two days was the discussion yesterday afternoon about the *Nails* test. Notwithstanding that for virtually every other question, the U.S. side was ready with a quick reply, when asked to defend one aspect of the *Nails* test, the U.S. side was rendered utterly speechless. We agree that it is impossible to defend the validity of the Nails test under the AD Agreement.

7. Korea's last comment about antidumping issues concerns the increasing frequency of the DOC's application of the second sentence. As the U.S. side itself admitted, such change in the U.S. approach is a conspicuous attempt to circumvent the WTO rulings prohibiting the zeroing methodology. No other reason can sufficiently explain the change from the reasonable regulation promulgated in 1997 to the new methodologies applied by the DOC that automatically examine the existence of targeted dumping in all antidumping allegations made by the U.S. domestic industries, and do so in a biased way designed to find targeted dumping in a larger percentage of cases.

8. This is not right. And Korea is not the only WTO Member to be concerned. As evident by the number of third parties that are participating, Korea believes many other Members are also concerned with this Panel's decision. The mechanical and quantitative-only approach claimed by the U.S., if allowed to take hold, will initiate a new period of repeated WTO-litigation.

Korea believes there is a shared systemic concern to minimize the risk of further burdening the system with another decade of WTO litigation over zeroing.

9. With respect to the subsidy issues, Korea would make only the following brief points in order to demonstrate that the U.S. has failed to support any of the four determinations that Korea has challenged.

10. First, on the disproportionately large amount issue, the U.S. has once again demonstrated that it remains either unable or unwilling to describe what a proportionately large amount of the Article 10(1)(3) tax credit would have been for Samsung. It remains equally unable or unwilling to describe what amount of the tax credit should have been expected for Samsung. Also, it continues to misread the Appellate Body's decision in *US – Large Civil Aircraft*. If the U.S. reading is correct, then the Appellate Body would have stopped its analysis and found disproportionality once it found that Boeing had received 69% of the total Wichita, Kansas bond subsidy. The fact that it went much further by discussing the merits of the second ratios that the parties proposed necessarily means that much more is required under Article 2.1(c) than the mere 24% calculation that the DOC relied upon in Samsung's case.

11. Moreover, the U.S. has impermissibly attempted to shift the burden to Samsung to demonstrate what the second ratio should have been. However, the DOC had the burden to demonstrate disproportionality, which it failed to do. Moreover, the DOC never asked Samsung for any evidence concerning the second ratio, so Samsung cannot be criticized for failing to submit required evidence.

12. Second, on the tying issue, it is absolutely clear that Samsung has always had the ability to tie its tax credits to the products that its Digital Appliance Division produced. But, the DOC refused to examine the tying evidence that Samsung submitted even though, in the antidumping context, the DOC said that the Digital Appliance Division's R&D pertained equally to all digital appliance products. It is astonishing to Korea that the U.S. would now ignore its own directly relevant findings in a published, non-confidential document that remains a highly relevant administrative precedent, just like any other case precedent upon which a party is entitled to rely.

13. Third, on the denominator issue, the Opening Statement of the U.S. deliberately ignored the factual finding that the DOC itself made in its Issues and Decision Memorandum in *Refrigerators* antidumping case. The DOC said there that, "[Samsung's] Digital Appliance business' related activities benefitted all of its subsidiaries that also produced and sold it digital appliance products". The Panel should regard this statement as dispositive of the denominator issue because it compels the conclusion that R&D tax credits, just like the R&D activities that generate those credits, pertain to worldwide production, not just local production in Korea.

14. Finally, on the regional specificity issue, the U.S. alleges that Korea misconstrues the text of Article 2.2. However, the reality is the inverse and it is the DOC that has failed to adhere to the requirements expressly set out in Article 2.2. In its Opening Statement, the U.S. recognized that Article 2.2 expressly makes the existence of limitations on the location of the enterprises eligible to receive the subsidy a necessary condition for a finding of regional specificity. While the U.S. claimed in its Opening Statement that the DOC's finding met this requirement, the inescapable fact is that it did not.

15. Korea invites the Panel to review the DOC's finding on regional specificity in the Issues and Decision Memorandum. As the Panel will confirm, the DOC did not identify specific limitations imposed on the location of the enterprises receiving the RSTA Article 26 subsidies, much less make a finding that such limitations were a condition for Samsung to have received the tax credits. Thus, the DOC determination fails to meet the requirements of Article 2.2 even under the overly expansive interpretation of "enterprise" put forward by the U.S., which, in any case, finds no support in the SCM Agreement.

16. The U.S. has described Korea's interpretation of "enterprises" as "untenable".[1] Yet, the interpretation advocated by Korea closely matches the definition that the U.S. has consistently

[1] U.S. Opening Statement at the Second Panel Meeting, para. 56.

included in its free trade agreements, where "enterprise" has been defined as an "entity constituted or organized under applicable law…, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization". The U.S. has included this definition of the term "enterprises" in at least 12 free trade agreements, as indicated in Exhibit KOR-133. Thus, the interpretation of "enterprises" put forward by the U.S. in this case is not only contradicted by the text and context of Article 2.2, it is also contrary to U.S. practice.

17. The U.S. cites approvingly the Panel Report in *US – Upland Cotton* and that panel's conclusions that the assessment of specificity must be made on a case-by-case basis and that, at some point, "a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products."[2] Korea recalls that Article 26 tax credits were available to all enterprises wherever located making any investments throughout 98 percent of the Korean landmass. The facts of this case therefore clearly show that the tax credits provided under Article 26 were broadly available and did not benefit a particular limited group of producers of certain products. Consequently, Article 26 tax credits are not specific under the approach articulated by the *US – Upland Cotton* panel and endorsed by the U.S. in this dispute. This conclusion is entirely reasonable. By contrast, the interpretation of Article 2.2. put forward by the U.S. is extreme as illustrated by the examples that Korea has posited and that U.S. simply refuses to address.

18. In conclusion, Korea reiterates its appreciation to the Panel and the Secretariat and looks forward to your written questions. Korea would like to wish everyone a safe journey home.

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[2] Panel Report, *US – Cotton (Panel)*, para. 7.1142; U.S. First Written Submission, para. 375 and U.S. response to Panel Question 3.11, para. 155.

ANNEX C

ARGUMENTS OF THE UNITED STATES

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ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. This dispute presents novel questions of legal interpretation that have not previously been considered by the Appellate Body or any WTO panel. In its first written submission, Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from the customary rules of interpretation of public international law. The Panel should find that all of Korea's proposed interpretations of the covered agreements simply are not supported by the ordinary meaning of text of those agreements, in context, and in light of the object and purpose of the agreements. Accordingly, all of Korea's legal claims lack merit, and should be rejected.

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

2. Article 3.2 of the DSU provides that the dispute settlement system of the WTO "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The applicable standard of review to be applied by WTO dispute settlement panels is that provided in Article 11 of the DSU and, with regard to antidumping measures, Article 17.6 of the AD Agreement. Per these standards, the Panel should "review whether the authorities have provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination." It is a "generally-accepted canon of evidence" that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence." Accordingly, Korea, as the complaining party, must establish a *prima facie* case before the United States, as the defending party, has the burden of showing consistency with that provision.

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

3. When and how a Member may utilize the methodology described in the second sentence of Article 2.4.2 of the AD Agreement are questions of first impression for the Panel. Article 2.4.2, by its express language, describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." Through its "as applied" and "as such" challenges in this dispute, Korea seeks nothing less than to read the second sentence of Article 2.4.2 out of the AD Agreement. The Panel should not countenance Korea's efforts in this regard.

Korea's "As Applied" Claims Related to the Washers Antidumping Investigation

4. Article 2.4.2 sets forth three comparison methodologies for determining the "existence of margins of dumping." The two primary comparison methodologies are the average-to-average and transaction-to-transaction comparison methodologies. The Appellate Body has observed that "there is no hierarchy between them" and "it would be illogical to interpret" them "in a manner that would lead to results that are systematically different."

5. The second sentence of Article 2.4.2 describes a third comparison methodology, the average-to-transaction comparison methodology, which may be used only when two conditions are met. First, an investigating authority must "find a pattern of export prices which differ significantly among different purchasers, regions or time periods" and, second, the investigating authority must provide an explanation "as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." The Appellate Body has observed that the third methodology is an "exception." As an exception, the third comparison methodology, logically, *should* "lead to results that are systematically

different" from the two "normal" comparison methodologies when the conditions for its use have been met.

The "Pattern Clause"

6. The "pattern clause" in the second sentence of Article 2.4.2 requires finding a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically.

7. Korea argues that, because of the qualitative connotations of the terms "pattern" and "significantly," the differences in export prices "must not be the result of some random, or exogenous cause, but in fact reflect what reasonably can be inferred to be targeting conduct." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. That latter question is not germane to an application of the "pattern clause." Additionally, Korea's reasoning is unsound. "'[L]ow' prices of sales," if they are below normal value, still constitute evidence that would support an affirmative finding of dumping, regardless of the intention of the exporter. The "reason" for the low prices changes nothing.

8. Korea argues that the USDOC acted inconsistently with the second sentence of Article 2.4.2 in the washers antidumping investigation because it "evaluated whether the prerequisites for invoking [the alternative comparison methodology] had been met exclusively through the use of a computational analysis of the difference in exporters' prices." The USDOC was not obligated to examine *why* there were significant differences in export prices, and the USDOC did not act inconsistently with Article 2.4.2 of the AD Agreement by not doing so.

9. In the washers antidumping investigation, the USDOC applied a two-part test – the *Nails* test – to determine whether a pattern of export prices that differed significantly among different purchasers, regions, or time periods existed. In doing so, the USDOC used analytically sound methods that relied upon objective criteria and verified factual information submitted by Samsung and LG. As reflected in the discussion in the final issues and decision memorandum, the USDOC undertook a rigorous, holistic examination of the exporters' export prices in order to ascertain whether there existed a regular and intelligible form or sequence of export prices that were unlike in an important manner or to a significant extent as between different purchasers, regions, or time periods. In addition to explaining its analytical approach, the USDOC addressed numerous arguments raised by interested parties concerning the methodology applied in the examination of the existence of a pattern of export prices. Accordingly, the USDOC did not act inconsistently with the requirements of the "pattern clause" in Article 2.4.2.

The "Explanation Clause"

10. The second condition in the second sentence of Article 2.4.2, the "explanation clause," provides that an investigating authority may utilize the alternative comparison methodology only "if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison." 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. Since an investigating authority may choose between the average-to-average and transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss the both the average-to-average and transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

11. In the washers antidumping investigation, the USDOC considered whether observed price differences could be taken into account using the average-to-average comparison methodology. The USDOC evaluated the difference between what the weighted average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-

to-transaction comparison methodology. The USDOC concluded 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. The USDOC provided a reasoned and adequate statement that makes clear or intelligible or gives details of the reason that it is not possible to deal or reckon with export prices which differ significantly in a manner that is proper, fitting, or suitable using one of the normal comparison methodologies set forth in the first sentence of Article 2.4.2. Accordingly, the "explanation" that the USDOC provided in the washers antidumping investigation is not inconsistent with Article 2.4.2.

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

12. Korea's claim that the USDOC acted inconsistently with Article 2.4.2 by "apply[ing] the [average-to-transaction] comparison methodology to all of LG's and Samsung's sales, not merely to those transactions which it found to constitute a pattern of export prices that differed among purchasers, regions and periods of time" lacks merit. 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 constrained as Korea proposes. The Appellate Body did not definitively declare in *US – Zeroing (Japan)* that Article 2.4.2 limits an investigating authority's application of the average-to-transaction methodology only to those transactions found to have been priced significantly lower than other transactions.

13. 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." "Masked" or "targeted dumping" involves both sales below normal value, which are evidence of dumping, as well as sales above normal value, which may mask such dumping. "Targeted dumping" is "unmasked" by also applying the average-to-transaction comparison methodology to those higher-priced sales, and by ensuring that the higher-priced sales do not offset dumping that properly should be evidenced by the lower-priced sales when the conditions for using the exceptional, average-to-transaction comparison methodology are met.

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

14. Korea's claims that the USDOC acted inconsistently with Articles 2.4.2 and 2.4 of the AD Agreement by using zeroing in connection with the average-to-transaction comparison methodology are without merit. Prior Appellate Body reports are not "dispositive of the question of whether zeroing is permitted." The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met.

15. An examination of the text and context of Article 2.4.2 of the AD Agreement leads to the conclusion that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. This accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes. That the average-to-transaction comparison methodology is an exception to the comparison methodologies, and that it can be used to "unmask targeted dumping" is strong contextual support for the proposition that the rules that apply to the average-to-transaction comparison methodology are different from the rules that apply to the normal comparison methodologies. Interpreting the second sentence of Article 2.4.2 of the AD Agreement in a manner that would lead to the average-to-transaction comparison methodology systematically yielding results that are identical or similar to the results of the normal comparison methodologies would deprive the second sentence of Article 2.4.2 of any meaning; it would no longer be "exceptional" and would no longer provide a means to "unmask targeted dumping." Such an interpretation would not be consistent with the customary rules of interpretation of public international law, in particular the "principle of effectiveness."

16. If zeroing is prohibited in both the average-to-average and average-to-transaction comparison methodologies, then both methodologies will always yield identical results. This is true because, for both methodologies, all of the normal value and export price data that are fed into the calculations and all of the calculations that are performed are identical. The mathematical operations simply are conducted in a different order under the two methodologies. Those

mathematical operations can be rearranged to reveal that the two calculation methodologies, without zeroing, actually are identical. Three mathematical principles underlie the mathematical equivalence argument: the associative, commutative, and distributive principles. Mathematical equivalence can be demonstrated using hypothetical examples, but the problem is not merely hypothetical. Even with all of the complexities of weighted averaging, numerous models, and various adjustments to ensure price comparability, the actual result in the washers antidumping investigation, if zeroing is prohibited under both methodologies, would be that the average-to-average and the average-to-transaction comparison methodologies would yield mathematically equivalent results. The Appellate Body has considered the "mathematical equivalence" argument in previous disputes, but the factual situations of those disputes can be distinguished from the factual situation here, and the Appellate Body's prior consideration of the argument neither supports nor compels rejection of the argument in this dispute.

17. The meaning of the second sentence of Article 2.4.2 can be confirmed through recourse to documents from the negotiating history of the AD Agreement, which reflect that Contracting Parties on both sides of the asymmetry/zeroing/targeted dumping issue understood that the three issues were linked and that zeroing was understood to be a key feature of the asymmetrical comparison methodology, and essential for its application to address masked dumping.

18. Korea also claims that the USDOC's use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Article 2.4. Korea overstates the Appellate Body's findings in previous disputes related to zeroing and Article 2.4. The Appellate Body has not found that zeroing breaches Article 2.4 without having first found a breach of another provision. The Panel should recognize the limited nature and application of the Appellate Body's previous findings. Furthermore, there is no basis for finding that the use of zeroing in connection with the alternative, average-to-transaction comparison methodology is not "fair." It is "fair" to take steps to "unmask targeted dumping" by faithfully applying the comparison methodology in the second sentence of Article 2.4.2, when the conditions for its use are met. Doing so is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased.

Korea's "As Such" Claims Related to Zeroing

19. Korea's "as such" claims related to zeroing rely on the same arguments that Korea advances in support of its "as applied" claims. For the reasons given above, those arguments are without merit. Korea's claims under Articles 1, 2.1, and 9.3 of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994 are dependant upon or consequential of its claims under Article 2.4.2 and 2.4, and thus also should be rejected.

Korea's "As Such" Claims Related to the "Differential Pricing Methodology"

20. Korea seeks to "establish that the differential pricing methodology is a measure challengeable in WTO dispute settlement, 'as such'." Korea's effort fails. The evidence Korea adduces to support its claim is insufficient. Korea is inviting the Panel, contrary to the admonition of the Appellate Body, simply to divine the existence of a measure in the abstract on the basis of a string of cases, or repeated action. The Panel should decline Korea's invitation.

21. Assuming *arguendo* that the Panel accepts Korea's claim that the "differential pricing methodology" is a measure that exists and can be subject to an "as such" challenge, for Korea to succeed in its "as such" claim against the alleged "differential pricing methodology" measure, Korea must demonstrate that the "differential pricing methodology" necessarily causes a breach of Article 2.4.2 of the AD Agreement. Korea has failed to do so. Korea has provided no basis to conclude that a differential pricing analysis breaches Article 2.4.2 because it has turned an exception into a "rule," and Korea's contentions are belied by the facts. At the time Korea submitted its panel request, the USDOC had actually used the exceptional, average-to-transaction methodology only about 11 percent of the time as a result of the application of a differential pricing analysis.

22. Korea advances two groups of complaints about the "differential pricing methodology." First, Korea contends that the "differential pricing methodology" is inconsistent with Article 2.4.2 of the AD Agreement, "as such," for the same reasons that it argues that, in the washers antidumping

investigation, the USDOC acted inconsistently with Article 2.4.2, on an "as applied" basis. For the same reasons given above, Korea's arguments lack merit.

23. Second, Korea sets forth a number of criticisms that it argues are specific to the "differential pricing methodology." However, Korea has failed to present legal arguments and evidence sufficient to make a *prima facie* case of a breach of Article 2.4.2 of the AD Agreement. Korea premises its arguments exclusively on hypothetical scenarios. Korea makes no reference to any actual evidence. Accordingly, Korea has failed to adduce evidence sufficient to make out a *prima facie* case that the "differential pricing methodology" breaches Article 2.4.2 of the AD Agreement, "as such."

Korea's "Ongoing Conduct" Claims

24. Korea's "ongoing conduct" claims are without merit. The purported "ongoing conduct" "measure" cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU. Additionally, the facts in this dispute do not support the conclusion that the challenged practices "would likely continue to be applied in successive proceedings." Not even one administrative review of the washers antidumping order has been completed. Thus, it is impossible for Korea to establish the "string of determinations, made sequentially. . . over an extended period of time" that would be required to support its claims related to alleged "ongoing conduct," as that concept has been elaborated by the Appellate Body.

Korea's Claim under Article 1 of the AD Agreement

25. None of the antidumping measures challenged by Korea in this dispute is inconsistent with Article VI of the GATT 1994 or any provision of the AD Agreement. Accordingly, the Panel should deny Korea's request for a finding that the challenged U.S. measures are inconsistent with Article 1 of the AD Agreement.

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

26. Korea asserts that the USDOC incorrectly found that subsidies under RSTA Article 10(1)(3) were *de facto* specific – despite overwhelming evidence that Samsung received disproportionately large amounts of these subsidies. Korea's second claim – i.e., that RSTA Article 26 subsidies are not specific – fares no better. This subsidy program falls squarely within Article 2.2 of the SCM Agreement, and is limited to a designated geographical region.

27. In addition, Korea challenges the method by which Samsung's subsidy rate was calculated. Korea attempts to introduce obligations into the SCM Agreement and GATT 1994 that are not set out in the text. There is nothing in these agreements that requires an investigating authority to treat subsidies as "tied" to a product, based on how a recipient chooses to "use" the benefit that it receives and any alleged effects of that use on a product. And the agreements do not require authorities to apply this use and effects inquiry to include offshore manufacturing.

RSTA Article 10(1)(3)

28. The USDOC's findings are fully consistent with the text of Article 2. Korea errs in asserting that the specificity determination is somehow at odds with the Appellate Body's approach in *US – Large Civil Aircraft*. Two companies received a substantial share of all benefits disbursed under a subsidy program. The absence of any restrictions on eligibility means that benefits would have been expected to be distributed more evenly across the program's 11,764 recipients. Thus, there was a significant disparity between the expected distribution of subsidy based on those conditions of eligibility and the actual distribution.

29. Equally groundless is Korea's assertion that the subsidies were "proportionate" because they were calculated using the same formula available to all Korean companies. Use of a common formula could indicate "objective criteria or conditions," but an indication of non-specificity under

Article 2.1(b) does not preclude a finding of *de facto* specificity. At most, the exercise of discretion would be relevant to a different analysis under Article 2.1(c).

30. Likewise, there is no merit to Korea's suggestion that the distribution of benefits reflects the fact that Samsung is a large company, and that any tax credit reflects a large company's research and human resources development activities. Korea's hypothesis is unsupported by evidence. The fact that a company is large does not mean that, where it receives a subsidy that is larger, in relative and absolute terms, than that received by other recipients, such a subsidy inherently cannot be found specific under Article 2.1(c). The USDOC found that to accept such an argument would "undermine the purpose" of the disproportionality inquiry.

31. Here, neither of the two factors identified in the third sentence of Article 2.1(c) has any bearing on the specificity inquiry. The considerable age of this subsidy program eliminates certain complications that can arise with new programs. And the USDOC was aware of the publicly known fact that Korea is one of the wealthiest and most diversified economies in the world – a fact that Korea neither raised nor contested.

32. The USDOC's remand redetermination supplements and reaffirms these findings. The USDOC drew upon newly-obtained information to address Samsung's argument that its share of the tax credits merely reflected the large size of the company. Even among other large companies, Samsung's use of the program was "overwhelming[ly] disproportionate."

RSTA Article 26

33. The USDOC's specificity determination is a straightforward application of Article 2.2 of the SCM Agreement. The RSTA Article 26 program is expressly limited to investments in facilities located in a designated region – i.e., the territory of Korea that falls outside the Seoul overcrowding area.

34. To evade these findings, Korea attempts to rely on legal theories that have been rejected by WTO panels. Korea asserts that RSTA Article 26 subsidies are available to all enterprises located *within the designated region*. The panel in *EC – Large Civil Aircraft* refused to accept this argument, which would require specificity "on a double basis" within Article 2.2. As the panel observed, this interpretation would render Articles 2.2 and 8.2(b) redundant. More recently, the panel in *US – Anti-dumping and Countervailing Measures (China)* rejected the "double basis" interpretation of Article 2.2.

35. Equally deficient is Korea's argument that a finding of non-specificity under Article 2.1(b) trumps a finding of regional specificity under Article 2.2. This interpretation has no grounding in the text of Article 2 and would make Article 8.2(b) redundant.

36. Korea attempts to re-characterize the RSTA Article 26 subsidies. But this program does not address the "use" of a subsidy, and instead ties eligibility to the geographic location of facilities. The fact that the restriction in RSTA Article 26 is addressed to the location of the facilities, as opposed to the head office of the recipient, is of no moment. Article 2.2 does not impose a "head office" test or similar restriction.

37. Likewise, Article 2.2 does not require that any geographic region be designated "explicitly," as Korea suggests. Nor is there any basis for Korea's apparent attempt to limit Article 2.2 to situations of *de jure* specificity. It is of no moment that the language of the relevant law designates a geographical region through language of inclusion or exclusion.

38. There is also 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. Article 2.2 does not depend on the relative proportion of land mass covered or excluded by a region. Although Korea suggests that large regions with "sensible exclusions" do not distort trade, the inquiry under Article 2.2 is not one of trade distortion; that comes into play in the context of a panel's adverse effects analysis or an investigating authority's injury analysis. To provide an exemption for geographically limited programs would invite circumvention of the subsidy disciplines of the SCM Agreement. And the alleged "exception" at issue here – the Seoul overcrowding region – is hardly a negligible exclusion that should be overlooked.

39. Korea falls back on "policy" arguments, but essentially concedes that RSTA Article 26 is a regional assistance program. The RSTA Article 26 program falls squarely within the regional specificity provisions of Article 2.2.

The Calculation of Samsung's Subsidy Rate

40. Korea challenges the method by which Samsung's countervailable subsidy rate was calculated. But its arguments are not well-founded in any specific obligation, and it points to no error in the calculation of that rate. Nor has any previous panel or Appellate Body report endorsed the interpretations put forward by Korea.

Korea Seeks to Create Rules that Are Not Set Out In the Agreements

41. Korea hinges its claims on finding specific obligations in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement on how a Member should allocate the numerator and denominator when calculating CVD ratios. Yet these provisions do not dictate precisely how the rate of subsidization is to be calculated.

42. In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts relating to the granting authority's bestowal of the subsidy are a key consideration. A Member may examine a subsidy and determine that it is appropriate to treat that subsidy as essentially "untied" for attribution purposes. Alternatively, a Member may examine a subsidy and determine that there is a product-specific "tie." The Member may allocate the subsidy entirely to that product and divide the benefit by only the sales of the product that it views as "tied" to that subsidy.

43. The use of both approaches is reflected in Annex IV of the SCM Agreement, which informs serious prejudice analysis. The Informal Group of Experts ("IGE") established by the Committee on Subsidies and Countervailing Measures developed recommendations to address when a subsidy is "tied" for purposes of paragraph 3. One acceptable method is to determine whether "the intended use of a subsidy is known to the giver, and so acknowledged, prior to or concurrent with the subsidy's bestowal." The IGE report also recommends that research and development subsidies presumptively be treated as untied. Other relevant context suggests the appropriateness of an approach that looks to the conditions of the granting of the subsidy.

Attribution of Subsidies On A "Tied" Basis

44. According to Korea, in apparently every case, a Member must analyze the actual use and effects of a subsidy in connection with a particular product, and apply a "tied" attribution methodology. But the terms of the SCM Agreement and the GATT 1994 do not impose a specific test for determining when a subsidy is "tied" to the production or sale of a particular product – either the approach employed by the USDOC or alternatives.

45. Korea's approach may yield results that are speculative and arbitrary. Adoption of Korea's use/effects approach could impose significant administrative burdens, and may be difficult or impossible to implement in a meaningful way.

46. Korea also relies on inapposite jurisprudence to support its position. Here, there are no allegations of pass-through or privatization, and it is undisputed that the RSTA subsidies at issue exist and benefit the products.

47. It was appropriate for the USDOC to employ an untied approach on the facts of this case. The design, structure, and operation of these RSTA programs do not suggest a product-specific tie. To the extent that the RSTA programs induce investment *ex ante* (i.e., by encouraging companies to invest in anticipation of receiving tax credits) they would not do so at the product level. Indeed, companies only receive credits for a percentage of their aggregate investment costs. The aggregate tax credits received by the company are more appropriately viewed as fungible, benefitting the entire company. Even if Samsung maintained underlying records to support the expenses it claimed in its return, in case the Korean authorities decided to conduct an audit, the Korean authorities did not receive or review these underlying documents in connection with the bestowal of the subsidies, and did not acknowledge any product-specific tie.

Sales of Products Manufactured Outside Korea

48. Equally, 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*. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require Members to take into account products manufactured outside the territory of the subsidizing Member when calculating subsidy rates. Members generally grant subsidies to generate benefits within their borders.

49. The USDOC explained that it was not appropriate to attribute subsidies to overseas production. There was no evidence that the granting Member intended to subsidize overseas production, and no connection between the structure and operation of the subsidy program and overseas production.

50. Korea asserts that the USDOC failed to "match" the elements in the numerator and denominator. This "matching" argument rests on a flawed premise – namely, that the inquiry hinges on the possible indirect effects of subsidies overseas. But even if an investigating authority were required to consider effects-based considerations for purposes of attribution, Korea offers no evidence of these supposed overseas effects.

51. Korea wrongly criticizes the USDOC for its alleged use of a presumption in favor of attributing subsidies to domestic sales. WTO panels and the Appellate Body have endorsed the use of presumptions where they are reasonable and rebuttable. Here, the USDOC will examine any relevant evidence and can draw the opposite conclusion. The record was devoid of evidence establishing that the grant of subsidy was intended to benefit overseas production.

52. Finally, Korea fails to account for the administrative burden associated with its overseas effects theory. Taken to its logical conclusion, Korea's theory would mean that Members would have to evaluate which sales of goods produced overseas were linked in some way to the subsidy, on a country-by-country basis, to determine the denominator in the subsidy ratio.

Korea's Claims Under Articles 10 and 32.1 of the SCM Agreement

53. Korea has failed to establish that the USDOC's specificity determinations and subsidy rate calculations are inconsistent with Article VI:3 of the GATT 1994 or Articles 1.2, 2 and 19.4 of the SCM Agreement. Accordingly, the USDOC's determination is not inconsistent with Articles 10 or 32.1 of the SCM Agreement.

V. CONCLUSION

54. For the foregoing reasons, the United States respectfully requests that the Panel reject Korea's claims.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

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

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

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

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

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

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

6. Korea objects to the USDOC's alleged "misuse of the standard deviation in the *Nails* test," and, in addition, Korea advances a numbers of statistics-based arguments. Korea's statistical arguments are without merit. The "pattern clause" does not require the use of any specific type of statistical analysis, and the USDOC has not misused standard deviations. Further, although the USDOC did, in a generic sense, analyze certain statistics, *i.e.*, weighted-average export prices, in the washers antidumping investigation, the "pattern clause" does not require the use of formal statistical techniques.

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

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

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

9. In its statements at the first panel meeting and in its responses to the Panel's questions, Korea offers the Panel no compelling reason to find that the USDOC's explanation in the washers antidumping investigation is inconsistent with the "explanation clause." It is not the case that the investigating authority must explain why it is not possible *at all* to take into account significantly differing export prices using one of the two normal comparison methodologies. Rather, the investigating authority must explain why the significant differences in export prices cannot be taken into account in a manner that is "proper," "fitting", or "suitable" using one of the normal comparison methodologies. Additionally, the term "appropriately" does not alter the meaning of the terms of the "pattern clause." Korea's proposed reading of the term "appropriately" simply is nonsensical.

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

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

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

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

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

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

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

15. The Appellate Body has never found that zeroing is impermissible in the context of the application of the average-to-transaction comparison methodology when the conditions set forth in the second sentence of Article 2.4.2 are met. The Appellate Body's findings in previous disputes neither support rejection of the "mathematical equivalence" argument nor compel its rejection. The Panel should recognize the limited nature and application of the Appellate Body's previous findings related to zeroing and the "fair comparison" language in Article 2.4 of the AD Agreement. The logical extension of the Appellate Body's reasoning that the alternative, average-to-transaction comparison methodology is an exception to the two comparison methodologies that an investigating authority must use "normally" – each of which, the Appellate Body has explained, logically should *not* "lead to results that are systematically different" – is that the alternative comparison methodology *should* "lead to results that are systematically different," *when the conditions for its use have been met*.

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

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

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

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

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

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

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

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

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

24. Korea's "systemic disregarding" contention just amounts to another phrasing of Korea's argument that zeroing is always impermissible. However, zeroing is permissible – indeed, it is necessary – when applying the alternative comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. Additionally, because the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology to all sales is permissible, there is no basis for finding that what Korea calls "systemic disregarding" is impermissible. Nothing in the text of the second sentence of Article 2.4.2 supports

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

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

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

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

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

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

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

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

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

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

32. This was the extent of Samsung's "size defense" before the USDOC – *i.e.*, that, in general, "large" companies will "typically" invest more in research and human resources development than "smaller" companies. To the extent that Samsung was attempting to establish a "second ratio"

that would explain the disproportionate subsidy distribution found by the USDOC, it failed to do so. The USDOC also found that this theory was fundamentally at odds with the purpose of the disproportionality inquiry.

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

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

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

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

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

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

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

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

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

41. Korea asserts that the Article 26 program "does not impose any limitation on the location of the enterprise that receives the subsidy." But the geographic limitation in the RSTA Article 26

program is imposed with respect to the location of "facilities" in which investments are made. The fact that a company such as Samsung has multiple locations – that fall both within and without a designated region – is of no moment. And Korea's interpretation would create a major loophole in subsidy disciplines.

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

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

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

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

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

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

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

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

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

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

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

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

Korea's Overseas Effects Theory Is Groundless

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

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

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

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

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

IV. CONCLUSION

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

ANNEX C-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. This dispute places before the Panel a number of important questions concerning the proper interpretation and application of the AD Agreement, the SCM Agreement, and the GATT 1994. Resolving this dispute will require the Panel to discern the meaning of various provisions of these agreements through the application of the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU. Korea proposes interpretations of the AD Agreement and the SCM Agreement that are divorced from those rules.

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

A. Zeroing Is Necessary for the Alternative, Average-to-Transaction Comparison Methodology To Have Any Effect

2. The Appellate Body has explicitly stated that it "has so far not ruled on the question of whether or not zeroing is permissible under the comparison methodology in the second sentence of Article 2.4.2." Of course, the United States recognizes that a number of Appellate Body and panel reports include findings that bear on the interpretive questions before the Panel. None of those findings compels the Panel to find against the United States. On the contrary, when understood in the context in which they were made, the logical extension of the Appellate Body's zeroing findings is that zeroing is permissible – indeed, it is necessary – under the alternative, average-to-transaction comparison methodology.

3. The second sentence of Article 2.4.2 describes a particular set of circumstances in which it may be appropriate for an investigating authority to employ the alternative, average-to-transaction comparison methodology to, in the words of the Appellate Body, "unmask targeted dumping." The Appellate Body has found that Members must offset positive and negative comparison results when using the "normal" comparison methodologies, and must calculate an aggregate margin of dumping for an exporter for the product as a whole. However, in a situation where a pattern of significantly different export prices is observed among different purchasers, regions, or time periods, such offsetting may "mask" what has been referred to as "targeted" dumping. Unmasking such dumping requires not offsetting the lower-priced export sales with the higher-priced export sales; that is, it requires zeroing. The Appellate Body has further observed that the third methodology is an "exception" to the comparison methodologies that "normally" are to be used. As an exception, the third methodology, logically, *should* "lead to results that are *systematically* different" from the two "normal" comparison methodologies when the conditions for its use have been met.

4. The concept of mathematical equivalence is critical to the resolution of the interpretive questions before the Panel because, if a proposed interpretation of a provision of the AD Agreement would lead to the alternative comparison methodology set forth in the second sentence of Article 2.4.2 yielding, in all cases, results that are identical to the results of the average-to-average comparison methodology, then that proposed interpretation cannot be accepted. Such an interpretation would render the second sentence of Article 2.4.2 ineffective, which would be inconsistent with the customary rules of interpretation. That is precisely what would happen under Korea's proposed interpretations. If the use of zeroing is impermissible in connection with the alternative, average-to-transaction comparison methodology, then that methodology will always yield results that are no different from the results of the average-to-average comparison methodology. In that case, the alternative, average-to-transaction comparison methodology is no exception at all.

5. Japan, China, and Korea suggest that the Appellate Body has already rejected the mathematical equivalence argument in the past. The Appellate Body's prior consideration of the

mathematical equivalence argument neither supports nor compels rejection of the mathematical equivalence argument in this dispute.

6. Japan, China, and Korea further suggest that the mathematical equivalence argument must fail because it rests on particular "assumptions." With respect to export prices, limiting the application of the alternative, average-to-transaction methodology only to the "targeted" export sales raises at least two potential concerns. First, doing so in a way that would exclude entirely from the dumping calculation other "non-targeted" sales would result in the calculation of even higher dumping margins. Second, applying the alternative, average-to-transaction comparison methodology to the "targeted" sales while applying the "normal" average-to-average comparison methodology to the remaining sales, without zeroing, would also lead to a result that is mathematically equivalent to the application of the average-to-average comparison methodology to all export sales. The identification of this assumption is no answer to the mathematical equivalence argument.

7. Likewise, identifying an assumption about the calculation of normal value does not mean that the mathematical equivalence argument fails. There is no reason why a weighted average normal value would be calculated any differently when applying the average-to-average comparison methodology pursuant to the first sentence of Article 2.4.2 and when applying the average-to-transaction comparison methodology pursuant to the second sentence of Article 2.4.2. Neither Japan nor China explains *why* manipulation or adjustment of the calculation of normal value, which is based on sales prices in the *home* market, would be appropriate to address a potential issue where there is a pattern of prices that differ significantly in the *export* market. The lower-price *export* sales are "masked" by other higher-price *export* sales. How would calculating *normal value* differently help "unmask targeted dumping"? Logically, using different normal values would not help "unmask targeted dumping" at all, and the identification of the normal value assumption is no response to the mathematical equivalence argument.

B. If Application of the Alternative, Average-to-Transaction Comparison Methodology Is Limited Only to Lower-Priced Sales, then the Exceptional Methodology Would Have No Effect

8. If zeroing is prohibited, then it does not matter whether the average-to-transaction comparison methodology is applied to all or just some export sales. If zeroing is prohibited, then, after the intermediate calculations are aggregated, the mathematical result will be the same as it would be if the "normal" average-to-average comparison methodology had been used. Assuming that zeroing is permissible, then it must also be permissible to apply the average-to-transaction comparison methodology not only to the export sales that are at significantly lower prices, but also to the higher-priced export sales that may "mask" the dumping evidenced by the lower-priced export sales.

C. The "Pattern Clause"

9. The conclusion that flows from an analysis in accordance with the customary rules of interpretation is that the "pattern clause" requires a finding of a regular and intelligible form or sequence of export prices that are unlike in an important manner or to a significant extent among different purchasers, regions, or time periods. An investigating authority examining whether a "pattern of export prices which differ significantly" exists should employ rigorous analytical methodologies and view the data holistically. As we have demonstrated, that is precisely what the U.S. Department of Commerce ("Commerce") did in the washers antidumping investigation.

10. Korea urges that an analysis pursuant to the "pattern clause" must take into account the qualitative, in addition to the quantitative significance of any observed differences. Korea means that the differences in export prices must "reflect what reasonably can be inferred to be targeting conduct." However, a qualitative analysis, to the extent that the particular facts suggest that such an analysis is relevant, would be employed to assess *how* the export prices differ from each other, not *why* the export prices are different. The "reason" for the low prices changes nothing.

D. The "Explanation Clause"

11. The "explanation clause" requires a reasoned and adequate statement by the investigating authority that makes clear the reason that it is not possible in the dumping calculation 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. Since an investigating authority may choose between the average-to-average or the transaction-to-transaction comparison methodologies, and since they yield systematically similar results, there would be no purpose in requiring an investigating authority to discuss both the average-to-average and the transaction-to-transaction comparison methodologies in the "explanation" provided under Article 2.4.2.

12. In the washers antidumping investigation, Commerce evaluated the difference between what the weighted-average dumping margin would have been as calculated using the average-to-average comparison methodology and the average-to-transaction comparison methodology. The "explanation" that Commerce provided in the washers antidumping investigation is not inconsistent with Article 2.4.2 of the AD Agreement.

E. Korea's "As Such" Claims Related to the "Differential Pricing Methodology"

13. Korea has failed to adduce evidence sufficient to support its claims regarding the alleged "differential pricing methodology." While the United States does not agree that there is any validity to Korea's claims with respect to the so-called "differential pricing methodology," we continue to consider that Korea has not made a *prima facie* case of inconsistency.

II. KOREA'S CLAIMS UNDER THE SCM AGREEMENT AND GATT 1994 ARE WITHOUT MERIT

14. Korea's challenge to Commerce's countervailing duty determination is equally without merit. Contrary to the rhetoric in Korea's submissions, Commerce's findings were thoughtful, reasoned, and grounded in the evidence. It is Korea who has pushed the envelope in this dispute, offering strained, results-driven interpretations of the relevant obligations and Appellate Body guidance, while presenting a distorted picture of the factual record. The Panel should decline Korea's invitation to import new obligations into the SCM Agreement or GATT 1994, and to substitute its own assessment of the facts for that of the investigating authority.

A. The Department of Commerce's Findings on Disproportionality Were Reasoned and Adequate, and Supported by Positive Evidence

15. Turning to Korea's first claim, the evidence amply supports Commerce's determination that subsidies conferred on Samsung under RSTA 10(1)(3) were *de facto* specific. Samsung received a large percent of all subsidies distributed in 2010, out of nearly 12,000 participants. By comparison, the average recipient obtained a very small percentage. Commerce found that this disparity was contrary to what would be expected, and indicated disproportionality – an approach that is fully consistent with the text of Article 2.1(c) of the SCM Agreement and the Appellate Body's findings in the *US – Large Civil Aircraft* dispute.

16. Korea's primary argument – i.e., its "size" defense – has no basis in law or fact. Commerce observed that, even if Samsung's size argument were factually accurate, it would still not apply this standard because to do so would "undermine the purpose" of the disproportionality inquiry.

17. Korea has submitted a copy of a redetermination that the Department of Commerce conducted pursuant to remand from a domestic court. While that redetermination occurred well after this Panel was established, it nonetheless further supports the conclusion that Commerce's specificity findings were not in error.

B. Subsidies Conferred Under RSTA Article 26 are Regionally Specific

18. Equally, there is no basis for Korea's assertion that the significant amount of facilities subsidies received under RSTA Article 26 should avoid scrutiny under the SCM Agreement. Eligibility is expressly limited to investments located in a designated geographic region – the area

falling outside the Seoul overcrowding area. Korea's claim rests on legal theories that have no grounding in the text of the SCM Agreement, and have been repeatedly rejected by WTO panels.

19. Korea falls back on the argument that subsidies limited to large designated regions are not regionally specific. But Article 2.2 does not privilege or exempt certain categories of region. Article 2.2 does not operate on a sliding scale or allow panels to overlook geographic limitations where regions are large. And it would be particularly inappropriate to overlook such geographic limitations here. The area excluded from eligibility includes Seoul, the capital of Korea and site of a large proportion of Korea's economy and population.

C. Commerce Appropriately Found that RSTA Subsidies Were Not "Tied" to Particular Products, and Calculated the Subsidy Ratio Accordingly

20. Likewise, there is no basis for Korea's criticism of the ratios calculated with respect to subsidies received by Samsung under RSTA Articles 10(1)(3) and 26.

21. Korea attempts to ground its preferred approach in Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. These provisions do not support Korea's arguments, but instead undermine them because they do not specify particular attribution methodologies, much less Korea's.

22. Absent rules on applying specific methodologies, an investigating authority must determine an appropriate approach. As explained in the U.S. first written submission, an investigating authority may derive guidance from certain provisions. Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement confirm that in determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts surrounding the Member's "bestowal" of the subsidy will be a key consideration. Annex IV of the SCM Agreement indicates that both "tied" and "untied" approaches to attribution are, in principle, compatible with the SCM Agreement. The Informal Group of Experts ("IGE") report to the Committee on Subsidies and Countervailing Measures is instructive, although not binding. Commerce's determination was consistent with these sources, and grounded in the facts relating to the bestowal of subsidies on Samsung.

23. Korea nonetheless argues that Commerce should have adopted a novel variation of the "tied" approach to attribution, based on the "retroactive" use and effect of the subsidy. And Korea criticizes Commerce for declining to accept and review accounting records that it says would have helped Commerce implement this approach by quantifying the amount of underlying expenses with some connection to washers. These arguments fail, for several reasons.

24. First, Korea has offered no basis in the SCM Agreement to consider that investigating authorities are compelled to calculate subsidy ratios based on how a portion of the benefit is "used."

25. Second, the structure, architecture, and design of the RSTA subsidy programs do not reflect a product-specific tie. 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 *corporation as a whole*. It is not meaningful to attempt to trace a given KRW of tax credit received to any KRW of underlying expense, much less to a particular product.

26. Third, even aside from the legal flaws in Korea's argument, it also rests on a flawed factual premise. RSTA tax credits do not "retroactively" reduce expenses, much less those related to a particular product.

27. Finally, the documents that Korea refers to have nothing to do with the "bestowal" of the subsidy. It is undisputed that the granting authority, Korea, was not presented with these documents when it bestowed the tax credits. And even under Korea's theory, these documents would not enable Commerce to derive a meaningful subsidy ratio that carves out expenses and sales information for washers – as opposed to the entire Digital Appliances unit, which includes a range of product lines, such as refrigerators. Even Korea is unable to undertake the kind of forensic analysis that it suggests is needed for a "retroactive" approach. All of this confirms that Korea's preferred approach is not a more "precise" way to attribute subsidies.

D. Korea's Overseas Effects Theory Has No Basis In Law or Fact

28. Korea's final attempt to impugn Commerce's attribution methodology fares no better than its earlier attempts. Korea argues that the denominator in the subsidy ratio for RSTA 10(1)(3) should have included sales of merchandise produced outside Korea.

29. This argument has no legal basis. Consistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, Commerce attributed subsidies based on the way in which they were bestowed on Samsung. Korea argues that Commerce instead should have calculated the subsidy ratio based on the possible knock-on effects of subsidies on overseas manufacturing. But it is unclear why this effects-based investigation is required to ensure that the elements in the numerator "match" those in the denominator. Korea's proposed effects-based inquiry would also impose a considerable administrative burden on investigating authorities, with no apparent advantage. Needless to say, neither the Appellate Body nor any WTO panel has ever imposed the requirement that Korea suggests.

30. It is significant that Korea does not challenge Commerce's attribution of RSTA Article 26 facilities subsidies to domestic production. Korea asserts that "R&D" subsidies are different, and that they "normally" benefit overseas production. This argument has no basis in the bestowal of the subsidy. But even on a purely effects-based reasoning, Korea's argument is unsupported and untenable.

III. CONCLUSION

31. As we have demonstrated in the U.S. first written submission and again this morning, Korea's claims are without merit, and the United States respectfully requests that the Panel reject them.

ANNEX C-4

CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. In light of the late hour, the United States will limit ourselves to offering just a few short closing comments. This dispute, like all WTO disputes, is about the meaning of the covered agreements and the content of the obligations that WTO Members have accepted and agreed to in those agreements. Korea seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement, including, *inter alia*, by reading out of the AD Agreement an entire sentence.

2. During the course of this proceeding thus far, including in its first written submission, in its opening statement, and when pressed today during the back-and-forth of the question and answer session, Korea has utterly failed to offer the Panel anything that approaches a plausible interpretation of the second sentence of Article 2.4.2 of the AD Agreement; one that is rooted in the ordinary meaning of the terms of that provision, in their context, and in light of the object and purpose of the AD Agreement. Korea nowhere even suggests that the prohibition on zeroing it asks the Panel to impose on the second sentence of Article 2.4.2 could be based on the terms of that provision itself. Korea attacks the U.S. application of, *inter alia*, the terms "pattern," "significantly," and "explanation," all in an effort, not to give meaning to the terms of the second sentence of Article 2.4.2, but to deprive it of any meaning whatsoever.

3. Korea's claims under the SCM Agreement are equally without merit. We could not help noticing this morning that not one of the third parties offered any comments on the subsidy issues in this dispute during the third party session. The issue of zeroing obviously is quite charged and can perhaps overshadow the other issues in a dispute such as this one. We appreciate the Panel's questions this afternoon and the careful attention the Panel has already given to the important questions at issue in this dispute under the SCM Agreement. At stake is the ability of Members to address massive amounts of injurious subsidization to what Korea itself agrees is the largest company in Korea. Just like the antidumping issues, the resolution to Korea's subsidy claims will come from a proper application of the customary rules of interpretation; it will not be found in an argument made by the United States in a previous dispute, which was rejected by the Appellate Body. When the Panel undertakes the interpretive analysis for itself, it will find that Korea's proposed interpretations of the SCM Agreement are strained and results-driven, and when the Panel examines the facts, it will find that Korea's presentation of the factual record is distorted.

4. Pursuant to the DSU, this Panel's charge is to make an objective assessment of the matter before it and to clarify the *existing* provisions of the covered agreements in accordance with customary rules of interpretation of public international law. At the beginning and at the end of the panel's analysis is the text of the covered agreements. The terms. We agree with and appreciate the interventions of the third parties this morning that the terms of the agreement are what matters, not characterizations of the terms or even generally accepted notions about the purpose of provisions. Common words and phrases that have been used widely, like "zeroing," "masking," and "targeted dumping," may be helpful in enhancing understanding of the terms, but they also could prove a distraction. It will be critical for the Panel to ground its own interpretive analysis and its legal findings in the terms of the agreements themselves.

5. The United States recognizes that the Panel is only at the beginning of its work, and we hope that our first written submission and our presentation over these past two days have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavor to provide responses that bring clarity and understanding to the many complex issues in this dispute. Ultimately, we seek to aid the Panel in arriving at the correct conclusions, based on proper interpretations of the covered agreements. We are confident that, if we are successful in that effort, the Panel will find in our favor and dismiss Korea's claims.

6. Once again, the United States thanks the Panel members, and the Secretariat staff, for their time and attention to this matter.

ANNEX C-5

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. The United States has demonstrated that Korea has failed to establish any breach of any provision of any of the covered agreements. In this statement, we draw to the Panel's attention and correct a number of the misstatements made by Korea during these proceedings.

1. Korea Misstates the Appellate Body's Previous Zeroing Findings

2. From the outset, Korea has misstated the nature and extent of prior Appellate Body findings relating to the use of zeroing in connection with the alternative, average-to-transaction comparison methodology. We are confident the Panel will agree that the question of whether zeroing is permissible in connection with the alternative, average-to-transaction comparison methodology, applied pursuant to the second sentence of Article 2.4.2, is a novel one; one that has not been decided by the Appellate Body previously, either explicitly or implicitly.

2. Korea Fails to Identify Anything in the Text of the Second Sentence of Article 2.4.2 of the AD Agreement that Prohibits the Use of Zeroing

3. Korea distorts the findings of the Appellate Body because it can find no support for its argument in the text of the second sentence of Article 2.4.2. The prohibitions on zeroing that the Appellate Body has found in the past are rooted firmly in the text of the first sentence of Article 2.4.2. The Appellate Body has found that its textual interpretations are supported by contextual analysis of other provisions of the AD Agreement, including, *inter alia*, the terms "dumping" and "margin of dumping." But the obligations – the prohibitions on zeroing that the Appellate Body has found – are in the text of the first sentence of Article 2.4.2. There is no similar textual basis in the second sentence of Article 2.4.2 for finding a prohibition on the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology when the conditions for its use have been met.

3. Korea Has Not "Broken" Mathematical Equivalence, and the United States Has Not Abandoned that Argument

4. Rather than being broken, mathematical equivalence has been confirmed by Korea's own paid consultant. As Korea's consultant demonstrates, everything else being equal, mathematical equivalence results if the average-to-average comparison methodology and the average-to-transaction comparison methodology (without zeroing) are applied to the data from the washers antidumping investigation, and also using hypothetical data.

5. Korea suggests that the United States has abandoned the mathematical equivalence argument, and goes as far as characterizing certain passages of the U.S. responses to the Panel's questions as an "abrupt change in the U.S. position." Korea has misunderstood the U.S. responses to the Panel's questions. When the U.S. arguments are examined, it is evident that Korea is asserting that the U.S. arguments convey the opposite of their actual meaning by selectively quoting U.S. statements, divorced from their context.

6. The dispute at this point is not about math. The parties agree on the math. The dispute is about so-called "assumptions" about the calculation of normal value, the export transactions used in the different comparison methodologies, and whether different adjustments may or should be made to export prices. The United States does not see why an investigating authority would calculate normal value differently, examine a different universe of export transactions, or make the kinds of adjustments that Korea proposes. In any event, these are questions of legal interpretation, and such questions are for the Panel to resolve itself. Korea's consultant has inadvertently waded into legal interpretation waters that are beyond the depth of his expertise.

4. Korea Misrepresents the U.S. Arguments Relating to the Negotiating History of the AD Agreement

7. Documents from the negotiating history of the AD Agreement confirm that the use of zeroing is permissible under the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. Korea misrepresents the U.S. arguments related to the negotiating history of the AD Agreement.

8. Korea suggests that the United States "maintain[s] that Japan and Hong Kong approved the use of the zeroing practice when implementing the second sentence." This distortion of the U.S. position is plainly contradicted by what the United States actually argued in the U.S. first written submission. What is established by the negotiating history documents is that the concern about and opposition to asymmetrical comparisons and zeroing were connected. Neither Japan nor Hong Kong mentioned "zeroing" in their proposed changes to the Antidumping Code. One view of the negotiating history is that neither viewed doing so as necessary. That is, they could have considered it sufficient that the revised Code require the use of symmetrical comparisons, which would, by necessity, in their view, preclude the use of the zeroing methodology about which they had expressed concerns.

9. The cited negotiating history documents are consistent with the view that the use of zeroing is impermissible in connection with the application of the symmetrical comparison methodologies, but its use is allowed in connection with the application of the alternative, asymmetrical comparison methodology. The compromise is evidenced on the face of Article 2.4.2, and is confirmed by reference to documents from the negotiating history.

5. Korea's Statistical Arguments Rest on Flawed Premises and Mischaracterizations of what Commerce Actually Did

10. Korea has recognized that "there is no single 'right way' to determine a 'pattern'" and that "[t]he text does not specify any specific method." This recognition, however, has not prevented Korea from elaborating rigid, specific requirements that it contends Article 2.4.2 of the AD Agreement imposes on an investigating authority's assessment of the existence of a pattern of export prices which differ significantly. The obligations Korea asks the Panel to find simply are not supported by the text of the second sentence of Article 2.4.2, and Korea's arguments are based on flawed premises and mischaracterizations of Commerce's analysis.

11. The "pattern clause" of Article 2.4.2 of the AD Agreement does not require the use of any particular formal statistical techniques. There are any number of ways that an investigating authority might examine export prices and identify a "pattern" within the meaning of the "pattern clause." Korea mischaracterizes the *Nails* test, which does not involve the type of statistical analysis discussed by Korea. Korea also incorrectly alleges that Commerce "ignores actual market prices." Commerce most certainly does not ignore actual market prices. Commerce's analysis is based on an examination of all of the actual export prices reported by the respondents.

6. Korea's Arguments Related to the "Explanation Clause" Are Aimed at Depriving the Second Sentence of Article 2.4.2 of any Meaning

12. Korea's arguments related to the "explanation clause" would again read the second sentence of Article 2.4.2 out of the AD Agreement, contrary to the principle of effectiveness, and are at odds with the Appellate Body's recognition that the second sentence provides Members a means to "unmask targeted dumping" in "exceptional" situations. Korea openly invites the Panel to find that such exceptional situations simply never would arise. The Panel should decline Korea's invitation.

7. Korea Has Failed to Establish the Existence of any So-Called "Differential Pricing Methodology" Measure

13. Korea has failed to establish the existence of any "differential pricing methodology" measure, and thus Korea's "as such" claims relating to such a purported measure must fail. Korea seeks to minimize the U.S. arguments, suggesting that the lone basis for the U.S. position is that "Korea cannot challenge the differential pricing methodology in general because there is always

some chance the USDOC might change the policy in the future." Korea again misunderstands and misstates the U.S. arguments, which speak for themselves.

14. Korea has presented the Panel with little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be challenged "as such," but the Appellate Body has warned that panels may not simply divine the existence of a measure in the abstract on the basis of such a string of cases, or repeated action. In light of Korea's characterization of the measure it seeks to challenge, the Appellate Body's analysis in the zeroing disputes of the evidence necessary to establish the existence of a measure of this nature would appear to be most apt. Unfortunately for Korea, Korea has failed to adduce evidence here that is comparable to the evidence presented in the zeroing disputes.

8. Korea's Criticisms of the Cohen's d Test Are Exaggerated

15. In its second written submission, Korea contends that Commerce's use of the Cohen's *d* test as part of its differential pricing analysis reflects the use of "arbitrary benchmarks" with "little inherent value." As with its other arguments, Korea overstates what the evidence on the record of this dispute actually supports. Despite Korea's suggestion that "the Cohen's *d* test is not an accepted measure of 'significance'," academic literature in fact recognizes the usefulness of effect size, which can be measured by the Cohen's *d* coefficient, in measuring significance. Moreover, the thresholds associated with the Cohen's *d* test have been "widely adopted" and "provide a good basis for interpreting effect size and for resolving disputes about the importance of one's results."

9. Korea Also Misstates Prior Appellate Body Findings Related to the Disproportionality Analysis and Introduces a New, Largely Incomprehensible Argument

16. Korea similarly misunderstands and misstates the Appellate Body report in *US – Large Civil Aircraft (Second Complaint)* to support its claims under the SCM Agreement. Korea does not rely on the Appellate Body's findings in *US – Large Civil Aircraft (Second Complaint)* so much as it relies on arguments the United States made in that dispute, arguments that the Appellate Body rejected. To be clear, the United States argued that the subsidy at issue was not *de facto* specific, and the Appellate Body upheld the panel's finding that the subsidy was *de facto* specific. The U.S. arguments on which Korea relies were not successful.

17. On facts very similar to those in this dispute, the Appellate Body found that the subsidy challenged in *US – Large Civil Aircraft (Second Complaint)* was *de facto* specific because Boeing received a disproportionately large amount of the subsidy. On the basis of the Appellate Body's interpretation and application of Article 2.1(c) of the SCM Agreement, the Panel should find that Commerce's determination that RSTA Article 10(1)(3) was *de facto* specific because Samsung and LG received a disproportionately large amount of the subsidy is not inconsistent with Article 2.1(c).

18. Korea also advances a puzzling new argument that is premised on mischaracterizations of the facts and U.S. arguments, and on a misreading of Article 2.1(c). Korea now argues that the Panel should "focus upon" the amount of tax credits *earned* during the period of investigation rather than the amount of tax credits *granted*. However, this does not align with Article 2.1(c) of the SCM Agreement, which refers to the *granting* of disproportionately large amounts of the *subsidy*. Furthermore, the tax credit earned under RSTA Article 10(1)(3) in a given year is not the amount of subsidy granted. The amount of subsidy granted is the amount of revenue foregone by the Korean government. Korea mischaracterizes the facts of its own subsidy program and the argument of the United States.

10. Korea Misconstrues the Text of Article 2.2 of the SCM Agreement and the U.S. Arguments Regarding RSTA Article 26

19. Korea seeks to avoid the disciplines of the SCM Agreement by relying on irrelevant policy justifications and by advancing an overly restrictive – and ultimately untenable – interpretation of the term "enterprises." Korea suggests that the term "enterprises" in Article 2.2, which is collocated with the term "certain," somehow should not be read as "certain enterprises," which is defined for purposes of the SCM Agreement in Article 2.1 as "an enterprise or industry or group of enterprises or industries." Korea's suggestion simply is not credible. The Panel should reject

Korea's approach and find that Commerce's regional specificity determination reflects a straightforward application of Article 2.2 of the SCM Agreement that is not inconsistent with that provision.

11. Korea's Arguments against Commerce's Tying Analysis Rely Increasingly on Irrelevant Non-Record Evidence and Mischaracterizations

20. Korea's arguments regarding Commerce's attribution of subsidies similarly rely on misstatements and extraneous evidence and arguments. First, Korea persists in its misguided effort to color this dispute with the introduction of non-record evidence from separate antidumping proceedings that were subject to rules that are distinct from those that govern Commerce's countervailing duty investigation of washers from Korea. Second, Korea is not taking a principled stand in support of a requirement that investigating authorities tie subsidies to a particular product. Korea is simply advocating a subsidy calculation at a level of generality (the corporate division level) that is somewhat lower than the level of generality of Commerce's subsidy calculation (the company level). Third, Korea asserts that Commerce was "passive" when presented with evidence allegedly germane to the tying analysis. In reality, Commerce did not act passively, but appropriately focused on evidence relevant to the issue at hand. Finally, Korea again misunderstands and misstates that Commerce's tying analysis in the washers countervailing duty investigation was an "irrebuttable presumption." Commerce's approach did not presume that the subsidies were tied or untied; it simply provided a means of classifying the programs based on the nature of the programs themselves.

12. Korea Misstates the Facts Concerning Commerce's Determination of the Denominator Used to Calculate Samsung's Subsidy Rate

21. Korea continues to misconstrue Commerce's determination in the refrigerators countervailing duty investigation. Commerce did not make an affirmative finding that RSTA Article 10(1)(3) benefits should be attributed to Samsung's global sales in the refrigerators investigation. Commerce simply made a mistake based on Samsung's erroneous reporting of data. To demonstrate this, we are providing Exhibit USA-86, an excerpt of Samsung's response to the USDOC's initial questionnaire in the refrigerators countervailing duty investigation, which shows that Commerce instructed Samsung to "not include the volume and value of merchandise produced outside of Korea" in its reported sales data.

22. Korea also asserts that Samsung raised the "royalty payment" issue with Commerce during the washers countervailing duty investigation. This is yet another mischaracterization of the record by Korea. During the washers investigation, neither Samsung nor Korea argued that these royalty payments also supported a finding that RSTA Article 10(1)(3) benefits should be attributed to global production, and Commerce had no reason to consider them in that context.

13. Conclusion

23. The United States has set out in some detail in this statement numerous errors made by Korea in this proceeding, including interpretations that are divorced from the text of the agreements and misunderstandings, misstatements, or mischaracterizations of the facts and determinations made by Commerce, the arguments of the United States, and prior findings of the Appellate Body.

24. As we have demonstrated in the U.S. written submissions, statements, and responses to the Panel's questions, all of Korea's claims are without merit, and the United States respectfully renews its request that the Panel reject them.

ANNEX C-6

CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

Madame Chairperson, members of the Panel:

1. You have heard extensive arguments from both sides in our written submissions and oral presentations. And you have told us that you have focused on those arguments and read our submissions numerous times. That certainly is reflected in the questions you have asked. Given that, we will not repeat the arguments we have already made.

2. We would simply acknowledge that the legal and interpretative issues before you are challenging and complex. In particular, a short sentence in the AD Agreement[1] setting forth an alternative comparison methodology that may be used under certain conditions sits squarely in the middle of a broad landscape of interpretative analyses by the Appellate Body concerning an issue that, to understate the matter, has been of great interest to WTO Members. Reconciling the terms, the purpose of that provision, and the object and purpose of the AD Agreement itself, as well as the many relevant findings of the Appellate Body will be no small undertaking. The probing questions of the Panel over the past two days, as well as the set of questions the Panel posed in connection with the first panel meeting, indicate that you well understand the difficult task the parties have asked you to undertake. So, thank you for agreeing to take on that task.

3. As the issues in dispute are novel, the Panel has the intellectually tantalizing opportunity, but also the weighty burden to be the first to reveal your solution to the puzzle presented by the second sentence of Article 2.4.2 of the AD Agreement. Of course, that solution must follow from an application of the customary rules of interpretation. That means, as the Panel well knows, a good faith reading of the ordinary meaning of the terms of that sentence in their context and in light of the object and purpose of the AD Agreement.

4. Additionally, the interpretative solution to the puzzle also must be a general solution, and a number of your questions recognize that. While this is a dispute between Korea and the United States in which Korea asks the Panel to make findings about certain U.S. measures (or alleged measures), the preliminary step for the Panel is to do that interpretative analysis to ascertain what the obligations are.

5. As we have argued, the Panel should find that the text of the AD Agreement cannot be read as narrowly and rigidly as Korea proposes. Rather, the agreement text affords investigating authorities in all Members, around the world, quite a bit of flexibility to approach the analytical questions in a variety of ways.

6. In that regard, I was struck by an observation by Dr. Cohen in the excerpt of the treatise that Korea has submitted to the Panel. In discussing the size conventions he developed, he noted that "the difference in size between apples and pineapples is of an order which hardly requires an approach via statistical analysis."[2]

7. The approaches to the application of the "pattern clause" that the U.S. Commerce Department has developed over time are, admittedly, quite complicated. The complexity, though, is borne of an effort to deal with thousands of transactions in numerous investigations in an objective, transparent, predictable way. Commerce has undertaken a good faith effort to grapple with the complexities that can arise from an analysis pursuant to the second sentence of Article 2.4.2, particularly in light of the Appellate Body's many interpretative findings related to zeroing.

8. Another investigating authority, though, might take a different, simpler approach. Perhaps that investigating authority handles antidumping investigations very rarely, or the investigations it handles involve far fewer imports.

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] Exhibit KOR-120, p. 13.

9. The interpretation of the second sentence of Article 2.4.2 of the AD Agreement must provide space for both kinds of approaches, by both kinds of investigating authorities.

10. As another observation about the interpretation of the second sentence of Article 2.4.2, it will be useful for the Panel to determine for itself and keep firmly in mind what it is that the second sentence is attempting to accomplish. You have our arguments on that. If you agree with us, and with the Appellate Body, that the purpose of the second sentence is to provide an investigating authority with the ability to unmask targeted or concealed dumping, then it is critical that the interpretation of that provision actually permits that to happen. It should not be the case that higher-priced export transactions, following an application of the second sentence, continue to obscure and mask lower-priced export transactions.

11. If the Panel agrees with that premise, which we urge you to do, then that explains why the alternative, average-to-transaction comparison methodology operates as we argue it does. That explains why combining the results of the alternative and normal methodologies in a mixed approach operates the way we argue it does.

12. Over the past two days, Korea's arguments have been exposed. Korea simply does not make sense of the second sentence of Article 2.4.2. As we have shown, Korea's arguments and its proposed interpretations, in fact, read the second sentence of Article 2.4.2 out of the AD Agreement. Korea's proposed interpretations just are not tenable.

13. For the reasons we have given, we again ask the Panel to reject Korea's claims and find that the challenged antidumping measures are not inconsistent with the provisions of the covered agreements.

14. As we have not discussed Korea's SCM claims[3] during the question and response portion of this meeting, we will not touch on our arguments related to those claims. We would note again, though, that we appreciate the Panel's flexibility in terms of extending the schedule for responding in writing to the Panel's written questions on the SCM issues. We look forward to addressing the Panel's questions in an effort to help the Panel better understand those issues.

15. In closing, the United States once again would like to thank the Panel members, as well as the Secretariat staff, for your time and for the careful attention you are giving to this matter.

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[3] Claims made under the *Agreement on Subsidies and Countervailing Measures*.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

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ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. This dispute is the first one to directly challenge "zeroing" in situations where dumping is targeted to particular purchasers, regions or time periods. It is important to recognize that these situations are very specific factual situations the contours of which are far from being clear, not only because the text of the second sentence is concise but also because recourse to it by the majority of the WTO Members has been relatively sparse so far. Considerable uncertainties exist as to when the second sentence of Article 2.4.2 could be invoked, how the comparison method provided in that sentence should be operated in practice and whether "zeroing" would be exceptionally permitted under the situation described in this second sentence.

(i) The third method should be an exception

2. A reading of Article 2.4.2 as a whole leads inevitably to the understanding that the third method is not expected to be routinely used. The adverb "normally" in the first sentence of this Article conveys an explicit instruction that the use of the third method (W-T) should not be the first option of investigating authorities. It may be used only if the authorities find a pattern of export prices which may indicate targeted dumping and are able to explain why the differences in prices cannot be taken into account appropriately by the "normal" methods (W-W or T-T). This understanding is reinforced by the auxiliary verb "may" in the second sentence of Article 2.4.2 as opposed to "shall" in the first sentence of this Article. Investigating authorities "may" have recourse to the W-T comparison method, i.e. this method is a mere possibility, not an obligation, and is certainly not automatic, contrary to the recourse to the W-W and T-T methods, which "shall normally" be used. The Appellate Body has already pronounced itself in the sense that the use of the W-T should be an exception.[1]

(ii) Not all "pattern[s] of export prices which differ significantly" matter for the purposes of resorting to the third method

3. With respect to the first condition for the use of the third method - that "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods" - Brazil understands that it is not all "pattern[s]of export prices which differ significantly" that matter for the purposes of resorting to the third method.

4. According to the United States, "[t]he relevant pattern at issue in the second sentence of Article 2.4.2 is that of export prices "which differ significantly…"[2], and this pattern is interpreted as being "a regular and intelligible form or sequence of export prices, which are unlike in an important or notable manner, or to a significant extent, as between different purchasers, regions or time periods"[3]. As Korea puts it, "[t]he focus […] is on *any* differences in pricing, irrespective of whether the pricing differences are *above* or *below* the average"[4]. Consistent with this interpretation, the USDOC, in its "Differential Pricing Methodology", considers not only low priced sales but also high priced sales when determining the comparison methodology to apply to the sales. In Brazil's view, the tests applied by the USDOC do not reveal a "pattern of export prices which differ significantly", as required by Article 2.4.2. They simply measure the percentage of sales that have passed the "Cohen's *d*" test and that, therefore, according to that methodology, are deemed to have a differential pricing. They do not consider whether the aggregate of those sales, i.e. the sales below the 0.8 and the sales above 0.8, form a pattern of export prices relevant for the purposes of the second sentence of Article 2.4.2. In addition, the tests seem to ignore the magnitude of the variations above and below 0.8.

5. Although an important variation in prices, both above and below the average, may be taken into consideration in assessing why the regular comparison methodologies would not be able to

[1] Appellate Body Report, *US – Zeroing (Japan)*, para. 131.
[2] U.S. First Written Submission, para. 60.
[3] U.S. First Written Submission, para. 65.
[4] Korea's First Written Submission, para. 114.

unmask the dumping, the mere existence of such variations is not sufficient to meet the conditions required by Article 2.4.2. The patterns of price variations that matter for determining the margin of dumping in the situations foreseen in that provision are, in normal circumstances, only those that are significantly *below* the price for the tested purchaser, region or time period. Patterns of price variations *above* that price *should not be considered relevant*, in principle, for the application of the third method, because in this case, no evidence of targeted dumping will normally have been found[5]. To allow a pattern of higher than average export prices to trigger the application of the third method seems not only contrary to the specific purpose of the second sentence of Article 2.4.2, which is to "unmask" "targeted dumping", but is also illogic in relation to the very purpose of the Anti-Dumping Agreement which is concerned with an specific price behavior that causes injury to the domestic industry of the importing country. It is important to recall that neither Article VI of the GATT 1994 nor the Anti-Dumping Agreement prohibit dumping "per se". In general, patterns derived from a subset of export prices whose average is higher than the overall average export price are not an issue in the Anti-Dumping Agreement, as the Agreement is concerned with such patterns of export price that a*re below the normal value and that cause injury to the industry*.

6. Therefore any decision about the existence of "a pattern of export prices which differ significantly" for the purposes 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, which is to counteract dumping that causes injury. An interpretation of the "pattern clause" consistent with the object and purpose of the Anti-Dumping Agreement *is certainly not* one that mechanically considers patterns of price variations *above* the average *as relevant* for the application of the third method.

(iii) What type of explanation is to be provided?

7. With respect to the second condition for the use of the third method, Brazil interprets the requirement to provide "an explanation" as a central obligation in the context of Article 2.4.2 of the Anti-Dumping Agreement. This obligation must be understood as requiring from the authorities an elaboration on the reasons for the impossibility to use the symmetrical methods. It does not suffice to simply provide a reason without further explaining it and the "explanation" must have a "genuine explanatory value"[6].

8. Brazil is not convinced that the explanations given in the investigation at issue in this dispute have this genuine explanatory value. The existence of high priced sales in the non-targeted group that "mask" the low-priced sales in the targeted group cannot *per se* be the decisive factor for having recourse to the W-T method. Also, it is not even clear to Brazil that the W-W method will always conceal differences in export prices. On the contrary: the fact that Article 2.4.2 itself envisages the possibility that this method can take account of differences in export prices seems to deny this proposition. Similarly, to justify the recourse to the third method in function of a specific result, i.e. a higher margin of dumping obtained with the use of the W-T when compared to the margin obtained with the W-W or T-T methods, seems to fall short of what is required by the second sentence of Article 2.4.2. The use of the third method should be based on an analysis of the applicability of the symmetrical methods to a given factual situation and the corresponding conclusion that these methods cannot take into account the differences in

[5] Brazil would like to point out that it is possible to conceive, in theory, of a very specific set of factual circumstances that would justify the application of the third method based on a pattern where the average export price of the subset of "targeted" transactions is higher than the export price for the whole set of relevant transactions. Such situation might arise, for instance, if the normal values varied significantly – one could think of products subject to strong price variations due to seasonal fluctuations in supply and/or demand. To provide a mathematical example, consider a product whose normal values, by trimester, were 100, 40, 40 and 40 and whose export prices were 70, 50, 50 and 50 (assuming one transaction per trimester and equal quantities). Even though the export price for the first trimester is higher than the overall average export price in the example, the targeted dumping situation that might require, to be remedied, the application of the third methodology is the one manifested in that very same trimester (because then the normal value is so much higher than the export price). This is clearly a very specific situation in the context of the application of a trade policy tool which is already exceptional in itself. Brazil makes this observation essentially to underline the importance of investigating authorities to proceed rigorously with respect to suspected "targeted dumping" situations, analyzing the specific set of facts of each of these situations and providing the corresponding explanations.

[6] China's Third Party Submission, para. 28.

export prices. The results that would be obtained using the different methods, in themselves, do not seem to authorize the use of one or another method.

9. For Brazil, the adverb "appropriately" in the second sentence of Article 2.4.2 is linked contextually with the verb "taken into account", so that what should be assessed as "appropriate" is the application of the symmetrical methods to the concrete case and not the result of this application. In principle, the investigating authority should explain why the application of the symmetrical comparison methods was not appropriate to the circumstances of the case at issue, *independently of the final margin of dumping* (the result).

10. Brazil also thinks that the "explanation" to be provided must contemplate the reasons of why *both* symmetrical methods cannot be used. Had the drafters of the Anti-Dumping Agreement intended that an explanation be limited to only one of the symmetrical methods, they would have said so explicitly at the end of the second sentence by stating, for example " by the use of *one* of the symmetrical methods".

(iv) Operation of the third method in "targeted dumping" situations

11. With respect to how the W-T method should operate in practice once the conditions for its use are met, there seems to be considerable uncertainties in this regard. An interpretation of the second sentence of Article 2.4.2 that would limit the application of this method to the transactions within the pattern raises several doubts: how the results of the W-T (applied to the transactions within the pattern) and the W-W or T-T comparisons (applied to the rest of the transactions) would be combined for the purpose of calculating an overall dumping margin? Would it be possible to adjust the W-A normal values, so as to produce different mathematical results? The answers to these questions should be found on the basis of the text, object and purpose of the Anti-Dumping Agreement itself. In any case, this analysis should be subject to the provision governing fair comparison (Article 2.4), which emphasizes the need to justify, at the outset, that the reason for invoking the second sentence of Article 2.4.2 is fully consistent with this provision.

12. With respect to the adjustments that could be made in the W-A normal value to avoid mathematical equivalence of results between the W-W and the W-T methods, Brazil understands that if the same normal value data is used in both methods, it would be difficult to discard this argument. The alternative suggested by the *Appellate Body*[7], in Brazil's view, could only be performed when the differences in export prices occur among time periods. When the differences in prices occur among purchasers or regions, uncertainty would arise on *how* or even *if* this approach could be followed. Even the use of the same monthly W-A normal value under both methods would not produce different results, since both would be based in the same time periods. To be even more precise, the monthly W-A normal values in both methods and the monthly W-A export price in W-W or the individual export transactions in W-T would be weighted by the same quantities, what would produce the same result.

(v) The "as such" claim against the "Differential Pricing Methodology"

13. With respect to the Korean claim "as such" against the "Differential Pricing Methodology", it is well known that the legal standard for assessing the existence of an unwritten measure is firmly established and that panels "must not lightly assume the existence of a "rule or norm" constituting a measure of general and prospective application"[8]. That being said, Brazil recalls, firstly, 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. It neither governs the definition of a measure for purposes of WTO dispute settlement, nor does it define exhaustively the types of measures that are susceptible to challenge in WTO dispute settlement[9]. Secondly, 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*. The amount of evidence that a complaining party must adduce against an unwritten measure that has been in place for several years is certainly not the

[7] *US – Stainless Steel (Mexico)*, AB report, para. 126.
[8] Appellate Body Report, *US – Zeroing (EC)*, para. 196.
[9] Appellate Body Report, *US – Continued Zeroing*, para. 179.

same as the one needed in relation to a measure recently put in effect, as is the case of the "Differential Pricing Methodology" that is being applied only since March 2013.

14. Last, but not the least, Brazil reminds the Panel that, although claims against unwritten measures must be carefully analyzed, these claims also "serve the purpose of preventing future disputes by allowing the root of WTO-inconsistent behavior to be eliminated"[10]. As they "seek to prevent Members *ex ante* from engaging in certain conduct"[11], these challenges are valuable in protecting the security and predictability needed to conduct future trade. "This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel"[12] independently of how they are categorized by the complainants ("as such", "as applied" or something else).

15. With this principle in mind, Brazil hopes that it will not be necessary another decade to obtain clarification on the use of the third method and especially on the use of "zeroing" in targeted dumping situations, in light of the disciplines of the Anti-Dumping Agreement.

(vi) The "systemic disregarding" in the "Differential Pricing Methodology"

16. Finally, with respect to what Korea calls the "systemic disregarding" in the context of the "Differential Pricing Methodology", Brazil understands that this practice seems to share the same rationale as that of "zeroing", inasmuch as it zeroes a negative result in the W-W comparison subset that could be used to offset the positive result in the W-T subset. And the effect also appears to be the same as that of "zeroing", found to be inconsistent in so many WTO disputes: it inflates the overall margin of dumping. Considering that the United States has not "respond[ed] to the substance of Korea's arguments that are specific to the "differential pricing methodology"[13], it would be important that the Panel further enquiries the United States as to the exact nature and precise content of this methodology. If the "systemic disregarding" is found to be like "zeroing", it would also not be consistent with the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement.

[10] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.
[11] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 172.
[12] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82, citing the Panel Report, *US – Superfund*, para. 5.2.2.
[13] United States' First Written Submission, para. 319.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. THE USE OF ZEROING WHEN APPLYING AVERAGE-TO-TRANSACTION METHODOLOGY IS AS SUCH INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

1. Canada submits that the use of zeroing when applying the exceptional average-to-transaction methodology is "as such" inconsistent with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement.

2. When employing the average-to-transaction methodology, the USDOC calculates an intermediate result for each export transaction compared to the weighted average normal value. When aggregating these results, the USDOC does not offset the intermediate results of transactions for which the export price is lower than the normal value with intermediate results of transactions for which the export price is found to exceed normal value. Aggregation without offsetting is commonly referred to as "zeroing".

A. The use of zeroing violates the fair comparison requirement in Article 2.4

3. The Appellate Body has found numerous times that the practice of "zeroing" is inconsistent with the Anti-Dumping Agreement in the context of both the weighted average-to-weighted average ("average-to-average") and the transaction-to-transaction methodologies (*US – Zeroing (EC)*; *US – Softwood Lumber V (Article 21.5 – Canada)*; and *US – Zeroing (Japan)*). It also reached the same finding when considering the average-to-transaction methodology in the context of administrative reviews. (*US – Stainless Steel (Mexico)*, and *US – Continued Zeroing*)

4. The principles espoused in those decisions on zeroing demonstrate that zeroing is also not permissible even when an investigating authority employs the exceptional average-to-transaction methodology set out in Article 2.4.2 in the context of initial investigations.

5. The definition of dumping contained in Article 2.1 of the Anti-Dumping Agreement applies throughout the Agreement. When examining the use of zeroing under the transaction-to-transaction 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. (See *US – Zeroing (Japan)*, see also *US – Stainless Steel (Mexico)*, and *US – Continued Zeroing*)

6. This means that even when an investigating authority is justified in using the exceptional weighted average-to-transaction methodology, the results of the individual comparisons must be aggregated to determine the margin of dumping in accordance with Article 2.4.2.

7. The practice of zeroing during this aggregation is not only inconsistent with Article 2.4.2; it is also 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. (See *US – Softwood Lumber V* (Article 21.5 – Canada))

8. Disregarding the results of certain intermediate comparisons is inconsistent with the obligation to make a "fair comparison" under Article 2.4.

9. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness, or lack of bias." (*US – Softwood Lumber V* (Article 21.5 – Canada))

10. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* stated that the use of zeroing can:

> In some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing [...] may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping. (footnote omitted)

11. When an investigating authority employs zeroing, it ignores the actual export price of a transaction made above normal value and rather, in effect, deems that the export price is equal to the normal value. The Appellate Body in *US – Softwood Lumber V* similarly observed that the practice of zeroing effectively treats certain export prices as less than they actually are.

12. Likewise, 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.

B. The relationship between zeroing and mathematical equivalency

13. Regarding zeroing and mathematical equivalency, the United States argues that zeroing is permissible when applying the average-to-transaction methodology because failing to do so would lead to results that are mathematically equivalent to those obtained through the standard methodologies.

14. We note that the Appellate Body in *US – Softwood Lumber V* (Article 21.5 – Canada) has already rejected such reasoning. Moreover, it does not follow from the fact that a given methodology may yield a mathematical difference, that this methodology is permissible under the Anti-Dumping Agreement. This simple fact does not cure the deficiencies in the U.S. differential pricing methodology, including those we identify below.

II. THE USDOC DIFFERENTIAL PRICING METHODOLOGY IS INCONSISTENT WITH ARTICLE 2.4.2 OF THE ANTI-DUMPING AGREEMENT

15. Canada submits that the USDOC differential pricing methodology is also "as such" inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

A. Article 2.4.2 of the Anti-Dumping Agreement only permits an investigating authority to rely on the average-to-transaction methodology in exceptional circumstances

16. Article 2.4.2 provides, in relevant part, that:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

17. This provision indicates that, in calculating a margin of dumping in an investigation, an investigating authority must normally employ either the average-to-average or the transaction-to-transaction methodology. The Appellate Body has stated that "[t]he asymmetrical methodology in the second sentence is clearly an exception to the comparison methodologies which normally are to be used." (*US – Zeroing* (Japan), see also *US – Softwood Lumber V* (Article 21.5 – Canada))

18. Any methodology used to determine whether targeted dumping exists should be rigorous enough to reflect the fact that situations of targeted dumping are exceptional in nature. That methodology must also meet the criteria enunciated in the second sentence of Article 2.4.2.

19. Canada addresses two significant problems with the U.S. differential pricing methodology. First, the overly mechanical approach of the differential pricing methodology does not identify a pattern of export prices which differ significantly among different purchasers, regions or time periods. Second, no explanation is given for why such differences cannot be taken into account by one of the two symmetrical methodologies.

B. The USDOC differential pricing methodology does not establish the requisite pattern of export prices which differ significantly

20. In order to determine whether to apply the exceptional methodology in the second sentence of Article 2.4.2, the USDOC uses the Cohen's *d* test to identify transactions that have an effect size that is equal to or exceeds 0.8 or -0.8 on the Cohen's *d* scale and then applies a ratio test to determine the percentage of the overall value of sales that those transactions represent. (See *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), (KOR-33))

21. Canada submits that the application of the USDOC differential pricing methodology does not meet the requirement for a pattern contained in the second sentence of Article 2.4.2. The ordinary meaning of the word pattern includes, "[a] regular and intelligible form or sequence discernible in certain actions or situations". (*OxfordDictionaries.com)* This definition clearly implies a qualitative element.

22. Under the differential pricing methodology, the USDOC uses its ratio test to calculate the percentage of the volume of sales that have a Cohen's *d* result that equals or exceeds 0.8 or -0.8. If such percentage is greater than 33 percent the USDOC then concludes that there is a "pattern". (See *Differential Pricing Analysis; Request for Comments,* 79 Fed. Reg. 26720 (USDOC May 9, 2014))

23. To illustrate, let us consider a hypothetical investigation during which the differential pricing methodology is applied. Assume that three of the Cohen's *d* results calculated are 1.0, 2.1 and -1.5, and thus meet or exceed the "large effect" threshold. If those results represent 33 percent or more of the total volume of sales, the USDOC would find that there is a pattern of significant differences. But this not a pattern, it is merely a variance.

24. The USDOC methodology therefore does not include a proper assessment as to whether the variance in export prices follows any discernible sequence or "pattern" of price differences.

25. Moreover, Article 2.4.2 only permits the use of the average-to-transaction methodology when there is a demonstrated pattern of export prices which differ significantly "among purchasers, regions or time periods". Given the use of the disjunctive "or", these three categories are distinct. The USDOC, however, aggregates the results of its application of the Cohen's *d* test for all three categories before using this aggregated total to determine if the 33 percent and 66 percent thresholds are met. The use of this process to justify the application of the exceptional average-to-transaction methodology ignores the requirement to identify a pattern among purchasers, regions, or time periods set out in Article 2.4.2.

26. Consequently, the differential pricing methodology fails to identify a *pattern* of export prices which differ significantly *among purchasers, regions or time periods* and is therefore inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.

C. The differential pricing methodology does not provide an explanation as to why one of the symmetrical methodologies cannot be used

27. An investigating authority must also explain why a pattern of export prices which differ significantly among different purchasers, regions or time periods cannot be taken into account appropriately by one of the two symmetrical methodologies before resorting to the average-to-transaction methodology. (See *US – Zeroing (Japan)*, see also *US – Softwood Lumber V* (Article 21.5 – Canada))

28. The USDOC provides no such explanation. Rather, it compares the dumping margins that would be obtained by using an average-to-average methodology to those that would be obtained by using the average-to-transaction methodology; if the differential is greater than 25 percent or if using the latter methodology results in an above *de minimis* dumping margin while the use of the former would not, then the USDOC uses the average-to-transaction methodology. (See *Differential Pricing Analysis; Request for Comments*, 79 Fed. Reg. 26720 (USDOC May 9, 2014), (KOR-25))

29. This so-called "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.

30. In addition, even if a mere difference could be seen as an explanation of why the use of the exceptional methodology could be justified, the use of zeroing in those calculations would still invalidate that test.

31. Korea has explained that the USDOC is using zeroing when applying its "meaningful difference test" pursuant to its differential pricing methodology. (Korea's first written submission, para. 197). This builds a bias into the system that makes it more likely that there will be a difference between the margin calculated pursuant to the average-to-transaction methodology and that calculated under the average-to-average methodology.

32. Canada notes that where a product is sold at a wide variance of export prices, with some above and others below normal value, even comparing the results calculated using the average-to-average methodology without zeroing to those obtained using the average-to-average methodology with zeroing could yield a substantial difference. Such a difference could exceed the 25 percent threshold established by the USDOC or result in a dumping margin exceeding the *de minimis* threshold in one case and no dumping in the other. This further demonstrates the inappropriateness of using zeroing in the "meaningful difference test".

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. ANTI-DUMPING ISSUES

A. Conditions on the Use of the Second Sentence of Article 2.4.2

1. The authority must identify a relevant pricing pattern

1. Article 2.4.2 of the *Anti-Dumping Agreement* establishes conditions that must be met before an investigating authority may resort to the exceptional W-T comparison methodology. "Normally" an authority must use one of the two symmetrical comparison methodologies (W-W or T-T) described in the first sentence of Article 2.4.2 in order to determine "margins of dumping" during the investigation phase of anti-dumping proceedings. The second sentence, however, allows an authority exceptionally to use the W-T comparison methodology if: (i) it establishes a "pattern of export prices which differ significantly among purchasers, regions or time periods"; and (ii) it provides "an explanation as to why such differences cannot be taken into account appropriately by use of a [W-W] or [T-T] comparison methodology".

2. Article 2.4.2, second sentence, requires that an investigating authority find a relevant pricing pattern of export prices which "differ significantly" among "different purchasers, regions or time periods". The individual export prices should not simply differ *per se*, but rather must form a discernible and intelligible "pattern" that can be distinguished from other prices falling outside the "pattern". Export prices in the pattern must differ "*significantly*", i.e., must differ in an "important, notable or consequential" way, which may have "both quantitative and qualitative dimensions".[1] The United States agrees that "significance" may have either quantitative or qualitative meaning. However, for the United States, it is enough for prices to differ on either basis to qualify as significantly different under Article 2.4.2. In other words, for the United States, large numerical differences satisfy this element even if they are *not* qualitatively significant, and conversely, qualitative differences pass even if they are numerically small. But this *uni-directional* approach to the question of "significance" is inconsistent with the requirements of Article 2.4.2 because, under a proper reading of this provision, relevant price differences must be meaningful in *both* senses of the word "significantly".

3. For China, *seasonality*, i.e., a regular and discernible cycle of prices over a period of time, is a qualitative dimension that must be taken into account by an authority. Numerically large differences in prices at different points in a seasonal cycle are not prices that "differ significantly" if the price difference is consistent with the regular fluctuation of the pricing cycle. This requirement of Article 2.4.2 finds support in Article 2.4 of the *Anti-Dumping Agreement*, which recognizes the fact that simply comparing market prices at different points in time can be an unfair comparison. The application of Article 2.4.2 is subject to Article 2.4.

2. The authority must provide an adequate explanation

4. Before using the W-T comparison methodology under the second sentence of Article 2.4.2, an authority must provide an *explanation* as to why a relevant pricing pattern cannot be taken into account appropriately through either a W-W or T-T comparison methodology. USDOC's brief acknowledgment in the *Washers* AD Determination that high prices may offset low prices (and *vice versa*), does not serve as an adequate explanation as to "why" *both* the W-W and T-T comparison methodologies cannot deal with the price differences identified. Rather, USDOC's explanation is devoid of explanatory content, fails to address the T-T methodology, and is a results-oriented justification of zeroing. As China explains below, zeroing is not permissible under the second sentence of Article 2.4.2. An explanation as to why zeroing is appropriate is thus not an explanation that accords with Article 2.4.2.

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

B. Limitations on the application of the W-T comparison methodology

1. Application to a limited group of sales within a "pattern"

5. Article 2.4.2 of the *Anti-Dumping Agreement* states that during the investigation phase, margins of dumping should "normally" be determined on the basis of the W-W or T-T comparison methodologies. Use of the W-T comparison methodology is *exceptional*. This means that the W-T comparison methodology may only be used on a limited basis. An investigating authority may only apply the W-T comparison methodology to those sales that comprise the relevant pricing pattern, with a "normal" comparison methodology used in relation to the remaining export sales. This is for several reasons.

6. *First*, the express textual connection in Article 2.4.2 between the concepts of the "export prices which differ significantly" and "the prices of individual export transactions" denotes a "parallelism" between the scope of those transactions which fall into the relevant pricing pattern and the scope of application of the W-T comparison methodology. This was confirmed by the Appellate Body when it said that:

> We […] read the phrase "individual export transactions" in [the second sentence of Article 2.4.2] as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.[2]

Thus, in order to determine a "margin[] of dumping" for the product as a whole, an authority first applies the W-T comparison methodology to the export prices that make up the pattern, then it aggregates these intermediate comparison results with those obtained from the transactions to which one of the symmetrical methodologies was applied.

7. *Second*, Article 2.4.2 limits the scope of application of the W-T comparison methodology to the extent necessary to "take into account appropriately" a relevant pricing pattern. The second sentence allows price differences to be taken into account "appropriately", and not in a generalized or excessive manner. Again, there is parallelism between the scope of the *problem* (a relevant pricing pattern that cannot be taken into account "appropriately") and the exceptional *remedy* provided. This is consistent with the fact that all comparison methodologies are subject to the "fair comparison" requirement of Article 2.4. An excessive use of the alternative comparison methodology, in response to a limited deficiency in the application of the symmetrical comparison methodologies, would not meet the requirement of "fair comparison".

8. *Third*, a general principle in WTO law is that an exception takes precedence over a general rule only to the extent of the conflict between the two provisions. Like other provisions of the covered agreements, Article 2.4.2 lays down a general rule that a symmetrical methodology should "normally" be used. The exception allowing use of the W-T methodology takes precedence over this general rule only to the extent necessary to "take[ ] into account appropriately" a relevant pricing pattern. For sales outside this pattern (for example, sales to customers, regions or time periods other than those found to be targeted, or sales of models or types of the product for which no relevant pricing pattern has been found), no conflict between the first and second sentences of Article 2.4.2 exists, and therefore, an authority must use a symmetrical comparison methodology.

9. *Finally*, China notes that a "relevant pricing pattern" necessarily can only exist in a subset all total export sales. The process of discerning a pattern – i.e., a "regular or intelligible form or sequence"[3] – serves to *distinguish* prices that fall within the pattern, on the one hand, from those that fall outside the pattern, on the other. Indeed, the United States' position that the pattern must include all sales because all sales are different from one another is at odds with the pattern

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[3] Definition of "pattern", Oxford English Dictionary Online (http://www.oed.com).

of prices actually identified by the *Nails Test* applied by USDOC in the *Washers* AD Determination. Under the *Nails Test*, the identified pattern did *not* comprise instances of dumping together with a group of higher priced sales which served to "mask" the low priced sales; instead it identified a specific *subset* of sales to certain customers, regions or time periods, within specific models of the product under investigation.

10. For all these reasons, there is no basis for USDOC to apply the W-T comparison methodology to all sales of an exporter.

2. Authorities cannot disregard or "zero" any intermediate comparison results in determining a "margin of dumping"

11. USDOC's practices of "zeroing" in conjunction with the W-T comparison methodology, and of the "systemic disregarding" of intermediate comparison results when it aggregates the results of W-W and W-T comparisons under the "differential pricing" methodology, cannot be reconciled with the requirement to determine a "margin of dumping". "Dumping" is *not* a transaction-specific concept, meaning transaction-specific comparisons are not, in themselves, "margins of dumping". Rather, both the *Anti-Dumping Agreement* and the GATT 1994 establish "dumping" as a "*product-related*" concept. The Appellate Body has thus concluded that "margins of dumping" may only be determined in relation to the product under investigation as a whole, encompassing *all of the export transactions* by an exporter.

12. Contrary to the United States' position, intermediate comparison results cannot constitute meaningful "evidence of dumping", because dumping only exists in the *aggregate* of all intermediate comparison results. The United States' analysis is fatally truncated. By focusing only on *some* transaction-specific results, the United States fails to acknowledge that transaction-specific comparison results in which export prices *exceed* normal value are evidence of an *absence* of dumping. Whether or not there actually is dumping can only be determined by aggregating all intermediate results together.

13. Thus, whatever method is used to calculate a margin of dumping, such a margin must be established for "the *product* as a whole".[4] As the meaning of "margins of dumping" is consistent across the entire *Anti-Dumping Agreement* (including, *a fortiori*, the two sentences of Article 2.4.2), all comparisons made between export price and normal value for individual *subsets* of the product subject to investigation must be aggregated in order to obtain a single margin of dumping. An authority is not permitted to disregard any comparison results by "zeroing" results where normal value *exceeds* export price, because this fails to generate a margin of dumping for the product as a whole. This applies equally to "systemic disregarding", whereby negative intermediate W-W comparison results are disregarded when aggregated together with the results of W-T comparisons.

14. The fact that the W-T comparison methodology is exceptional and only applies in limited circumstances does not provide a justification for the use of "zeroing". The second sentence of Article 2.4.2 provides an exception from the requirement, under the first sentence, to use a particular *comparison methodology* to determine the existence of "margins of dumping during the investigation phase". It thus allows use of a different *means* to find dumping. It does not modify the meaning of "dumping" or "margins of dumping" that applies throughout the *Anti-Dumping Agreement*.

15. Finally, a prohibition on the use of "zeroing" in conjunction with the W-T methodology does not, as the United States argues, reduce the second sentence of Article 2.4.2 to inutility. Where the conditions under the second sentence are met, the authority is permitted to use the alternative methodology when otherwise it would not be so permitted. Further, even if the second sentence is understood to require that there is a different *result* as between the W-W and W-T comparison methodologies, it is possible to obtain mathematically different results by varying the assumptions used in respect of each methodology. For example, if the temporal basis for the weighted average normal value is changed, mathematically different results generally arise.

[4] Appellate Body Report, *US – Zeroing (EC)*, para. 126.

II. COUNTERVAILING DUTY ISSUES

16. As to Korea's claim regarding the finding of *de facto* specificity, China notes that in *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body stated that the question whether a subsidy is "disproportionately large" depends, first, on 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, on whether "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".[5] Thus, the question raised by Korea's claim regarding the finding of *de facto* specificity in relation to RSTA Article 10(1)(3) is whether USDOC's finding that Samsung received disproportionate amounts of the subsidy rested on more than a simple finding that Samsung received a greater share than other recipients. In China's view, the assessment of *de facto* specificity must be based on more than such a simplistic assessment.

17. With respect to Korea's claim regarding the amount of subsidy for the production of a certain product, China notes that, contrary to the United States' position that an authority is generally not obliged to determine the precise amount of subsidy directly attributable to a product, the Appellate Body in *US – Countervailing Measures on Certain EC Products* found that, subject to Article VI:3 of the GATT 1994, an authority must ascertain the precise amount of the attributable subsidy before imposing a countervailing duty. Therefore, USDOC was obliged to conduct a careful examination of all data submitted by the interested parties before determining a subsidy to be a "genuine and substantial cause" of a particular market effect observed for the product being investigated.

18. As to Korea's claim that USDOC failed properly to match the numerator and the denominator in its calculation of the *ad valorem* level of subsidy, China notes that the Appellate Body has expressly recognized that the elements taken into account in the numerator of a subsidy calculation must match those taken into account in the denominator.[6] An authority must base its determination on positive evidence. China is concerned that USDOC appears to have established a presumption that government subsidies benefit *solely* domestic production when, in fact, this may not be the case.

[5] Appellate Body Report, *US – Large Civil Aircraft (2nd Complaint)*, para. 879.
[6] Appellate Body Report, *US – Softwood Lumber IV*, footnote 196 to para. 164.

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THIRD PARTY RIGHTS

1. The EU requests that the rights of third parties be appropriately protected in this case. As notified to the DSB, the EU has a *substantial interest* in the matters before the Panel, within the meaning of Article 10.2 of the DSU, and we request that our interests as a Third Party (and by extension the interests of the other Third Parties) be *fully* taken into account throughout the panel process. In particular, given that the DSU Appendix 3 Working Procedures have been modified in a manner that risks to *diminish* the rights of the Third Parties as provided for in the DSU and the DSU Appendix 3 Working Procedures, we request that, at the same time, other appropriate modifications (outlined below) to the DSU Appendix 3 Working Procedures also be made in order to *re-balance* the Working Procedures, so as to *fully preserve* the rights of the Third Parties as provided for in the DSU and the DSU Appendix 3 Working Procedures. Consequently, given the introduction of such modification, in order to avoid the pronounced unfairness to the Third Parties that could otherwise result, the EU seeks the following *re-balancing* measures:

- Receipt by the Third Parties of submissions (including exhibits) to the Panel, that is, including first written submissions, rebuttals, preliminary or interim ruling requests and responses thereto, responses to questions and comments thereon and opening and closing oral statements.

- In addition to the Third Party session at the first meeting, the presence of the Third Parties during the rest of the first meeting, as well as at the second meeting.

- The opportunity to respond, orally or in writing, to any question the Panel might wish to address to all Third Parties or to the EU specifically, at the discretion of the Panel, and to indicate a desire to respond to a particular question addressed to a Party or other Third Party, subject to the Panel's agreement.

II. BCI PROCEDURES

2. The EU welcomes the adoption of BCI Procedures in this case. However, we have the following reservations about certain provisions. First, with reference to paragraph 2 of the BCI Procedures, we consider that a Member's right to submit information to a panel cannot be conditioned on the provision of such an authorising letter. Insofar as this rule represents an attempt to reflect Article 6.5 of the ADA, we point out that that provision does not govern the question, which is rather governed by Article 18 of the DSU and Article 17.7 of the ADA. Under the confidentiality regime established by those provisions, a Member's right to submit information to a panel cannot be fettered by a panel conditioning it upon authorization from a private body. Under Article 17.7, confidential information is provided to the panel by the litigating Member. The provision refers to a "person, body or authority" only to reflect the fact that, pursuant to Article 13 of the DSU, a panel may seek information from any individual or body it deems appropriate. Second, with reference to paragraph 1, we consider that designation is a matter, in the first place, for the Member providing the information. A Member may be encouraged to follow the designation used in the municipal proceedings, but cannot be obliged to do so from the outset. Third, linked to the preceding observation, we consider that designation is ultimately a matter for the Panel, at least in case of disagreement, and cannot be absolutely delegated to the investigating authority or any interested party. We therefore consider that the rules should contain a challenge clause by which the other party can challenge the designation proposed by the Member providing the information. Furthermore, in order to avoid a risk of over-designation in which neither party has a particular interest, the challenge clause should be open to both the Panel and Third Parties.

III. KOREA'S "AS APPLIED" CLAIMS AGAINST THE WASHERS ANTI-DUMPING DUTY ORDER

3. The EU considers that the purpose of the final sentence of Article 2.4.2 of the ADA, as reflected in the preparatory work, is to strike a reasonable compromise between two different points of view. The first point of view is that whether or not dumping exists must be measured by taking into account the average pricing behaviour of an exporter, in both domestic and export markets, as well as average costs, irrespective, on the export side, of the purchaser, region or time period. Thus, for this purpose, the data universe includes all export transactions to all purchasers and regions and in all time periods of the investigation period, to the full value of all export transactions, whether they are less or more than the normal value. This is so whether the comparison methodology is weighted average-to-weighted average or transaction-to-transaction. The second point of view is that whether or not dumping exists may be measured by comparing each export transaction with a normal value, and, if the export price exceeds the normal value, by recording a finding of zero dumping, that is, by not allowing any off-set between positive and negative results. The compromise, as enshrined in Article 2.4.2 of the ADA is that normally the first rule applies; but that exceptionally, if targeted dumping by purchaser, region or time period is demonstrated to exist, a normal value established on a weighted average basis may be compared to prices of individual export transactions.

4. Thus, what the final sentence of Article 2.4.2 of the ADA does is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. Thus, in the case of regional targeted dumping, a weighted average-to-weighted average comparison might lead to a determination of no dumping. However, a closer examination of one particular regional market within the importing Member might reveal that, in fact, the relatively low priced and dumped transactions are pouring into that region and devastating the local industry, and this is being off-set by relatively high priced transactions to other regions. In such a case, what the final sentence of Article 2.4.2 of the ADA does it to permit an investigating authority to respond to such a situation, by unmasking the targeted dumping. Instead of determining the existence and amount of dumping by reference to the entire territory of the importing Member, it is entitled instead to determine the existence of a pattern of export prices which differ significantly among different regions, and unmask the targeted dumping accordingly. The same observation applies, *mutatis mutandis*, with respect to targeted dumping by purchaser or time period.

5. In a normal anti-dumping calculation, that is, one 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. If the export price is less than the normal value, then dumping exists. The EU fails to see why the situation should be any different under the final sentence of Article 2.4.2 of the ADA. In the case of regional targeted dumping, for example, the objective question is whether or not the product is being dumped into a particular region, based on an objective examination of the data. The reasons for which the dumping might be occurring, and specifically the reasons for the existence of the pattern and the use of the weighted average-to-transaction methodology, might be relevant to the explanation to be provided pursuant to the final sentence of Article 2.4.2 of the ADA, but such reasons are not relevant to the question of whether or not a pattern of relatively low priced exports by purchaser, region or time period, has been demonstrated to exist. We think that the terms "pattern" and "significantly" can be understood quantitatively; and we agree with the US' that the term can also be understood qualitatively.

6. The matter before the Panel has not already been decided by the existing case law on zeroing. On the contrary, in our view, panels and the Appellate Body have exercised considerable caution and judicial restraint in this matter, confining themselves to resolving the particular disputes that have come before them. Specific cases have addressed specific types of comparison methodologies in specific types of proceedings. However, a targeted dumping case has not previously come before any panel, and panels and the Appellate Body have been careful not to prejudge the issues related to targeted dumping. Thus, at most, what Korea and the US appear to be arguing is that the basic underlying logic that has been used to resolve previous disputes should be carried forward, in a systematic and consistent manner, in order to resolve the present dispute, and in such a way that Article 2.4 and particularly Article 2.4.2 are interpreted and applied coherently.

7. The EU disagrees 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 passing the pattern and gap tests, as opposed to all transactions to or in the particular purchaser, region or time period. We fail to see how this would comport with the basic objective of the targeted dumping provision, which, as we have outlined above, is to permit an investigating authority to unmask targeted dumping by purchaser, region or time that would otherwise be concealed. It is not clear to us 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 pattern and gap tests. 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 to or in other purchasers, regions or time periods would not be allowed to offset the dumping amount.

8. The EU agrees with Korea that the Appellate Body has already decided that mathematical equivalence does not determine the matter, and that the explanations in the measure at issue make no reference to the possible use of the transaction-to-transaction methodology. The EU submits that the consistency of the measure at issue with the final sentence of Article 2.4.2 of the ADA should be assessed in that light.

IV. KOREA'S "AS SUCH" CLAIMS AGAINST THE NAILS II METHODOLOGY AND THE DIFFERENTIAL PRICING METHODOLOGY

9. The EU understands Korea's position to be that the Differential Pricing Methodology came into existence on 4 March 2013. We further understand that, consequently, as of that date, the Nails II Methodology has no longer been applied, and in fact does not exist. This Panel was established on 22 January 2014. Consequently, as of a date preceding this Panel's establishment, it appears that the Nails II Methodology no longer existed. This understanding appears to be generally shared by the US. In these circumstances, the EU considers that the Panel should not make any findings with respect to the Nails II Methodology.

10. The EU considers that it results from the different descriptions of the two methodologies provided by Korea itself that there are significant differences between them. In these circumstances, we consider that they are insufficiently similar to be treated as a single measure.

11. With regard to Differential Pricing Methodology and the first flaw, we share the view 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 second flaw, we consider that, if there are, for example, 10 regions, and the relatively low priced transactions are distributed equally amongst them, there is no basis on which to find regional targeted dumping. However, if the relatively low priced transactions are in 2 adjacent regions, we consider that the transactions to the 2 regions may be cumulated for the purposes of determining whether or not there is a pattern of export prices which differ significantly among different regions. In effect, the 2 regions are treated as one. We would make the same remark with respect to related purchasers or adjacent time periods. With respect to the third flaw, we consider that it is difficult to understand the justification for combining data that are not generated on the basis of equivalent parameters.

V. KOREA'S CLAIMS UNDER THE SCM AGREEMENT

12. Korea argues that the USDOC miscalculated the amount of subsidisation with respect to the product concerned, and wrongly determined that the tax credits received by Samsung pursuant to Articles 10(1)(3) and 26 of the *Restriction of Special Taxation Act* (RSTA) were specific in accordance to Articles 1.2 and 2 of the SCM Agreement.

A. Calculation of the amount of subsidisation

13. The EU 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. The inclusion of amounts that have been bestowed on products other than the product under investigation in the calculation of the amount of subsidisation of the product concerned would necessarily result in a breach of those provisions.

14. That being said, the EU 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.

15. A relevant question for the Panel to examine 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. In the latter case, when a company manufactures several products in addition to the product concerned, the specific amounts granted to the product concerned from a subsidy that is contingent upon certain activities conducted by that company may be more difficult to determine with precision. Indeed, since money is fungible and can be used to finance any cost incurred by the company, subsidies generally affecting the production or sales of any product may ultimately be used in the manufacturing or selling activities of many products. This is regardless of whether the subsidy covers costs relating to R&D activities already conducted or investments previously made. Likewise, 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 means 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).

B. Specificity

16. The EU recalls that Article 2 of the SCM Agreement has been the subject of clarifications provided by panels and the Appellate Body in recent cases, such as in *US-Anti-Dumping and Countervailing Duties (China)*, *EC – Large Civil Aircraft*, and *US – Large Civil Aircraft*. The EU suggests that the Panel consider the issues before it in light of the clarifications provided by these cases.

17. In particular, with respect to Korea's allegations regarding RSTA Article 10(1)(3) tax credits, the EU 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 to obtain 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.

18. Turning to Korea's allegation regarding RSTA Article 26 tax credits, the EU considers that the Panel should examine whether the eligibility criteria in question are objective and neutral. It appears that, whilst the list of qualifying sectors covers many sectors, this does not necessarily imply that the eligibility criteria are neutral or objective, in the sense described in footnote 2 of the SCM Agreement. This list, however, could be more relevant to determine whether the subsidy appears to be non-specific in accordance with Article 2.1(a) of the SCM Agreement. Finally, with respect to Article 2.2 of the SCM Agreement, the EU considers it relevant to determine who the

granting authority is in this case. If the granting authority is the Government of Korea, then it would appear that companies located within the "overcrowding control region" of the Seoul Metropolitan Area and willing to make investments therein would be excluded from any tax credits pursuant to RSTA Article 26 and, thus, the subsidy would not be available to all enterprises within the jurisdiction of the granting authority.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. INTRODUCTION

1. Due to its systemic interest, Japan will address the proper legal interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") as well as the conduct of the United States Department of Commerce (the "USDOC") with respect to the application of anti-dumping duties concerning *Large Residential Washers from Korea*.

II. THE USE OF ZEROING IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT INCLUDING WHEN APPLYING THE SECOND SENTENCE OF ARTICLE 2.4.2

2. The Appellate Body repeatedly found that zeroing is inconsistent with the relevant provisions of the Anti-Dumping Agreement. It emphasized that the concepts of "dumping" and "margins of dumping" do not pertain to individual transactions, but to a product under investigation as a whole.[1] Its decisions have been derived from the definition of "dumping" set out in Article 2.1 of the Anti-Dumping Agreement, which defines the determination of dumping in relation to "a product", as well as from Article VI:2 of the GATT 1994, which allows a Member and its authorities to levy anti-dumping duties with respect to "any [dumped] product" or "such product". The Appellate Body also clarified that the term "dumping" has the same meaning "in all provisions of the Agreement and for all types of anti-dumping proceedings, including original investigations, new shipper review, and periodic reviews",[2] and that the concepts of "dumping" and "margin of dumping" "should be considered and interpreted in a coherent and consistent manner for all parts of the Anti-Dumping Agreement."[3]

3. While the second sentence of Article 2.4.2 permits an investigating authority to rely on a particular type of comparison methodology under exceptional circumstances, nothing in the provision allows the investigating authority to counteract the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-wide/specific, and not transaction-specific concepts. The second sentence states: "A normal value established on a weighted average basis may be compared to prices of individual export transactions". It does not contain any language that allows for a departure from the definition of dumping and margins of dumping. In this regard, the permission of the use of the asymmetric comparison methodology (W-T) as such by no means mandates or allows an investigating authority to apply zeroing. The Appellate Body clarified that the application of zeroing under the W-T methodology is inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[4]

4. The USDOC's use of zeroing is also inconsistent with the fair comparison obligation under Article 2.4 of the Anti-Dumping Agreement. The Appellate Body stated that zeroing "cannot be described as impartial, even-handed, or unbiased" (i.e., "fair") in the sense of Article 2.4, because the use of zeroing "artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[5] 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.[6] 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.

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[1] Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93; Appellate Body Report, *US – Zeroing (EC)*, para. 126; Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 106.

[2] Appellate Body Report, *US – Zeroing (Japan)*, para. 109.

[3] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 94.

[4] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 133.

[5] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 142; Appellate Body Report, *US – Zeroing (Japan)*, para. 146.

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

5. As for the argument of mathematical equivalence, as the United States admits, it is premised on the assumption that "all of the normal value and export price data that are fed into the calculations … are identical".[7] This has no basis in the Anti-Dumping Agreement. The Appellate Body explained the U.S. argument in a previous dispute, stating it would apply only "under the specific assumptions of the hypothetical scenario".[8] The Appellate Body suggested that an investigating authority may unmask targeted dumping by "focusing" on (i.e., establishing the margin of dumping based on) only export transactions constituting a "pattern", stating that the "universe" of export prices in the second sentence "would necessarily be more limited" than the "universe" in the first sentence.[9] In addition, an investigating authority could refer to different pools of home market transactions when calculating the normal values for the different comparison methodologies under the first and second sentences. In such case, the outcomes of the comparisons may be different because the groups of transactions making up the normal value may differ. In particular, the T-T comparison methodology under the first sentence will almost certainly never yield the same results as the W-T comparison methodology under the second sentence. As such, the pricing data considered under the first and second sentences of Article 2.4.2 are systematically different, which makes the mathematical equivalence argument implausible.

6. Further, the United States' argument that the negotiation history of the Anti-Dumping Agreement confirms that zeroing should be permissible under the second sentence is not convincing. The only conclusion that can be drawn from the evidence submitted by the United States is that some Members had serious concerns as to the use of zeroing in W-T comparisons. In any case, the views expressed by some delegations hardly represent the common intention of WTO Members.

III. THE USDOC FAILS TO PROPERLY FIND A "PATTERN" AS REQUIRED UNDER THE SECOND SENTENCE OF ARTICLE 2.4.2

A. The U.S. Methodologies Fail to Assess Qualitative Aspects of Differing Export Prices

7. Turning to the first requirement for invoking the second sentence of Article 2.4.2, the methodologies adopted by the USDOC to identify targeted dumping by finding a "pattern" suffer from fundamental flaws. The second sentence requires an investigating authority to find a "pattern of export prices which differ significantly among different purchasers, regions or time periods". Since the words "pattern" and "significant" both have qualitative aspects,[10] a "pattern" of differing export prices must convey proper *meaning* which reflects the purpose of the analysis to be conducted under the second sentence of Article 2.4.2.

8. In this regard, the Appellate Body clarified that the role of the second sentence is to "capture pricing patterns constituting 'targeted dumping'"[11] and to "unmask" such targeted dumping.[12] It also explained 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".[13] Because "dumping" by definition refers to sales made at lower (not to higher) prices, targeted dumping can be found when an investigating authority must show that export prices for certain purchasers, regions or time periods are significantly lower than those for other purchasers, regions or time periods , in a way that the former can be conceived as "targeted." In doing so, an investigating authority must qualitatively assess the significance of the observed deviation of a certain group from other groups of purchasers, regions or time periods with respect to the specific fact pattern. Such assessment is also required as a very basic rule of statistics.[14] Furthermore, in order to evaluate whether observed price differences are "significant", one needs to take into

[7] United States First Written Submission, para. 181.
[8] Appellate Body Report, *US – Softwood Lumber V (Art. 21. 5 – Canada)*, para. 99.
[9] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[10] Korea First Written Submission, paras. 131 and 134-135.
[11] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127; Appellate Body Report, *US – Zeroing (Japan)*, para. 133. See also the United States' First Written Submission, at para. 176.
[12] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[13] Appellate Body Report, *EC – Bed Linen*, para. 62.
[14] Lane, David et al., *Online Statistics Education: A Multimedia Course of Study*, (http://onlinestatbook.com/), pp. 11-12 and 648 (JPN-2); McFarland, Henry B., The U.S. Department of Commerce's Approach to Targeted Dumping: The Wrong Test and the Wrong Response (June 25, 2014). p. 6. (JPN-3)

account the characteristics of the relevant product and market, including the price variances of such a product in the market.

9. The USDOC's methodologies suffer from a common inconsistency with the second sentence of Article 2.4.2, as they adopt purely quantitative benchmarks that are mechanically applied in all cases. Under the *Nails* test, the USDOC identifies a "pattern" through a two-step analysis consisting of the "pattern test",[15] for which the USDOC bases its assessment solely on quantitative thresholds such as one standard deviation and 33% (of volume across all models) and the "gap test". Under the Differential Pricing Methodology, the USDOC employs the so-called Cohen's *d* test, for which it relies on purely quantitative and mechanical thresholds such as Cohen's *d* of plus or minus 0.8. There is no evidence that the USDOC assesses or interprets the meaning of the observed price variations or calculated statistics in a qualitative manner in order to determine whether certain purchasers, regions or time periods are "targeted".

10. The shortcoming of the USDOC's methodologies of disregarding qualitative aspects is aggravated with respect to the Differential Pricing Methodology. The Differential Pricing Methodology also includes within the identified "pattern" those export transaction groups with *higher* weighted average prices than the normal value. It is hardly understandable how the Differential Pricing Methodology identifies targeted "dumping" by using a "pattern" which in fact consists of a disorderly mixture of higher and lower prices.

B. The USDOC Fails to Take All Models into Account When Determining Whether Certain Purchasers (or Regions or Time Periods) Are "Targeted"

11. As the Appellate Body clarified, nothing in the text of the second sentence of Article 2.4.2 suggests that "models" or "types" of the same product under investigation can be considered as such categories.[16] The identification of a "pattern" pursuant to the second sentence cannot be completed at the level of certain price variations for individual models sold. Accordingly, in order to find that a certain purchaser, region or time period is "targeted", an investigating authority must show that export prices for the specific purchaser, region or time period are significantly lower across all models.

12. The USDOC's methodologies fail to take all models into account when identifying a "pattern" of targeted dumping. Under the *Nails* test, the USDOC considers that the "pattern test" is satisfied if the weighted average prices for *certain* models are below the "one standard deviation" standard and the aggregated transaction volume for such models exceeds 33% of the entire volume sold to that purchaser (or region or time period) across all models. Under the Differential Pricing Methodology, the USDOC splits export transactions for particular purchaser, region and time period by different models, and aggregates those model-specific transaction groups that passed the Cohen's *d* threshold of plus or minus 0.8.[17]

C. The Differential Pricing Methodology Aggregates Unrelated Variations Across Different Purchasers, Regions and Time Periods

13. As explained by Korea, under the Differential Pricing Methodology, the USDOC aggregates unrelated price variations within the category of purchasers (or regions or time periods) in order to identify a "pattern".[18] In other words, it combines price irregularities "across" different purchasers (or regions or time periods), instead of examining the difference "among" these purchasers (or regions, or time periods). The USDOC also aggregates unrelated price variations across the *distinct categories* of purchasers, regions and time periods.[19] Such an aggregation turns the "or" in "different purchasers, regions or time periods" into an "and" without any legal basis. Thereby, the USDOC fails to properly identify a "pattern" of export prices which differ significantly "*among* different purchasers, regions *or* time periods" as required by the second sentence of Article 2.4.2.

[15] Korea's First Written Submission, at para. 105.
[16] Appellate Body Report, *EC – Bed Linen*, para. 62.
[17] Korea's First Written Submission, at paras. 204-208.
[18] Korea's First Written Submission, at paras. 222-226.
[19] Korea's First Written Submission, at paras. 227-233.

IV. THE USDOC FAILS TO PROVIDE AN ADEQUATE "EXPLANATION" AS REQUIRED UNDER THE SECOND SENTENCE OF ARTICLE 2.4.2

14. As Korea argues, the terms "explanation" and "why" require an investigating authority to provide clear and detailed reasons for or the purpose of the inability or impossibility to appropriately take into account a pattern of significantly different export prices by the use of a W-W or T-T comparison.[20] Moreover, under the principle of effective treaty interpretation, the "explanation" clause must be interpreted in such a manner that it has a role separate and distinct from that of the "pattern" clause.

15. The United States seems to argue that the explanation requirement is fulfilled as soon as an investigating authority finds a difference between the margin of dumping calculated using the W-T comparison methodology and that calculated using the W-W comparison methodology.[21] This interpretative approach is circular; since the United States employs zeroing when using the asymmetrical comparison methodology exceptionally provided for in the second sentence of Article 2.4.2. As a consequence, the two calculation methodologies automatically yield different results.

16. In order to understand the reason behind the explanation requirement, one needs to bear in mind that an exporter generally does not sell its product at a uniform price. Export prices usually vary because each export price is determined based on various factors, including demand levels and scales of transactions that may vary among different purchasers, regions and time periods, as well as behavior of consumers and other market participants. Given that it is perfectly normal to observe certain differences in export prices of a product in a given market, such variations are expected to be captured and appropriately considered by the methodologies pursuant to the first sentence, which the Members agreed shall "normally" be used. As such, an "explanation" has to be provided at least as to why observed variations in export prices are not a mere reflection of factors that normally exist in a given market or otherwise does not allow to establish an appropriate margin of dumping under the first sentence so as to properly counteract dumping causing injury.

V. THE APPLICATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2 SHOULD BE LIMITED TO THOSE TRANSACTIONS THAT CONSTITUTE A "PATTERN"

17. Under the *Nails II* test, the USDOC uses the W-T comparison methodology and uses zeroing for all sales. [22] The same approach is employed under the Differential Pricing Methodology if certain conditions are met[23] yet this expansive use of the W-T comparison methodology is contradicted by the second sentence of Article 2.4.2. As explained by the Appellate Body, "[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, regions, or time periods."" [24] As such, the phrase "individual export transactions" in that sentence should be read "as referring to the transactions that fall within the relevant pricing pattern."[25]

VI. CONCLUSION

18. Japan appreciates the Panel's consideration of Japan's views with regard to the interpretation of the provisions of the Anti-Dumping Agreement addressed above.

[20] Korea's First Written Submission, at para. 156.
[21] United States First Written Submission, paras. 127-129.
[22] Korea's First Written Submission, at para. 108.
[23] Korea's First Written Submission, at paras. 198-200.
[24] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.
[25] Appellate Body Report, *US – Zeroing (Japan)*, para. 135; Also see Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.

ANNEX D-6

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

Madam Chair, Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. Norway did not present a written third party submission to the Panel. In this oral statement, I will therefore briefly set out Norway's view on one of the legal issues raised: the use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology referred to in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*[1].

2. However, before I turn to this issue, Norway would like to underline that the resort to this methodology is indeed an exception, to be applied only in very limited situations where the normal methodologies for calculating dumping margins are not appropriate. The criteria stated in the second sentence of Article 2.4.2 must be fulfilled, and the methodology must comply with Article 2.4. As elaborated in more detail by Korea and a number of third parties, the United States' methodology disregards all the criteria for the application of Article 2.4.2.

3. I now turn to the issue of zeroing. In line with the Appellate Body's consistent rulings in numerous previous cases, Norway holds that the use of all forms of zeroing, in all forms of proceedings under the *Anti-Dumping Agreement* is prohibited. This applies regardless of the comparison methodology employed to calculate the dumping margin, including the third comparison methodology of the second sentence of Article 2.4.2.

4. The Appellate Body has repeatedly found that the practice of zeroing is inconsistent with the *Anti-Dumping Agreement* in the context of both the "weighted-average-to-weighted-average" methodology and the "transaction-to-transaction" methodology. It has furthermore come to the same conclusion in terms of the third comparison methodology in the context of administrative reviews. As Norway will show, it is clear from the principles and interpretations laid down by the Appellate Body, that zeroing is also prohibited in terms of the third comparison methodology in the context of initial investigations.

5. Based on Article 2.1 of the *Anti-Dumping Agreement*, and Article VI:1 of the *GATT 1994*[2], 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.[3] Furthermore, the Appellate Body has underlined that the concepts of "dumping" and "margin of dumping" are exporter-specific,[4] and that "a single margin of dumping is to be established for each individual exporter or producer investigated".[5] The Appellate Body 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".[6] Norway points to the wording of Article 2.4.2, which explicitly refers to the "margins of dumping" and the comparison methodology used to determine the existence of these. 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]

6. Norway would furthermore like to highlight that the Appellate Body has found that Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement* require aggregation of <u>all</u> results of intermediate comparisons when calculating the dumping margin. In *US – Softwood Lumber V*, the

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[1] *The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*

[2] *The General Agreement on Tariffs and Trade 1994*.

[3] Appellate Body Report, *US – Zeroing (EC)*, para 126, Appellate Body Report, *US – Softwood Lumber V*, paras. 92-93.

[4] Appellate Body Report, *US – Stainless Steel (Mexico*), paras. 89-90, Appellate Body Report, *US – Zeroing (EC)*, para. 128.

[5] Appellate Body Report, *US – Continued Zeroing*, para. 283.

[6] Appellate Body Report, *US – Zeroing (Japan),* para. 109.

[7] First Written Submission of Korea, para. 70.

Appellate Body ruled that the individual comparisons only represent "intermediate values" that the investigating authority had to aggregate in order to arrive at the margin of dumping for the product as a whole. The investigating authority furthermore "necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2".[8] Disregarding or artificially reducing to zero the results of intermediate comparisons, through the application of zeroing, is thus at odds with this and inconsistent with Article 2.4.2.

7. In this regard, Norway would like to underline that the Appellate Body has confirmed this interpretation, both in the context of the "transaction-to-transaction" methodology[9], as well as in the context of the "weighted-average-to-transaction" methodology in administrative reviews[10]. The Appellate Body has thus found that a comparison between normal value and the prices of individual export transactions does not detract from its coherent conclusion on this matter.

8. Norway struggles to see that there is anything in the wording of the second sentence of Article 2.4.2 that would allow a different interpretation in this regard. Furthermore, the object and purpose of the provision is to address dumping targeted at particular purchasers, region or time periods. These dumping situations reflects a pricing strategy where the exporter dumps prices on specific purchasers, regions or time periods, while retaining higher prices for other sales. The very nature of targeted dumping thus necessitates a reference to the overall pricing behavior of the exporter, in order to identify this type of dumping. It necessarily follows that dumping cannot take place at the level of each individual transaction.[11]

9. Norway notes that the United States claims that the negotiation history of the *Anti-Dumping Agreement* confirms that zeroing should be permissible under the second sentence of Article 2.4.2.[12] As Norway understands it, the gist of the argument seems to be that communications of two delegations and minutes of a negotiating meeting can be read as proof that the asymmetrical comparisons, that is comparisons between individual export transactions and weighted average normal value in anti-dumping investigations, and zeroing, were viewed as one and the same thing. Norway strongly disagrees with this assumption. In our opinion, the material only shows that some Members were concerned about the use of zeroing in "weighted-average-to-transaction" comparisons. This is a far cry from deducting a permission of applying zeroing when using said comparison methodology. Furthermore, we note that the United States previously has described the negotiating history of Article 2.4.2 in quite a different way. In *US – Softwood Lumber V*, the United States argued that there were two practices employed by Members to establish "margins of dumping" at the time of the Uruguay Round negotiations that were relevant for the interpretation of Article 2.4.2. The first practice consisted of making "asymmetrical" comparisons, while the second practice was zeroing. The United States asserted that, because the negotiators were able to agree only on the issue of "asymmetry", it would be reasonable to expect that, absent modified text in the *Anti-Dumping Agreement* addressing zeroing, that practice would continue to be consistent with the *Anti-Dumping Agreement*.[13] In this case, the United States clearly saw these two practices as two separate issues.[14] The Appellate Body did not agree with the United States in that proceeding. Similarly, the material at hand does not in any way prove that the negotiators intended to allow zeroing when applying the third comparison methodology.

10. Moreover, the use of zeroing when applying this third comparison methodology is inconsistent with the obligation of Article 2.4 of the *Anti-Dumping Agreement* to make a "fair comparison" between the export price and the normal value. The term "fair" has been interpreted by the Appellate Body to connote "impartiality, even-handedness or lack of bias".[15] The Appellate Body has found that zeroing tends to inflate the margins calculated, and that it can, in some instances, turn a negative margin of dumping into a positive margin of dumping.[16] The Appellate

[8] Appellate Body Report, *US – Softwood Lumber V*, para. 98.
[9] Appellate Body Report, *US – Softwood Lumber V (Art 21.5 – Canada)*, paras. 85-124.
[10] Appellate Body Report, *US – Stainless Steel (Mexico),* paras. 102-104.
[11] As held by the Appellate Body in *US – Stainless Steel (Mexico)*, para. 98*:* "A proper determination as to whether an exporter is dumping or not can only be made on the basis of an examination of the exporter's pricing behaviour as reflected in all of its transaction over a period of time."
[12] First Written Submission of the United States, paras. 242-250.
[13] Appellate Body Report, *US – Softwood Lumber V*, para. 107.
[14] Appellate Body Report, *US – Softwood Lumber V,* para. 108.
[15] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada)*, para. 138.
[16] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.

Body has thus emphasized that there is an "inherent bias" in zeroing,[17] and that "this way of calculating cannot be described as impartial, even-handed or unbiased."[18] As with the other two comparison methodologies, the use of zeroing while applying the "weighted-average-to-transaction" methodology distorts certain facts related to the investigation and contains an inherent bias, making a positive determination of dumping more likely. This is clearly in violation of the "fair comparison" obligation of Article 2.4 of the *Anti-Dumping Agreement*.

11. In conclusion, Norway holds that "dumping" and "margins of dumping" cannot occur at the level of individual transactions. This is in line with consistent findings of the Appellate Body, which has emphasized that the concepts have the same meaning throughout the *Anti-Dumping Agreement*. All intermediate comparison results must be aggregated in order to establish the margin of dumping for the product as a whole and for each individual exporter. Furthermore, zeroing cannot be said to be impartial, even-handed or unbiased. The use of zeroing when applying the exceptional "weighted-average-to-transaction" methodology is hence inconsistent with Articles 2.4.2 and 2.4 of the *Anti-Dumping Agreement*.

Madam Chair, Members of the Panel,

12. This concludes Norway's statement. I thank you for your attention.

[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 135.
[18] Appellate Body Report, *US – Softwood Lumber V (Art. 21.5 – Canada),* para. 142.

ANNEX D-7

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THAILAND

Madam Chair, distinguished Members of the Panel,

1. Thailand appreciates the opportunity to present its view to the Panel in this dispute.

2. In Thailand's view, the use of zeroing is not permitted when applying a comparison methodology of weighted average-to-transaction (W-T) under the second sentence of Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

3. In previous disputes, the Appellate Body has held that whenever an investigating authority uses intermediate comparisons as a step to determine the overall dumping margin for the product, the investigating authority may not, in aggregating the results of those intermediate comparisons, "zero" the results of some of those comparisons.

4. Although the Appellate Body has not yet considered the use of zeroing in the W-T methodology in cases of "targeted dumping" under the second sentence of Article 2.4.2, Thailand submits that the Anti-Dumping Agreement does not permit the use of zeroing in such case. We recall that 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. Allowing the use of zeroing in the W-T methodology under targeted dumping while prohibiting it in all other instances would render the previous interpretations of "fair comparison" with regard to zeroing meaningless.

5. The use of zeroing under any of the methodologies used to determine dumping and margins of dumping cannot be considered "fair" under Article 2.4 of the Anti-Dumping Agreement. In Thailand's view, therefore, the use of zeroing when applying the W-T methodology under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, is inconsistent with the Anti-Dumping Agreement.

6. Thailand submits that the use of the W-T methodology provided for under Article 2.4.2, second sentence, is permitted only in exceptional circumstances, in which two requirements are satisfied: "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods", and "an explanation is provided as to why such differences cannot [apply] the use of a weighted average-to-weighted average or transaction-to-transaction comparison." In this dispute, Thailand will not address the issue of how investigating authorities may identify in a WTO-consistent manner when these two exceptional circumstances exist. We simply request the Panel to reach conclusions on these issues that take into account the interests of both exporting Members and importing Members. We may address these issues in further detail in upcoming disputes in which these issues arise.

7. In conclusion, Thailand respectfully requests the Panel to find that the use of zeroing in the W-T comparison methodology in circumstances of "targeted dumping" under the second sentence of Article 2.4.2 is inconsistent with the Anti-Dumping Agreement.

Madam Chair, distinguished Members of the Panel, thank you for your kind attention.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ARGUMENTS OF TURKEY

I. INTRODUCTION

Mr. Chairman, Distinguished Members of the Panel

1. The Republic of Turkey (hereinafter referred to as Turkey) would like to thank the Panel for the opportunity to share her viewpoint as a Third Party in the current proceedings. Turkey makes this oral submission due to her systemic interest in the correct and coherent interpretation of the Agreement on Implementation of Article VI of GATT 1994 (hereinafter referred to as ADA or Anti-Dumping Agreement).

2. In this context, Turkey has decided not to elaborate on the specific facts presented by the Parties and rather focus on the right legal interpretation of the second sentence of Article 2.4.2 of ADA.

II. INTERPRETATION OF THE SECOND SENTENCE OF ARTICLE 2.4.2

3. Turkey understands that the dispute on the legal boundaries of the second sentence of Article 2.4.2 concentrates on two primary questions: a) What is the legal content of the conditions allowing the investigating authority to use of weighted average normal value - individual export prices comparison (hereinafter referred to as W-T comparison)? b) Does the W-T comparison, *per se*, necessarily lead to zeroing?

4. As regards the first question, Article 2.4.2 stipulates one substantive and one procedural condition. Article 2.4.2 reads as follows:

> 2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions *if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods*, and *if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison*. (emphasis added)

5. In Turkey's understanding, the article, on its face, envisages two conditions[1] rather than three as asserted by the Republic of Korea (hereinafter referred to as Korea). The investigating authority has to a reach a conclusion that a pattern of export prices displaying a significant difference among purchasers, regions or time periods is present. In Turkey's view, every component used in this sub-sentence is legally, logically and grammatically linked to each other. The word "pattern", for instance, cannot be read individually without considering the fact that the "pattern" is established by export prices which significantly differ in terms of purchaser, region or time. In that context, the words reflect the rationale of the drafters if they are construed together.

6. Concerning the substantive condition, Korea underlines that a "pattern", under Article 2.4.2, reflects an aggregated pricing behavior of the exporter which defines the totality of export sales and not individual transactions[2]. The U.S. interprets the word "pattern" in a more contextual manner and underlines that a "pattern" shows a regular and intelligible form or sequence of export prices which significantly differ among purchasers, regions and time periods[3]. In Turkey's view, the

[1] United States' first written submission, para. 52; footnote 74.
[2] Korea's first written submission, para. 86.
[3] United States' first written submission, para. 55.

assessment whether a "pattern" exists requires the evaluation whether single transactions repeat themselves consistently during the investigation period and such repetition form a structure that significantly differ among purchasers, regions and time periods. As a matter of fact, such an evaluation puts weight equally on the transactions itself and the export sales as a whole to pinpoint whether the repeating lines in export sales form a grouping or differing structure. We understand that this form or sequence should be observable and identifiable[4].

7. As explicitly stipulated in the provision, such a pattern should not only differ among purchasers, regions and time periods but that difference must be significant in scale. We are in the same line with the case law that "*significant*" has a meaning of "*notable, important or consequential*"[5]. In light of this definition the investigating authority should have enough discretion to decide what constitutes a notable, important or consequential difference by considering the merits of the investigation and peculiarities of individual export transactions.

8. Turkey does not support the legal interpretation that a "*pattern of significant difference*" should be necessarily an outcome of a specific intent to apply "*targeted dumping*" and that usual commercial practices are perfectly plausible if the differing export prices display a pattern in line with the expected results of these practices[6]. Neither from the reading of Article 2.4.2 nor from the examination of case law it is possible to conclude that the "*usual commercial*" practices are defenses to permit the act of targeted dumping[7].

9. The plain reading of the Article 2.4.2 shows that the W-T comparison acts as an exception and that the investigating authority can resort to the methodology only under certain conditions[8]. As an expected result of the due process requirement, diversion from the general rule requires an explanation on why normal methodologies, stipulated in the first sentence of Article 2.4.2, cannot be used appropriately. Turkey understands that this explanation should be in such a context that it should not deprive the interested parties from using their right of presenting evidences they consider relevant in respect of the question. Thus, the base of the test controlling the adequacy of the explanation should be Article 6.1 of the Anti-Dumping Agreement.

10. Concerning the second question, Turkey prefers not to present any comment on the specifics of the U.S. methodology and on mathematical equivalence argument at this stage of the proceedings.

11. Nevertheless, Turkey highlights her previously underscored viewpoint that the second sentence of Article 2.4.2 operates as an exception to the first sentence part of the Article and that the rules and procedures to be followed differ in terms of legal obligations and burden of explanation.

12. Turkey understands that the W-T comparison methodology was designed to address a specific case, namely targeted dumping. In this framework, it should be assessed carefully whether applying the legal discipline that was devised to mark the boundaries of the normal comparison methodologies of the first sentence of Article 2.4.2 can really fit the exceptional structure of the comparison methodology stipulated in the second half of the Article. As a matter of legal interpretation, Turkey would like to share her view that the application of the legal discipline envisaged for the first two methodologies shown in Article 2.4.2 may erode the effectiveness of the results expected from the W-T comparison methodology which is exceptional in nature and asymmetric in terms of comparison structure.

III. CONCLUSION

13. Mr. Chairman, distinguished Members of the Panel, with these comments, Turkey would like to contribute to the legal debate of the parties in this case, and express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the interpretation of Anti-Dumping Agreement.

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[4] United States' first written submission, para. 73.

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

[6] Korea's first written submission, para. 142

[7] United States' first written submission, para. 86.

[8] *U.S. – Softwood Lumber VI,* Article 21.5 (Panel), para. 5.33.

14. We thank you for your kind attention and remain at your disposal for any question you may have.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ARGUMENTS OF VIET NAM

Madam Chair, distinguished Members of the Panel.

1. Viet Nam appreciates this opportunity to present its views as a third party in this dispute.

2. Viet Nam believes that this dispute is of great systemic importance for the disciplines under the *Agreement on Implementation of Article VI of the GATT 1994* ("Anti-Dumping Agreement") as well as the *General Agreement on Tariffs and Trade 1994* ("GATT 1994). The issues raised in this dispute related to the application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement have, in fact, been raised by Viet Nam in the context of administrative proceedings being conducted against imports from Viet Nam by the U.S. Department of Commerce (USDOC).

3. In this third party oral statement, Viet Nam submits that: (i) the use of "zeroing" by the USDOC under the W-T comparison methodology is "as such" inconsistent with several provisions of the Anti-Dumping Agreement and the GATT 1994; and (ii) the panel should, interpret the conditions for applying the second sentences of Article 2.4.2 of the Anti-Dumping Agreement consistently with the object and purpose of Article 2.4.2 and, in particular, its status as an exception to the preferred rules for the comparison of normal value and export price. This is essential for ensuring that recourse to the so-called third methodology remains an exception to the use of the two "normal" comparison methodologies under the first sentence of Article 2.4.2. This is what the drafters of the Anti-dumping Agreement intended by making the second sentence of Article 2.4.2 an exception.

I. General observations

4. As a general point, Viet Nam wishes to express its concern about the recent proliferation of investigations by the United States Department of Commerce (USDOC) in which the USDOC has used the third comparison methodology. This surge has largely coincided with the United States' decision to cease zeroing under the other two comparison methodologies. This gives cause for great concern. USDOC has found targeted dumping to exist in recent years with increasing frequency. Moreover, under the new "differential pricing" methodology which has replaced the targeted dumping methodology, USDOC now examines *automatically* – without a precipitating request by the applicant – whether the third methodology can be applied. All this undermines the exceptional nature of the second sentence of Article 2.4.2. Furthermore, by applying zeroing when using the third comparison methodology USDOC has created a back-door through which zeroing is re-introduced into common anti-dumping practice, to be used at will by investigating authorities.

5. It is essential that the conditions under which the third methodology may be used be interpreted in a manner that preserves their object and purpose as an exception, as confirmed by the Appellate Body. In contrast to the object and purpose of the second sentence of Article 2.4.2, the United States would have the panel read the conditions for application of the exception as being little more than mere formalities which find prices to differ significantly without reference to significance as a concept based on common sense, statistics, or the object and purpose of the Anti-Dumping Agreement itself. This approach is simply not consistent with how Article 2.4.2 is drafted or with the object and purpose of the provision within the broader context of the object and purpose of the Agreement.

II. "Zeroing" is just as prohibited under the average-to-transaction comparison methodology as it is prohibited under the average-to-average and transaction-to-transaction methodologies

6. Viet Nam disagrees with the United States' reading of the second sentence of Article 2.4.2 as permitting recourse to the "zeroing" methodology. Korea has put forward a convincing set of arguments in this regard.[1] For instance, the United States' reading of Article 2.4.2 presumes that

[1] Korea's First Written Submission, Section IV.

dumping can be found at the level of individual transactions. However, the Appellate Body has consistently ruled that "dumping" can only be determined for the product as a whole, and not for individual transactions.[2]

7. The fact that the second sentence of Article 2.4.2 is an exception[3] does not speak to the issue of zeroing. The second sentence is an exception to the "normally"[4] applicable comparison methodologies. It is exceptional not because it permits zeroing; rather, 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).

8. Viet Nam is also not convinced by the United States' mathematical equivalence argument.[5] The United States' numerical example appears to be somewhat simplistic and basic. Moreover, it would appear to rely on certain assumptions which are questionable under the second sentence of Article 2.4.2. For instance, the example appears to assume that an investigating authority may apply the third methodology to all export transactions, rather than only to transactions within the pattern. However, that is one of the many open questions that Korea has raised[6] and that Viet Nam hopes the panel will address. The United States has not demonstrated whether mathematical equivalence would hold in the absence of that assumption.

9. Moreover, as the Appellate Body has found, even if two methodologies were to yield the same mathematical result *in some cases*, this would not deprive the second sentence of Article 2.4.2 of its useful effect.[7] Rather, mathematical equivalence presupposes that the same result would obtain *in all cases*. The United States has not discharged this burden of proof on this point.

10. Hence, in the light of the text of Article 2.4.2 and the existing extensive case law, Viet Nam considers that the United States' recourse to zeroing under the second sentence of Article 2.4.2 is inconsistent with Articles 2.1, 2.4, 2.4.2, 9.2 and 9.3 of the Anti-Dumping Agreement as well as with Articles VI:1 and VI:2 of the GATT 1994.

III. The United States does not comply with the conditions that govern recourse to the third methodology

11. Viet Nam is concerned about the United States' reading of the various conditions in Article 2.4.2, second sentence, that govern recourse to the exceptional third methodology. These conditions include, among other things, the existence of a "pattern" of prices that "differ significantly among different purchasers, regions or time periods", as well as a meaningful explanation why the two "normally" used comparison methodologies are insufficient to capture such differences.

12. Article 2.4.2 second sentence must be interpreted in a manner that preserves the useful effect of these conditions. These conditions must not be converted into mere formalities that are easily satisfied by an investigating authority in many cases. However, that appears to be precisely what the United States would have the panel do.

13. Both the United States "*Nails II*" and "differential pricing" methodologies would appear to establish an excessively low threshold for the phrases "pattern" and "differ significantly". Korea's first written submission highlights in detail numerous problematic aspects in this regard. Viet Nam did not see an adequate response to these arguments in the United States' submission.

14. For instance, under the "*Nails II*" approach, the United States uses one standard deviation as one of the criteria. Whatever the discretion of an investigating authority, this would appear to be far too low a threshold. Viet Nam would urge the panel to engage in a thorough statistical and quantitative analysis of this point. The "differential pricing" methodology appears even more problematic in this regard, since the United States appears to use only a 0.8 of one standard

[2] See for instance, Appellate Body Report, *US – Continued Zeroing*, para. 283.
[3] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[4] Article 2.4.2 of the *Anti-dumping Agreement*.
[5] United States' First Written Submission, Sections IV.B.5.c and IV.B.5.d.
[6] Korea's First Written Submission, Section V.C.3.
[7] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.

deviation. This lowers the bar even further. It cannot be that numerical thresholds are set so low that they would potentially be satisfied in the vast majority of anti-dumping investigations.

15. These concerns are compounded by several other factors. For instance, USDOC uses *average* export prices per comparison point (e.g. per purchaser), rather than the *actual* prices of individual export transactions. Doing so affects the calculation of the standard deviation and in many cases will make it more likely that a given purchaser, region or time-period will fall below the cut-off points and will be deemed to form a "pattern". Moreover, the use of such computed averages – which are different from the prices of actual export transactions – appears inconsistent with the term "export prices" in Article 2.4.2. Another example is what Korea has identified as the "vertical", "horizontal" and "cross-category" variation practice.[8] Viet Nam shares these concerns expressed by Korea.

16. These aspects of the United States' methodology inappropriately create the possibility that random, relatively minor and commercially entirely commonplace price fluctuations will be characterized as a "pattern" of prices that "differ significantly". This makes it unduly easy to apply the third methodology. This cannot have been the intention of the drafters of the Anti-dumping Agreement or they would not have classified the third methodology as an exception.

17. Also, USDOC considers it entirely irrelevant that lower prices may reflect standard commercial practices, for instance, routine seasonal fluctuations or lower prices to large-volume customers. In Viet Nam's view, contrary to the United States' arguments, such considerations are highly relevant for an effective interpretation of the term "pattern", both in its ordinary meaning and in the context at hand. 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. Viet Nam agrees with Korea's arguments on this point.[9]

18. Finally, Viet Nam is concerned 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. First, the United States fails to provide any explanation with respect to the T-T methodology, contrary to the plain meaning of Article 2.4.2. Second, the explanation that the W-W methodology "conceals" certain price differences is, as Korea correctly argues, merely a description of what any averaging process entails by its very essence. Finally, saying that the W-T methodology with zeroing yields a higher margin than the W-W methodology without zeroing is not an explanation why price differences "cannot be taken into account appropriately" by the W-W 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. Nothing in Article 2.4.2 supports such an interpretation when choosing among the possible methodologies for determining the margins of dumping.

IV. The third methodology, to the extent it may be applied, can only be applied to the transactions constituting the identified pattern

19. Finally, Viet Nam agrees with Korea that, assuming the third methodology can be used, it can only be applied to the transactions found to "differ significantly", that is, within the pattern. The two "normal[]" methodologies should be applied to transactions outside the pattern.

V. Conclusion

20. Madam Chair, distinguished Members of the Panel,

21. This is the first time that a panel will rule on the consistency of a Member's actions with the second sentence of Article 2.4.2. Your ruling will set an important precedent for the interpretation and the application of this provision. Viet Nam recognizes that, like many provisions under the Anti-dumping Agreement, Article 2.4.2 second sentence leaves a margin of discretion to the

[8] See Korea's First Written Submission, paras. 217-233.
[9] Korea's First Written Submission, paras. 142-144.

investigating authorities in how to operationalize its various conditions. However, this discretion cannot entail recourse to zeroing, nor can it justify reducing the conditions in Article 2.4.2 to formalities or thresholds that can easily be satisfied potentially in any investigation.

22. For the reasons explained above, Viet Nam would like to urge the panel to rule that the United States' "*Nails II*" methodology (as such and as applied in the *Washers* investigation) and the "differential pricing" methodology (as such); as well as other aspects of the United States' approach to the third methodology, are inconsistent with Articles 2.1 2.4, 2.4.2, 9.2 and 9.3 of the *Anti-dumping Agreement* as well as Articles VI:1 and VI:2 of the GATT 1994.

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