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UNITED STATES – ANTIDUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA

AB-2016-2

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS464/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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NOTICES OF APPEAL AND OTHER APPEAL

ANNEX A-1

UNITED STATES' NOTICE OF APPEAL*

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States files this notice of appeal to the Appellate Body on certain issues of law covered in the Report of the Panel on *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464/R & WT/DS464/R/Add.1) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal interpretation of the "pattern" for purposes of 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* (the "AD Agreement").[1] The Panel found that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period) while other export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. This finding is in error and is based on erroneous findings on issues of law and legal interpretations.[2] The United States respectfully requests that the Appellate Body reverse or modify the Panel's findings.

2. The United States seeks review of the Panel's findings relating to the "scope of application"[3] of the alternative, average-to-transaction comparison methodology. The Panel found that the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement "should only be applied to transactions that constitute the 'pattern of export prices which differ significantly among different purchasers, regions or time periods'."[4] Consequently, the Panel found that the U.S. Department of Commerce ("USDOC") acted inconsistently with the second sentence of Article 2.4.2 of the AD Agreement by applying the alternative, average-to-transaction comparison methodology to all export transactions in the washers anti-dumping investigation.[5] The Panel also found that the USDOC's differential pricing analysis is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement, "as such," because it applies the alternative, average-to-transaction comparison methodology to all export transactions under certain circumstances.[6] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations.[7] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

3. The United States seeks review of the Panel's findings relating to the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement.[8] The Panel found that "the USDOC's use of zeroing when applying the [average-to-transaction] comparison methodology is 'as such' inconsistent with the second sentence of Article 2.4.2," and that "the USDOC acted inconsistently with the second sentence of Article 2.4.2 by using zeroing when applying the [average-to-transaction] comparison methodology in the *Washers* anti-dumping investigation."[9] Consequently, the Panel also found that "the use of zeroing in the context of the [average-to-transaction] comparison methodology is 'as such' inconsistent with Article 2.4" of the

* This Notice, dated 19 April 2016, was circulated to Members as document WT/DS464/7.

[1] See, e.g., Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191, 8.1.a.i, 8.1.a.vi, 8.1.a.ix, and 8.1.a.xii-xvi. As with other findings reflected throughout the Panel Report, this list of the paragraphs in the Panel Report reflecting this legal error is indicative.

[2] See, e.g., Panel Report, paras. 7.23-24, 7.27-29, 7.45-46, 7.119.c, 7.141-142, 7.144, 7.154-157, 7.160-163, 7.187-191.

[3] Panel Report, para. 7.11.

[4] See, e.g., Panel Report, para. 7.29.

[5] See, e.g., Panel Report, paras. 7.29, 8.1.a.i.

[6] See, e.g., Panel Report, paras. 7.119, 8.1.a.vi.

[7] See, e.g., Panel Report, paras. 7.21-7.29.

[8] See Panel Report, paras. 7.172-7.209.

[9] See, e.g., Panel Report, paras. 7.192, 8.1.a.xii, 8.1.a.xiv.

AD Agreement, "the USDOC acted inconsistently with Article 2.4 by using zeroing in the *Washers* anti-dumping investigation,"[10] and "the use of zeroing by the USDOC when applying the [average-to-transaction] comparison methodology in administrative reviews is inconsistent 'as such' with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994."[11] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations, including an erroneous interpretation and application of the phrase "individual export transactions" in the second sentence of Article 2.4.2 of the AD Agreement.[12] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

4. The United States seeks review of the Panel's finding that the USDOC's differential pricing analysis "is inconsistent 'as such' with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'."[13] These findings by the Panel are in error and are based on erroneous findings on issues of law and legal interpretations, including an erroneous interpretation of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement.[14] The United States respectfully requests that the Appellate Body reverse the Panel's findings.

[10] See, e.g., Panel Report, paras. 7.206, 8.1.a.xiii, 8.1.a.xv.
[11] See, e.g., Panel Report, paras. 7.208, 8.1.a.xvi.
[12] See, e.g., Panel Report, paras. 7.187-7.193, 7.206-7.208.
[13] See, e.g., Panel Report, paras. 7.143, 7.147, 8.1.a.ix.
[14] See, e.g., Panel Report, paras. 7.138-7.147.

ANNEX A-2

KOREA'S NOTICE OF OTHER APPEAL*

1. Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6, 16 August 2010) ("Working Procedures"), Korea hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Report in *United States — Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* (WT/DS464/R) ("Panel Report").

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures, Korea files this Notice of Appeal together with its Other Appellant Submission with the Appellate Body Secretariat.

3. Pursuant to Rule 23(2)(c)(ii) of the Working Procedures, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Korea's ability to rely on other paragraphs of the Panel Report in its appeal.

I REVIEW OF THE PANEL'S FINDINGS UNDER THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994.

4. Korea seeks review by the Appellate Body of the Panel's interpretation of Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement as they relate to the proper way to combined the two subsets of intermediate results created by the application of the exceptional W-T comparison method in the second sentence of Article 2.4.2.[1] In particular, the Panel erred in finding that:

- The intent of the second sentence of Article 2.4.2 somehow creates an exception to the fundamental principles governing the existence of "dumping" and a "margin of dumping".[2]
- Intermediate comparison results could somehow constitute "dumping" without including the prices of all export transactions in the overall assessment.[3]
- The authority can properly find a "margin of dumping" based on a numerator consisting only some export transactions from the subset using the W-T comparison method, as long as the denominator includes all export transactions.[4]
- The need to "unmask" so-called "targeted dumping" somehow justifies departure from the fundamental principles governing the existence of "dumping" and a "margin of dumping".[5]
- Without these exceptions to the fundamental principles there would be mathematical equivalence in all cases, and that equivalence could not be eliminated by changing the assumptions behind the analysis being done.[6]
- Such disregarding of offsets does not inflate the margin of dumping contrary to Article 2.4.[7]

5. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.167, 7.169, 8.1(a)(x) and 8.1(a)(xi), that the authority may disregard offsets from the subset based on the normal comparison methods when combining those results with the subset based on the exceptional W-T comparison method. As part of this review, Korea also requests the Appellate Body to review paragraphs 7.26, 7.27, 7.162, 7.166, and any other

* This Notice, dated 25 April 2016, was circulated to Members as document WT/DS464/8.

[1] Panel Report, paras. 7.154-7.167, 7.169.
[2] Panel Report, paras. 7.155, 7.156, 7.157, 7.160.
[3] Panel Report, paras. 7.154, 7.156, 7.157, 7.160.
[4] Panel Report, paras. 7.157, 7.160.
[5] Panel Report, paras. 7.26, 7.27, 7.154, 7.162.
[6] Panel Report, paras. 7.164, 7.165, 7.166.
[7] Panel Report, para. 7.169.

discussions that suggest so-called "targeted dumping" can exist among the intermediate comparisons the authority may be conducting, before the authority has properly considered and taken into account all export transactions for the product as a whole. Korea further requests that the Appellate Body complete the analysis and find that (1) the fundamental principles for determining "dumping" and "margin of dumping" also apply to the second sentence of Article 2.4.2, and that authorities cannot deny offsets when combining the subsets of intermediate comparisons created by application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement; and (2) denying such offsets inflates the "margin of dumping" and is thus contrary to the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement.

6. Korea seeks review by the Appellate Body of the Panel's interpretation of the pattern clause of the second sentence of Article 2.4.2 as not requiring the authorities to consider qualitative factors when finding a "pattern" of export prices that "differ significantly.[8] In particular, the Panel erred in finding that:

- Korea had only challenged the failure to address the "reasons" for export price differences, and had not challenged more broadly the failure to address qualitative factors and the factual context more generally.[9]

- The second sentence did not require the authorities to consider the reasons for export price differences as part of properly finding that a "pattern" actually existed,[10] or that the differences could be considered "significant".[11]

7. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.52, 7.119(a), 8.1(a)(ii) and 8.1(a)(v), that the authorities need not consider qualitative factors as part of making a proper finding of export prices that "differ significantly" and constitute a "pattern". As part of this review, Korea also requests the Appellate Body to review paragraphs 7.72, 7.73, 7.76, and any other discussions that suggest "targeted dumping" can exist among the intermediate comparisons the authority may be conducting, before the authority has properly considered and taken into account all export transactions for the product as a whole. Korea further requests that the Appellate Body complete the analysis and find that the authorities must consider both quantitative and qualitative factors when finding a "pattern" of export prices that "differ significantly".

8. Korea seeks review by the Appellate Body of the Panel's interpretation of the explanation clause of the second sentence of Article 2.4.2 as not requiring the authorities to explain why the normal T-T comparison method cannot take into account the pattern of export price differences.[12] In particular, the Panel erred in finding that:

- The second sentence of Article 2.4.2 does not require the authorities to consider both of the normal comparison methods – both the W-W comparison method and the T-T comparison method -- before turning to the exceptional W-T comparison method.[13]

- Somehow the burden of considering the T-T comparison justifies ignoring the express requirement that the authority consider this option before turning to the exceptional W-T comparison method.[14]

9. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.81, 7.119(b), 8.1(a)(iv) and 8.1(a)(viii), that the authorities need not explain why the normal T-T comparison method cannot take into account export price differences. Korea further requests that the Appellate Body complete the analysis and find that the authorities must in every case consider both the normal comparison method – both W-W and T-T – before resorting to the exceptional W-T comparison method.

[8] Panel Report, paras. 7.44- 7.52.
[9] Panel Report, paras. 7.33, 7.48, 7.49.
[10] Panel Report, paras. 7.46, 7.47.
[11] Panel Report, paras. 7.48, 7.49.
[12] Panel Report, paras. 7.78-7.81.
[13] Panel Report, paras. 7.79, 7.80.
[14] Panel Report, para. 7.80.

II REVIEW OF THE PANEL'S FINDINGS UNDER THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

10. Korea seeks review by the Appellate Body of the Panel's findings under Article 2.2 of the SCM Agreement as they relate to the USDOC's determination that RSTA Article 26 tax credits are regionally specific.[15]

11. The Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, because it failed to review the USDOC's determination and to determine whether the USDOC's conclusion on regional specificity was reasoned and adequate and based on positive evidence.

12. The Panel misinterpreted and misapplied Article 2.2 in finding that Korea failed to establish that the USDOC's determination of regional specificity is inconsistent with that provision. The Panel erred, *inter alia*, in finding that:

- Article 2.2 of the SCM Agreement covers all measures that include "considerations regarding geographic location" or that "encourage particular enterprises to direct their resources to certain geographic locations".[16]
- "the Article 26 subsidy is contingent on an enterprise becoming 'located within' a designated geographical region".[17]
- "[w]e are not persuaded that the application of Article 2.2 should hinge on the distinction drawn by Korea between an 'enterprise' (as defined by Korea) and the 'facilities' of such an enterprise".[18]
- "an 'industry or group of enterprises or industries' would never meet the definition of 'enterprise' proposed by Korea, because such entities are not companies or businesses with legal personality. The fact that these entities are nevertheless explicitly deemed to constitute 'certain enterprises' by Article 2.1 of the SCM Agreement must mean that Korea's interpretation of the term 'enterprise' is overly restrictive".[19]
- "the designation of *any* geographical region – no matter how small or how large – would suffice to trigger the application of Article 2.2".[20]
- The geographical region need not be affirmatively identified, but rather, "might also be accomplished through less direct means that nevertheless make the region known".[21]
- "Article 23 of the RSTA Enforcement Decree effectively designates the geographical region in which the relevant investments will be eligible for subsidization".[22]
- The USDOC's determination that RSTA Article 26 tax credits are regionally specific is not inconsistent with Article 2.2 despite not being based on positive evidence or a reasoned and adequate explanation.[23]

13. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.289 and 8.1(b)(iii), that Korea failed to establish that the USDOC's determination of regional specificity in respect of the RSTA Article 26 tax credit scheme is inconsistent with Article 2.2 of the SCM Agreement. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article 2.2 of the SCM Agreement in finding that the RSTA Article 26 tax credit scheme is regionally specific.

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[15] Panel Report, paras. 7.261, 7.266-7.274, 7.279-7.283, 7.286-7.289.
[16] Panel Report, para. 7.273.
[17] Panel Report, para. 7.273.
[18] Panel Report, para. 7.267.
[19] Panel Report, para. 7.268.
[20] Panel Report, para. 7.282. (original emphasis)
[21] Panel Report, para. 7.280.
[22] Panel Report, para. 7.280.
[23] Panel Report, paras. 7.289 and 8.1(b)(iii).

14. Korea seeks review by the Appellate Body of the Panel's findings under Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement as they relate to the USDOC's determination that Samsung failed to meet its burden to provide evidence that "tied" the tax credits that it received under RSTA Article 10(1)(3) and RSTA Article 26 to its development, production, and sale of the large residential washers that were the subject of the USDOC's investigation.[24]

15. The Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, in finding that the "tax credit subsidies are not R&D subsidies".[25]

16. The Panel erred in the interpretation and application of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement in finding, *inter alia*, that:

- The tax credits that Korea bestowed under Article 10(1)(3) and Article 26 were not tied to any particular product.[26]
- As a result, the USDOC was justified in allocating the tax credit subsidies across all products and not just to digital appliances, including large residential washers.[27]
- The relevant subsidies were not R&D subsidies because they were awarded after the underlying R&D activities had been undertaken.[28]
- The benefits that Samsung received as tax credits constituted revenue foregone or not collected, which is equivalent to cash that Samsung could keep in its accounts and/or spend on any product.[29]
- Samsung's discretion regarding the use of the cash resulting from the tax credit subsidies justified the USDOC's treatment of those subsidies as "untied".[30]
- Since the benefits that arose from the tax credit subsidies could be used in any way, the USDOC was not required to find that those subsidies were tied to the production of the products for which the R&D activity was undertaken.[31]
- The fact that Samsung could identify the precise R&D activities that benefited the production of the products produced in its Digital Appliance business unit was irrelevant to the issue of whether Samsung was able to tie its tax credits to those products.[32]
- The USDOC's finding in the contemporaneous antidumping investigation of large residential washers that it could directly tie R&D activity performed by Samsung's Digital Appliance business unit to the products produced by that unit was irrelevant.[33]

17. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.306 and 8.1(b)(iv), that Korea failed to establish that the USDOC's failure to tie the RSTA Article 10(1)(3) and RSTA Article 26 tax credit subsidies to Digital Appliance products is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 194 when it failed to find that Samsung submitted positive evidence that tied the tax credits attributable to Samsung's Digital Appliance business unit to the products that were produced by that unit.

[24] Panel Report, paras. 7.300-7.306.
[25] Panel Report, para. 7.302.
[26] Panel Report, para. 7.300.
[27] Panel Report, para. 7.302.
[28] Panel Report, para. 7.302.
[29] Panel Report, para. 7.302.
[30] Panel Report, para. 7.302.
[31] Panel Report, para. 7.303.
[32] Panel Report, para. 7.303.
[33] Panel Report, para. 7.304.

18. Korea seeks review by the Appellate Body of the Panel's interpretation and application of Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement as it relates to the USDOC's determination that it should use the sales value of the products that Samsung produced and sold in Korea, rather than the sales value of the products that Samsung produced and sold worldwide, as the denominator in the formula that the USDOC used to calculate the *ad valorem* subsidy margin for the tax credits that Samsung received under RSTA Article 10(1)(3).[34] The Panel erred, inter alia, in finding that:

- The "real issue" was not the correctness of the USDOC's allocation of the benefit conferred by the RSTA Article 10(1)(3) tax credit subsidies based on the effects of the R&D activities that gave rise to the tax credits.[35]

- The benefit of the tax credit subsidy was the "tax credit cash" that Samsung received, and that benefit was not tied to the R&D activities that gave rise to the tax credits since Samsung was free to dispose of the cash as it saw fit.[36]

- The positive effects of the R&D activities on Samsung's overseas production activities do not constitute a "benefit" within the meaning of Article 1.1(b) of the SCM Agreement.[37]

- The USDOC was entitled to rely on its presumption that Korea granted the Article 10(1)(3) tax credits to benefit only domestic production.[38]

- The USDOC was entitled to conclude that neither Samsung nor Korea had rebutted that presumption.[39]

19. Accordingly, Korea requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.319 and 8.1(b)(v), that Korea failed to establish that the denominator used to calculate the *ad valorem* margin attributable to RSTA Article 10(1)(3) tax credits should consist solely of the sales value of products produced by Samsung in Korea. Korea further requests that the Appellate Body complete the analysis and find that the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement by failing to use as the denominator the value of Samsung's worldwide product sales, rather than its domestic sales.

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[34] Panel Report, paras. 7.316-7.319.
[35] Panel Report, para. 7.317.
[36] Panel Report, para. 7.317.
[37] Panel Report, para. 7.317.
[38] Panel Report, para. 7.318.
[39] Panel Report, para. 7.318.

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. The United States appeals certain of the Panel's legal findings and conclusions related to the interpretation and application of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and certain of the Panel's findings that U.S. measures challenged by Korea in this dispute are inconsistent with various provisions of the AD Agreement and the GATT 1994.

2. As demonstrated below, the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the AD Agreement by failing to interpret that provision in accordance with the customary rules of interpretation of public international law, as required by Articles 3.2 and 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

3. Specifically, section II.B demonstrates that the Panel erred in its interpretation of the relevant "pattern" in the second sentence of Article 2.4.2 of the AD Agreement. The Panel concluded that the relevant "pattern" for the purpose of the second sentence of Article 2.4.2 comprises only low-priced export transactions to a particular "target" (be that a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are "non-pattern" transactions. This conclusion does not follow from a proper application of the customary rules of interpretation of public international law.

4. Properly interpreted, the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement, which refers to "a pattern of export prices which differ significantly among different purchasers, regions or time periods," requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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. Any such "pattern" necessarily would be a pattern of export prices that would transcend multiple purchasers, regions, or time periods, and necessarily would include both lower and higher export prices that "differ significantly" from each other.

5. Section II.C demonstrates that the Panel's findings regarding the scope of application of the alternative, average-to-transaction comparison methodology are erroneous. The Panel erred by failing to undertake a proper analysis pursuant to the customary rules of interpretation, by engaging in circular logic, and by premising its findings on its own erroneous interpretation of the relevant "pattern" under the second sentence of Article 2.4.2 of the AD Agreement.

6. Section II.D demonstrates that the Panel erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with provisions of the AD Agreement and the GATT 1994. The Panel erred by failing to properly interpret the second sentence of Article 2.4.2 of the AD Agreement in accordance with the customary rules of interpretation of public international law.

7. The Panel engaged in virtually no analysis whatsoever of the text of what it called the "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement[2]. Instead, the

[1] Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 1,297 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 32,621 words (including footnotes).

[2] The "methodology clause" of the second sentence of Article 2.4.2 of the AD Agreement provides that: "A normal value established on a weighted average basis may be compared to prices of individual export transactions…." *See United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Report of the Panel, WT/DS464/R (March 11, 2016) ("Panel Report"), para. 7.9.

Panel based its findings concerning the operation of the alternative, average-to-transaction comparison methodology and zeroing on its flawed understanding of the relevant "pattern" and its own misreading of the Appellate Body's previous findings concerning zeroing.

8. A proper 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 conclusion follows from a proper application of the customary rules of interpretation of public international law. It also accords with and is the logical extension of the Appellate Body's findings relating to zeroing in previous disputes, and it can be confirmed by recourse to the negotiating history of Article 2.4.2 of the AD Agreement.

9. The Panel also erred in finding that the use of zeroing in connection with the application of the alternative, average-to-transaction comparison methodology is inconsistent with Articles 2.4 and 9.3 of the AD Agreement, and Article VI:2 of the GATT 1994. These findings are dependent on the Panel's erroneous findings under Article 2.4.2 of the AD Agreement, and should be reversed for the same reasons.

10. Section II.E demonstrates that the Panel erred in finding that a differential pricing analysis undertaken by the U.S. Department of Commerce ("USDOC") is inconsistent, "as such," with the second sentence of Article 2.4.2 of the AD Agreement. The Panel's finding was premised on its understanding of the relevant "pattern," but the Panel's understanding of the relevant "pattern" is erroneous and not consistent with a proper interpretation of the second sentence of Article 2.4.2 of the AD Agreement.

11. Additionally, the USDOC's differential pricing analysis is not inconsistent with the "pattern clause" of the second sentence of Article 2.4.2, when that clause is properly interpreted in accordance with the customary rules of interpretation. The "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement requires an investigating authority to undertake a rigorous, holistic examination of the data in order to find 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. The USDOC has done this when it has applied a differential pricing analysis in antidumping proceedings.

12. A differential pricing analysis seeks to identify a "pattern," but does not require a specific "target." 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." Investigating authorities might take other approaches to identify a "pattern" that also are consistent with the terms of the "pattern clause."

13. In contrast to a "targeted dumping approach," a differential pricing analysis looks 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 of the AD Agreement, 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.

14. A differential pricing analysis does not aggregate random and unrelated price variations. A differential pricing analysis considers the pricing behavior of the exporter in the United States market as a whole. Nothing in the text of the "pattern clause" of the second sentence of Article 2.4.2 of the AD Agreement suggests that the significant export price differences among purchasers, 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 the exporter's pricing behavior exhibits "a pattern of export prices which differ significantly among different purchasers, regions or time periods."

ANNEX B-2

EXECUTIVE SUMMARY OF KOREA'S OTHER APPELLANT'S SUBMISSION[1]

A. The Panel Erred by Allowing Authorities to Disregard Certain Results When Combining the Two Subsets Created Pursuant to the Second Sentence of Article 2.4.2

1. The Appellate Body has provided repeated guidance for more than a decade about the meaning of "dumping" and "margin of dumping". The final overall combination based on all export transactions must show a net result that meets the definition of "dumping" to establish a single "margin of dumping". Individual low prices can never be "dumped" because the concept "dumping" simply does not exist at the level of individual export prices or even partial combinations of those prices. Any calculations from some of the export prices, even if they lower, are just intermediate calculations. These principles do not depend on the comparison method being used.

2. As its most fundamental error, the Panel started its interpretative analysis with "the intent of the comparison methodology established in the second sentence of Article 2.4.2". Although the "object and purpose" represents one element of a proper analysis, the Panel should have first fully considered the text and context of that provision. The Panel did not do so, and therefore reached the wrong conclusions.

3. By its express terms, the second sentence allows investigating authorities to use a particular type of comparison method. Specifically, when certain conditions have been met, the authorities may compare "a normal value established on a weighted-average basis" to "prices of individual export transactions" when establishing the existence of the "margin of dumping" for the investigated exporter for the product under consideration. Beyond allowing an exception to the normal comparison methods, however, neither the second sentence of Article 2.4.2 nor Article 2.4.2 more generally creates any exception to the basic concepts of "dumping" and "margin of dumping".

4. Yet notwithstanding the narrow focus of the text itself, the Panel incorrectly found that the second sentence created a new "method of calculating the margin of dumping". This purported "new" method to determine the "margin of dumping" has no textual or contextual basis. Textually, the second sentence in no way suggests a special understanding of these key concepts. The context provided by Article 2.4.2 overall confirms that the second sentence does not create any new understanding of "dumping". These contextual arguments have been reviewed exhaustively by the Appellate Body in numerous prior disputes, making the Panel's failure to discuss the text or context in any detail quite surprising. Finally, the object and purpose of the second sentence is to address situations where certain purchasers, regions, or time periods are singled out for different (presumably lower) export prices. Such pricing strategies can only be identified and properly understood with reference to the overall pricing behaviour of the exporter, and cannot occur at the transaction-specific level or for any subset of exports.

5. The Panel repeatedly confused the distinction between intermediate comparisons for some export prices and a final conclusion of "dumping" based on all export prices. This conceptual error permeated the Panel's analysis, and it led the Panel repeatedly to consider something to be "dumping" or "evidence of dumping" when that intermediate stage in the analysis could not possibly yield a proper conclusion of "dumping".

6. Moreover, it is not enough to include all the export transactions in the denominator. There is no "net amount of dumping" within the subset using the W-T comparison method, because "dumping" cannot be found until all export transactions have been taken into account. Export prices within the subset using the W-T comparison method cannot be "dumping". Thus, a numerator based only on the export transactions within the subset applying the W-T comparison method does not establish a proper amount of "dumping".

[1] Pursuant to the Appellate Body guidelines for executive summaries, Korea confirms that this executive summary contains a total of 4,616 words (including footnotes) and that the overall other appellant submission (other than the executive summary) contains a total of 49,894 words (including footnotes).

7. The Panel also seems to have believed that prohibiting zeroing within each of the two subsets meant that all comparisons would be considered equally. But prohibiting zeroing within each subset ensures only that the net amounts emerging from each subset reflect all of the transactions within each subset. Those amounts still have to be combined. By setting any negative amount from the subset using the normal comparison methods equal to zero (and denying any offsets for this negative amount), the Panel's approach improperly acts as if the export prices in that subset were lower than they really were. Each export price should be given the same full effect in either subset, regardless of the comparison method applied to that subset.

8. The Panel also showed a fundamental misconception about the relationship between any "dumping" and the associated "margin of dumping". The numerator and denominator must refer to the same total universe of export sales. The Panel's approach ignores the interrelationship of the amount of "dumping" and the "margin of dumping". This connection is expressed most directly in Article VI:2 of the GATT and the Anti-Dumping Agreement, where the "amount" of the duty imposed to offset "dumping" is limited to no more than the "full margin of dumping" (Article 9.1) and "shall not exceed the margin of dumping" (Article 9.3). The same connection can also be seen in Article 7.2 regarding provisional measures. Article VI:1 of the GATT and Article 3 also require a connection between "dumping" or the "dumped imports" and the material injury to the domestic industry. The Panel's approach also disregards prior Appellate Body decisions that require both the numerator and denominator to reflect all comparison results.

9. A major part of the Panel's rationale was its belief that the purpose of the second sentence was to allow authorities to "unmask" so-called "targeted dumping". But the Panel misunderstood the purpose of the second sentence, and then used this misunderstanding to disregard the consistent Appellate Body jurisprudence about the concepts "dumping" and "margin of dumping".

10. One must look beyond short-hand phrases and look at the actual provision and its purpose more closely. The purpose that most closely links the text and context of the second sentence is simply to allow the authority to undertake the more careful examination of individual export prices that the W-T comparison method allows. The purpose to "unmask" individual export prices, however, is very different from the purpose to "unmask" so-called "targeted dumping". The purpose to "unmask" certain export prices is fully consistent with the Appellate Body's jurisprudence on "dumping" and "margin of dumping". Certain export prices are "unmasked" as an intermediate stage in the analysis. At this point, there is no conclusion about "dumping" nor can there be any such conclusion. A conclusion of "dumping" can never be reached based solely on a subset of prices. The purpose of the second sentence has been achieved once this more detailed examination has taken place at this intermediate stage.

11. The Panel thought this purpose to "unmask targeted dumping" was consistent with the negotiating history. But the Panel's citation to a single document from the negotiating history that referenced possible "masking" of "selective dumping", is a very limited piece of evidence. Moreover, the Appellate Body has already considered this legislative history, and still confirmed that there cannot be "selective dumping" based on a subset of export sales.

12. Although the phrase "targeted dumping" has been used occasionally, the phrase "unmask targeted dumping" has appeared much less frequently. This phrase has appeared in only two Appellate Body decisions, and the context in which the Appellate Body used this phrase was to note the need to limit the exceptional W-T comparison method to those transactions that met the conditions for the exception. The Appellate Body used this phrase to clarify the scope of the second sentence, not to create a new concept of "dumping". Moreover, the Appellate Body decisions on zeroing make quite clear that by "unmask" the Appellate Body certainly did not mean that zeroing (the denial of offsets) would be allowed to "unmask" some export transactions as having been "dumped" without considering all export transactions.

13. The Panel mistakenly found "mathematic equivalence". Korea notes that this argument of "mathematical equivalence" has been rejected by the Appellate Body four times, finding that even if "under certain circumstances" or "under a specific set of assumptions" the results are equivalent, such a situation does not render a provision inutile. In the face of the Appellate Body's repeated rejection of this argument, the Panel found mathematical equivalence anyway without any support for this conclusion. The Panel's bald assertion of mathematical equivalence should be rejected for several reasons. First, the Panel illogically dismissed Korea's arguments that changing the basis of normal value or changing the method of adjustments would avoid mathematical equivalence.

Second, the Panel dismissed Korea's arguments about the "assumptions" being made by the authority, including assumptions about normal value, even though they are essentially the same arguments that previously led the Appellate Body to reject mathematical equivalence in the past. Third, the Panel found mathematical equivalence even though Korea had submitted extensive evidence that the Panel did not discuss at all. Finally, there is nothing different about the situation of combining the results from two subsets. The prior arguments before the Appellate Body also addressed combining two separate results, and rejected mathematical equivalence in that context.

14. Beyond its findings under the second sentence of Article 2.4.2, the Panel also ruled against Korea's separate claim that systemic disregarding was inconsistent with Article 2.4 of the Anti-Dumping Agreement. The Panel's reasoning, however, simply repeats the legal errors identified above with regard to the Panel's interpretation of the second sentence of Article 2.4.2 that "dumping" can exist within a subset of the export sales. Therefore for the reasons set forth in more detail above, we ask the Appellate Body also to reverse these Panel findings regarding Article 2.4. Broad findings under Article 2.4 – like those made in US – Zeroing (Japan) – confirm the fundamental principles that make any denial of offsets WTO inconsistent because doing so means finding "dumping" without considering all of the export transactions fairly and equally for the product as a whole.

B. The Panel Erred by Finding that the Pattern Clause Did Not Require Authorities to Consider Qualitative Factors

15. The Panel's did not interpret the terms "significantly" and "pattern" in the context of the Anti-Dumping Agreement as a whole. This error has two aspects. First, the Panel failed to consider these terms in the context of how these terms are used elsewhere. The Panel considered the ordinary meaning of these terms, but then never considered that the Anti-Dumping Agreement as a whole uses the term "significant" precisely when it wishes to convey a broader meaning than just "large". Whether the text of the second sentence of Article 2.4.2 uses the term "reasons" misses the point. Article 2.4.2 does not merely require that export prices differ; it requires that they differ "significantly". The Panel finding that the term "significantly" can be analyzed in purely quantitative terms directly contradicts the statement of the Appellate Body in US – Large Civil Aircraft (2nd complaint) that the significance of lost sales has both "quantitative and qualitative dimensions."

16. Second, the Panel also did not read these two terms in the context of the explanation clause. The Panel seemed to think that because it found a textual basis in the explanation clause to consider qualitative factors, it could reject any such textual basis in the pattern clause. But this approach reads these two parts of the second sentence in isolation, instead of reading them together as context for each other. Such qualitative considerations – such as falling costs – should be considered both as part of determining whether price differences are "significant" and as part of determining whether W-W comparisons can "take into account appropriately" any difference. The Panel's discussion of the explanation clause seems to recognize this interrelationship, but confused the distinction between export prices differences that are "significant" as well as constituting a "pattern" and so-called "targeted dumping". The Panel improperly grounded its reading of the explanation clause in its flawed understanding of the object and purpose of "unmasking targeted dumping".

C. The Panel Erred by Finding that Authorities Need Not Address the T-T Comparison Method When Explaining the Need to Depart From the Normal Comparison Methods

17. The Panel ignored the express obligation to address both the normal comparison methods before turning to the exceptional comparison method. The absence of any explanation ever as to why the T-T comparison methodology cannot take into account appropriately the pattern of significantly different prices is contrary to the requirement in the second sentence of Article 2.4.2 that such an explanation be given.

18. The Panel misinterpreted the terms "a" and "or" in the context of the second sentence. The use of the term "a" reflects the fact that in the end the authority will be using "a" single comparison method. Similarly, the use of the term "or" reflects this choice between two alternative normal comparison methods. The use of the singular article and disjunctive conjunction simply recognizes that there are two alternative normal comparison methods that must be considered.

The text explicitly provides that if the authority seeks to depart from the use of one of those two normal methods, then the authority must explain why it cannot use either of the normal methods.

19. The Panel incorrectly seemed to think it would be burdensome and serve no purpose to require the authority to address the T-T comparison method if the authority had already selected the W-W comparison method. But the text does not specify the degree of explanation required or create any burden. Nor does this additional explanation fail to serve any purpose. W-W and T-T comparisons may be symmetrical, but they are not the same. Explaining why one works does not automatically explain why the other will not work. The purpose of the second sentence is to allow a more detailed examination of individual export prices. This purpose relates directly to the choice among the different comparison methods. The more detailed examination ensure a more thorough consideration of the three possible comparisons methods under the second sentence, and thus helps ensure that the choice is in fact "appropriate".

D. The Panel Erred in Finding that RSTA Article 26 Subsidies are a Regionally Specific Subsidy

20. RSTA Article 26 tax credits were available to all Korean corporations, wherever located that made investments anywhere outside the "overcrowding control region" of the Seoul Metropolitan Area, which comprised just 2% of Korea's land mass.

21. First, the Panel erred because it never reviewed the USDOC's determination on regional specificity in order to apply its interpretation of Article 2.2, or determine whether the USDOC's conclusion was reasoned and adequate and based on positive evidence. Thus, the Panel failed to comply with its duty, under Article 11 of the DSU, to make an objective assessment of the matter.

22. Second, the Panel based its finding on an incorrect interpretation and application of Article 2.2. RSTA Article 26 subsidies do not encourage localization of the enterprises in a designated geographical region. Instead, they discourage enterprises from making investments in a small area that constitutes 2% of Korea's territory. Because the area in which investments are discouraged is so small, and the area in which investments may be made is so large (98% of the territorial jurisdiction of the granting authority) the subsidies cannot be said to be "limited" in any meaningful way.

23. Even assuming that the stipulation as to the investments made by recipient firms constituted a limitation on the location of the enterprises, the area in which investments must be made – 98% of Korea's land mass – does not constitute a "designated geographical region". The area is too unbounded; it is neither sufficiently demarcated nor cohesive enough, and there is almost total overlap with the jurisdiction of the granting authority. In such circumstances, the area in which investments may be made is not "a designated geographical region" within the meaning of Article 2.2.

24. Concluding that such subsidies are narrowly targeted, and therefore specific, is putting form over substance, and ignoring the intent of Article 2 as a whole. The reasons provided by the Panel to reject Korea's arguments are unpersuasive and did not provide a valid basis to dismiss Korea's claim.

25. Overcrowding and urban sprawl are not only a serious problem for Korea, they constitute serious challenges for many developed and developing countries. Subsidies provide an efficient and effective policy tool to mitigate this problem, while introducing minimal trade distortions. Article 2.2 does not address the kind of subsidies provided under RSTA Article 26 and thus preserves Members' ability to use such subsidies to mitigate overcrowding and urban sprawl. The Panel's overly expansive interpretation improperly constrains Members' ability to take corrective measures.

26. Korea therefore requests that the Appellate Body reverse the Panel's finding. Korea additionally requests that the Appellate Body complete the analysis and find that the USDOC's determination that RSTA Article 26 subsidies are specific is inconsistent with Article 2.2.

E. The Panel Erred in Finding that Samsung Failed to Tie the Subsidies that it Received Under RSTA Article 10(1)(3) and RSTA Article 26 that Were Attributable to Investments Made by its Digital Appliance Business Unit to the Products Made by that Unit

27. Samsung, a large and highly diversified Korean company, utilized two provisions of Korean law that provided tax credit subsidies for making specified investments in R&D activities and certain types of business assets. Samsung organized its corporate activities into business units. One such unit was the Digital Appliance business unit, which produced large residential washers, refrigerators, and other types of consumer products. This unit maintained detailed records of the investments that it made that qualified for the two tax credit programs.

28. During the course of the USDOC's antidumping investigation of large residential washers, Samsung provided to the USDOC a listing of the eligible expenditures of its Digital Appliance business unit and the tax credits that the eligible expenditures had generated under RSTA Article 10(1)(3) and Article 26. Samsung contended that the ad valorem countervailing duty margin that the USDOC should calculate for each of the two tax credit subsidy provisions should equal the tax credits attributable to Digital Appliance business unit's eligible expenditures (i.e., the numerators) divided by the Digital Appliance business unit's sales value (i.e., the denominators).

29. The USDOC rejected this calculation on the ground that Samsung had failed to "tie" the tax credits of the Digital Appliance business unit to that unit's sales. The purported reason for this alleged failure was that the amounts of the two tax credit subsidies provided to the Digital Appliance business unit were not known to the subsidy giver, i.e., to the Korean tax authorities, and so acknowledged either when the tax credits were conferred or before that time. The subsidies were conferred on the date that Samsung filed its tax return for fiscal year 2010, which was March 31, 2011. According to the USDOC, the tax return itself did not separately identify the tax credits that were attributable to the eligible expenditures made by the Digital Appliance business unit. Rather, Samsung reported a single lump sum for all of its business units for each of the two credits. However, the USDOC refused to consider evidence that Samsung presented in its questionnaire response and at the on-site verification of that response that contained the tying evidence.

30. The Panel found that Samsung failed to make a sufficient showing that it could tie the two tax credit subsidies received by the Digital Appliance business unit to expenditures made by that unit, but it relied upon a rationale that the USDOC itself did not rely upon. As a result of Samsung's alleged failure to make the required showing of tying, the Panel upheld the USDOC's calculation of the ad valorem subsidy margin attributable to Article 10(1)(3) by dividing the total eligible R&D expenses incurred by all of Samsung's business units by the total sales of those business units. The result was a dramatic inflation of the Article 10(1)(3) ad valorem subsidy margin from 0.22% to 0.72%. The USDOC similarly inflated the margin for Article 26 tax credits from 0.0046% to 1.05%.

31. WTO jurisprudence is clear that the focus in every tying inquiry must be on whether the particular subsidy can be directly linked to particular product or product line. However, the Panel did not conduct this type of inquiry. Instead, it chose to rely entirely on the fact that the cash proceeds of the tax credits could be used in any manner that Samsung chose. However, the Panel's reliance had nothing to do with determining whether there was a direct link, i.e., a tying, between the subsidy at issue and particular products. The use of the proceeds of a subsidy is irrelevant to the tying inquiry, despite the Panel's contrary finding. Moreover, if the Panel's test is correct, then virtually every subsidy is countervailable regardless of whether it can be tied to a particular product or product category.

32. The fatal flaw in the Panel's affirmance of the USDOC's ad valorem margin calculations is that the Panel failed to examine the specific issue of whether Samsung had submitted positive evidence that allowed the USDOC to calculate, i.e., to tie, the tax credit benefit that Samsung received on its development, production, and sale of the digital appliance products that it produced to the R&D and other investment activities that generated those tax credits. Instead, the Panel denied the tying claim based on its finding that the cash proceeds of the tax credits "may be spent by Samsung on any product".

33. Since the Panel failed to apply the correct tying test, it thereby failed to apply either Article VI:3 of the GATT 1994 or Article 19.4 of the SCM Agreement. Had the Panel applied the required tying analysis, it would have determined that the Article 10(1)(3) and Article 26 tax credits that Samsung received on its development, production, and sale of large residential washers were at the de minimis level, i.e. they provided a total benefit of less than 1% ad valorem. Consequently, the USDOC would not have issued a countervailing duty order to Samsung based on undisputed record facts.

34. The USDOC itself has stated that the manner in which the proceeds from any type of subsidy are spent is irrelevant to the issue of whether a subsidy can be tied to a particular product or group of products. In the preamble to the final countervailing duty regulations that the USDOC published on November 25, 1998, the USDOC provided an extended discussion of the concept of tying, and it addressed various comments that interested parties submitted on the subject of how and when tying to a particular product should be found. Some commenters "argued that because money is fungible, the Department should not allow subsidies to be tied to particular products or to particular export markets." The USDOC rejected this argument. Therefore, the Panel erred in finding that the unrestricted use of proceeds from a subsidy program constituted the deciding factor in determining whether those proceeds could be tied to a particular product or product line.

35. Equally important, the Panel was not free to reject the USDOC's finding that the use of proceeds from a subsidy was irrelevant to a tying analysis. By doing so, the Panel improperly substituted its own rationale as its legal basis for finding that tying had not been shown. The Appellate Body has stated that "panels should not substitute their own conclusions for those of the competent authorities." Moreover, "the panel should seek to review the determination while giving due regard to the approach taken by the investigating authority, or it risks constructing a case different from the one put forward by that authority."

36. For these reasons, the Appellate Body should reverse the Panel's findings and instead find that Samsung made an adequate showing of tying of tax credits earned by its Digital Appliance business unit to the eligible expenditures made by that unit.

F. The Panel Erred in Finding that the Subsidies that Samsung Received Under RSTA Article 10(1)(3) Benefited Only Samsung's Domestic Production and Not its Worldwide Production

37. The USDOC collects countervailing duties by first calculating the ad valorem margin of subsidy provided by each of the programs that it determines to countervail, expressed as a percentage. The total ad valorem margin for all countervailable programs is then applied to the entered value of a particular importation to determine the amount of countervailing duties that are owed. If the entered value of a particular shipment of large residential washers is $100,000 and the applicable total ad valorem duty is 1.2%, then the importer must pay a countervailing duty of 1.2% x $100,000, or $1,200, to the United States Treasury.

38. The calculation of the ad valorem margin is a critical determinant of the amount of countervailing duties that an importer may owe. That margin consists of a numerator, which equals the total amount of the countervailed subsidies, and a denominator, which equals the total value of the sales that benefited from the countervailed subsidies. As a matter of simple mathematics, an increase in the denominator will reduce the ad valorem margin percentage, and a reduction in the denominator will increase that margin.

39. The dispute between Korea and the United States focuses on the calculation of the denominator that the USDOC used to calculate the ad valorem margin attributable to the tax credit benefits that Samsung received under RSTA Article 10(1)(3). Samsung contended that the eligible R&D investments that it undertook and, the tax credits that it obtained from those investments benefited its worldwide production. However, the USDOC found that the tax credits benefited only Samsung's production in its home market of Korea. The ad valorem margin attributable to Article 10(1)(3) R&D tax credits that the USDOC calculated using Samsung's home market sales value was 0.72%. Had the USDOC used Samsung's worldwide sales value, it would have calculated an ad valorem margin of only 0.49%.

40. The Panel rejected Korea's arguments on the same ground as it rejected the arguments that Korea made concerning the tying issue. Specifically, the Panel found that the "tax credit cash" benefit that Samsung received as a result of the tax credit program was "not tied to the R&D activities that gave rise to the tax credits, since Samsung is free to dispose of the tax credit cash as it sees fit." Moreover, even though Samsung's overseas subsidiaries may have benefited from the R&D activities that Samsung performed in Korea, the "positive effect" of those activities "does not constitute 'benefit' within the meaning of Article 1.1(b)".

41. Here again, the Panel employed an erroneous analysis because it failed to determine the appropriate denominator that was to be linked with the numerator. By focusing on the use of the "tax credit cash", the Panel ignored the underlying requirement that it determine which products Samsung had produced and sold that had benefited from the R&D activities that Samsung had performed, which resulted in the tax credits that were then provided.

42. Samsung also provided substantial evidence to the USDOC, which the Panel ignored, that demonstrated unequivocally that the R&D activities that it performed benefited its worldwide production and that the USDOC had found to this effect. If the R&D activities benefited worldwide production, then the tax credits attributable to those activities similarly benefited worldwide production. This evidence rebutted any presumption that the USDOC, or the Panel, might otherwise have been entitled to employ to the effect that subsidy programs benefit only production in the country where the benefits are provided.

ANNEX B-3

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

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

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

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

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

5. No prior WTO dispute has involved a Member's application of the comparison methodology set forth in the second sentence of Article 2.4.2 of the AD Agreement. This dispute presents an issue of first impression for the Appellate Body.

6. To the extent that the USDOC's approach to the application of a "mixed" comparison methodology can be likened to zeroing, the U.S. appellant submission demonstrates that zeroing is permissible – indeed, it is necessary – when applying the alternative, average-to-transaction comparison methodology, if that "exceptional" comparison methodology is to be given any meaning. Additionally, the U.S. appellant submission shows that the application of the alternative, average-to-transaction comparison methodology to all sales (with zeroing) is not inconsistent with Article 2.4.2 of the AD Agreement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23. Korea's understanding of the term "significant" would read the quantitative dimension out of that term, necessitating an exclusive focus on Korea's understanding of the qualitative dimension. In Korea's view, any numerical difference in export prices can be explained away. Korea's proposed interpretation is inconsistent with the ordinary meaning of the term "significantly" in its context, and also with the Appellate Body's guidance regarding the meaning of the term "significant."

24. Section II.C responds to Korea's appeal of certain Panel findings related to the "explanation clause" of the second sentence of Article 2.4.2 of the AD Agreement. The "explanation clause" sets forth the second of two conditions for using the alternative, average-to-transaction comparison methodology, and provides that an investigating authority may utilize the alternative comparison methodology "if an explanation is provided as to why such differences cannot be taken into

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

25. Korea argues that the Panel incorrectly interpreted the "explanation clause" by finding that it does not require an investigating authority to provide an explanation regarding both the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. Korea's arguments lack merit. The Panel's interpretation follows from a proper analysis pursuant to the customary rules of interpretation of public international law. Korea's proposed interpretation fails to read the terms of the "explanation clause" in their proper context, in particular in the context of the first sentence of Article 2.4.2, which affords an investigating authority discretion in selecting whether to use the average-to-average comparison methodology or the transaction-to-transaction comparison methodology.

26. Korea's proposed interpretation also does not accord with prior Appellate Body guidance concerning the relationship of the average-to-average comparison methodology and the transaction-to-transaction comparison methodology. The Appellate Body has observed that the average-to-average and transaction-to-transaction comparison methodologies "fulfil the same function," and they are "equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two."

27. Korea's proposed interpretation also is not logical. Logically, if an investigating authority is free to choose between the average-to-average comparison methodology and the transaction-to-transaction comparison methodology, and those comparison methodologies yield systematically similar results, then there would be no purpose in requiring an investigating authority to explain why a pattern of export prices that differ significantly cannot be taken into account appropriately by the transaction-to-transaction comparison methodology, when the investigating authority already has explained why the pattern of export prices that differ significantly cannot be taken into account appropriately by the average-to-average comparison methodology.

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

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

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

31. Section III.A addresses Korea's claim that the Panel erred in rejecting its specificity claim with respect to RSTA Article 26. Contrary to Korea's assertions in this appeal, the Panel was faced with a straightforward application of Article 2.2 of the SCM Agreement. Article 2.2 provides, in relevant part, that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

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

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

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

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

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

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

38. Korea criticizes the Panel's interpretation and application of the phrase "designated geographical region" in Article 2.2. Korea complains that the Panel should have adopted a series of results-oriented interpretations – for instance, finding in Article 2.2 an alleged requirement that a Member "affirmatively" designate a geographical region for a subsidy to be regionally specific. But the Panel correctly reasoned that Korea's argument would mean that where a Member expressly identifies a region in which access to subsidies is excluded, there is no "affirmative" designation of a region, despite the fact that such a designation would also make clear which geographical region is included, and have the same effect. The Panel correctly found that Article 2.2 does not include the "affirmatively" identify requirement Korea seeks to read into the text, which would reduce the inquiry under Article 2.2 to a semantic game, inviting ready circumvention of subsidy disciplines.

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

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

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

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

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

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

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

- The structure, architecture, and design of the RSTA subsidy programs did not reflect a product-specific tie. As the Panel found, the tax credits were conferred by reference to "total R&D activities." Samsung submitted an *aggregate* pool of expenses, and received an *aggregate* pool of tax credits based on formulas that related to *aggregate* and *average* expenses for the company's entire domestic operations – and not to particular products.

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

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

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

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

48. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not require Members to take into account products manufactured outside the territory of the subsidizing Member when calculating subsidy rates. To the contrary, the language of these provisions suggests a focus on production activity occurring within the territory of the granting Member.

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

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

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

52. The USDOC presumed (rebuttably) that a Member grants a subsidy to benefit domestic production. Korea challenges that Panel's finding that the USDOC was entitled to conclude that this presumption was not rebutted on these facts. Here, again, Korea relies on separate anti-dumping proceedings, but they cannot rebut a presumption with respect to the attribution of the "benefit" of a subsidy to overseas manufacturing.

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

ANNEX B-4

EXECUTIVE SUMMARY OF KOREA'S APPELLEE'S SUBMISSION[1]

A. The Panel Correctly Found That the Second Sentence of Article 2.4.2 Does Not Permit Zeroing

1. The Appellate Body has repeatedly clarified that "dumping" only exists based on a full consideration of all export transactions by each exporter, and only based on the product as a whole. Considering all export transactions is not "masking" anything, and is an indispensable part of a proper finding of "dumping".

2. The U.S. arguments on why the second sentence of Article 2.4.2 allows zeroing share two overarching flaws. First, the United States tries to distinguish the second sentence from the first sentence based on a few words in isolation without taking into account the Anti-Dumping Agreement as a whole and the consistent use of the key language "dumping" and "margin of dumping". Second, the United States has not really found any new arguments, and thus faces the difficulty of finding an argument that does not directly contradict prior Appellate Body findings.

3. Nothing in the text or context of Article 2.4.2 suggests that "dumping" or "margin of dumping" should have any different meaning than the rest of the Anti-Dumping Agreement. Indeed, this need for a consistent interpretation is why Article 2.4.2 opens with the overarching phrase "the existence of margins of dumping" – which echoes the Article 2.1 phrase that a product "is considered as being dumped" – before turning to some specific rules about the use of different comparison methods under different circumstances.

4. The U.S. textual arguments all fail. The Appellate Body has not grounded its zeroing decisions solely on narrow textual differences between the first and second sentences of Article 2.4.2. Rather, the Appellate Body has focused on the proper understanding of the overarching concepts of "dumping" and "margin of dumping", allowing the Appellate Body to interpret consistently the obligations of the various provisions of the Anti-Dumping Agreement under which zeroing has been challenged.

5. The United States argues for "systematically different" results that will "unmask targeted dumping". Implicit in this U.S. argument is its belief that "dumping" somehow exists for a group of export transactions, which must be "unmasked" so as to find "dumping" to exist. This U.S. inference that "dumping" for a subset of export transactions needs to be "unmasked" has no basis in the text of Article 2.4.2 or Appellate Body jurisprudence.

6. The U.S. argument for systematically different results so as to satisfy the principle of effectiveness has several problems. First, this argument essentially would have the principle of "effectiveness" take precedence over all other principles of interpretation. Second, a treaty text can have meaning even if the text results in the same or similar margins of dumping in some cases; treaty text can have meaning as long as it sometimes has meaning in those other cases. Third, the U.S. argument depends entirely on a false assertion of mathematical equivalence.

7. The U.S. argument about mathematical equivalence should be rejected for several reasons. First, the U.S. argument rests largely on the false assumption that the method of determining normal value must remain fixed. Changing normal value or changing export price adjustments makes perfect sense in the context of the inquiry posed by the second sentence of Article 2.4.2. Such changes would allow a more precise comparison, and thus allow a W-W or T-T comparison to "appropriately" take into account significant price differences. Although the United States develops many different hypothetical scenarios in an effort to show mathematical equivalence, these scenarios all depend critically on the assumption that normal value remains fixed.

[1] Pursuant to the Appellate Body guidelines for executive summaries, Korea confirms that this executive summary contains a total of 1,884 words (including footnotes) and that the overall other appellee submission (other than the executive summary) contains a total of 19,109 words (including footnotes).

8. Second, as is true with its hypothetical examples, the specific U.S. examples from *Washers* also depend on the same assumption that normal value does not change. Korea submitted specific evidence to the Panel demonstrating what would have happened in the *Washers* original investigation if normal value had been changed from an annual average to monthly averages. The results showed materially different dumping margins for both Samsung and LG. The United States never disputed this evidence.

9. Third, this argument of "mathematical equivalence" has been considered and rejected by the Appellate Body four times. The Appellate Body has repeatedly found that even if "under certain circumstances" or "under a specific set of assumptions" the results from different comparison methods are equivalent, such a situation does not render a provision *inutile*. The U.S. efforts to distinguish these repeated Appellate Body findings fail. The Appellate Body's occasional use of the phrase "unmask targeted dumping" does not require any different conclusion.

10. The Panel did not create a new approach that "effectively rewrote the second sentence". The Appellate Body has already provided repeated clarification of what "dumping" and "margin of dumping" mean for the Anti-Dumping Agreement. It is the United States – not the Panel – that now seeks to rewrite the text of Article 2.4.2 to create a different concept of "dumping" – one that finds "dumping" to exist in a subset of export transactions and ignores the remainder of the export transactions for an exporter.

B. The Panel Correctly Interpreted the "Pattern" Requirement

11. The Panel correctly found that the "pattern" must consist of a set of export prices that actually demonstrate some discernible order, and cannot just be a collection of random export price differences. The current USDOC methodology takes any situation of enough price differences beyond a certain threshold and then labels those differences as a "pattern" even if they are actually just random price differences.

1. High and Low Prices Are Not Part of the Same "Pattern"

12. The fundamental flaw in the U.S. argument is that it fails to properly read the ordinary meaning of "pattern" in the overall context of the second sentence. The United States simply strings together dictionary definitions, and misses the most important contextual point in the second sentence – that the terms "pattern" and "differ significantly" set forth distinct requirements that both must be met. It is not enough to have export prices that "differ significantly" within one of the three specially enumerated categories. This need to focus on specific categories is precisely why the text does not just say the authorities must "find export prices which differ significantly". The text also requires finding a "pattern".

13. A "pattern" of lower prices makes sense because the lower prices can constitute the "intelligible form" that can be discerned from the other prices. There might even be a "pattern" of higher prices – higher export prices that stand out from the other export prices in some discernible and intelligible way. Yet the United States ignores this aspect of the term "pattern" and allows a "pattern" to be any collection of differing prices – including both higher and lower prices at the same time.

14. The United States also incorrectly believes that because the lower prices are being distinguished with reference to the higher prices, both the lower prices and the higher prices and all of the other prices are necessarily part of the "pattern". The Panel correctly dismissed this argument by noting the higher and lower prices could not be part of the same "pattern". The Panel noted that the "characteristic for establishing the degree of price variation is therefore not the same", since being higher than other prices or being lower than other prices are distinct "patterns".

15. Any need to "unmask" so-called "targeted dumping" does not change this interpretation. Korea has explained at some length in its Other Appellant Submission that the Panel misconceived the purpose of the second sentence, and that this language, "unmask targeted dumping", used by the Appellate Body in a single decision must be understood in context.

2. Random Price Differences Cannot Be Aggregated to Find a "Pattern"

16. The Panel correctly found two textual bases for its interpretation that distinct categories cannot be combined. First, the Panel reasonably interpreted the term "or". Since the categories of "purchasers, regions, or time periods" are inherently different, it was reasonable to interpret the use of "or" in this context as disjunctive. Moreover, within the text of the second sentence, the text uses the disjunctive "or" when discussing these three distinctive categories, but uses the conjunctive "and" to make clear that there must be both a "pattern" and an explanation.

17. Second, the Panel also reasonably interpreted the term "among", finding this term referred to something "in relation to the rest of the group they belong to". The issue is not whether the DPM initially tests each purchaser against other purchasers. Rather, the issue is whether differences for purchasers can be combined with differences based on time, and with differences based on regions, so as to find a single "pattern".

18. The United States also ignores other textual and contextual points. Under the U.S. interpretation of aggregating across different categories, any true "pattern" becomes obscured and becomes just random price variation. The authority can no longer distinguish whether export prices are actually differing among various purchasers, from whether different purchasers bought at different points in time.

C. The Panel Correctly Limited the Scope of the Exceptional Comparison Method

19. The Appellate Body has confirmed that the exception should be applied only to those transactions that meet the conditions to invoke the exception – the export transactions that fall within the "pattern". The Panel correctly noted that the text makes clear that the exceptional comparison method applies to the "prices of individual export transactions". The Panel also stressed the reference to "such differences" as confirming that the "individual export transactions" at issue were those that fell within the relevant pattern. The Panel also correctly noted the contextual point that the second sentence explicitly focused on a subset of export transactions that constitute a "pattern," and by definition created another subset of export transactions that were not part of the "pattern".

20. The United States tries to limit the Panel's rationale to the single word, "individual", even though the Panel explicitly addressed other textual elements of the second sentence and Article 2.4.2 more generally. This U.S. argument ignores the rest of the second sentence. The United States is also reading the term, "individual", narrower than the Appellate Body has read the term.

21. The United States also inappropriately dismisses the textual reference to "such differences". The existence of this particular phrase in the second sentence is telling. Instead of focusing on all price differences among all export transactions, the text instead focuses specifically on "such differences" and requires the explanation to focus on "such differences." The text is thus explicitly creating a group of sales that meet the conditions for the exception and another group of sales that do not.

22. It does not make interpretative sense to make all of the export transactions part of the "pattern". Even if all export prices are used as a benchmark to determine the subset of prices that "differ significantly" from the benchmark, use of the benchmark export prices does not make them part of the "pattern".

23. The U.S. interpretation also ignores the logical relationship between a basic rule and an exception. Under the U.S. interpretation, there would be no limit on the scope of the exception.

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

ANNEX C-1

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil would like to comment in the present appeal proceedings three specific aspects of Panel's report: (i) the identification of the patterns for purchasers, regions or time periods and their aggregation; (ii) the explanation requirement to depart from the normal comparison methods; and (iii) the practical application of the second sentence of Article 2.4.2.

2. Brazil understands that the patterns of price variations that matter for determining the margin of dumping in the situations of "targeted dumping" are only those that are significantly *below* the price for the tested purchaser, region or time period. Brazil also agrees with the Panel when it states that a "pattern" of export prices cannot be found *across* the different categories covered by the second sentence of Article 2.4.2, but should rather be found than "among" the constituent elements of each category.

3. With regard to the "explanation" required by Article 2.4.2, Brazil understands that a departure from the normal symmetrical methods demands an explanation as to why the price differences could not be unmasked by the application of both W-W or T-T methods.

4. The application of the W-T method also presents serious challenges, such as what should be done with the transactions outside the pattern. It is important to reach a clear distinction between "zeroing" and "systemic disregarding". The solution given by the Panel appears to be in line with the objectives of the Anti-Dumping Agreement.

ANNEX C-2

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION

INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. Canada is participating in this appeal as it has a substantial systemic interest in the interpretation of WTO anti-dumping rules.

2. Canada's written submission addresses three issues regarding the application of the exceptional weighted average-to-transaction (average-to-transaction) methodology referred to in 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). In particular, Canada will focus on the need for an investigating authority to properly identify a pattern among export prices, the impermissibility of zeroing in applying the average-to-transaction methodology, and the Panel's errors in allowing "systemic disregarding".

3. The text of the second sentence of Article 2.4.2 creates an exception to the two standard dumping calculation methodologies and thus requires a rigorous application of the criteria contained therein. An investigating authority must examine whether a pattern consisting of a regular and intelligible series of export prices can be identified among purchasers, regions, or time periods. The Panel correctly found that the United States Department of Commerce (USDOC) Differential Pricing Methodology (DPM) fails to meet this requirement when it aggregates transactions from across all three groups.

4. With respect to zeroing, the correct application of the principles espoused in past decisions can only lead to the conclusion that zeroing is also impermissible under the average-to-transaction methodology. Furthermore, as zeroing distorts the magnitude of a dumping margin, its use in applying the average-to-transaction methodology violates the fair comparison requirement in Article 2.4.

5. Finally, the Panel erred in finding that the second sentence of Article 2.4.2 permits an investigating authority to establish an "amount of dumping" exclusively by reference to "pattern" transactions. The Panel further erred in finding that, when combining comparison results under the weighted average-to-weighted average (average-to-average) and average-to-transaction methodologies, the "systemic disregarding" of negative average-to-average comparison results is permissible.

6. There are four fundamental problems associated with these findings. First, the Panel misapplied the well-established interpretation of "dumping" as an exporter- and product-specific concept, and the "margin of dumping" as pertaining to all export sales of subject goods by an exporter. Second, the exception under the second sentence of Article 2.4.2 does not alter these principles by permitting an investigating authority to disregard certain transactions when calculating a margin of dumping for an exporter. Third, the Panel ignored the Appellate Body's repeated rejection of mathematical equivalence as a basis for justifying zeroing. Fourth, permitting the establishment of a "margin of dumping" based on a subset of "pattern" transactions would distort the margin of dumping in a manner as egregious as the application of zeroing under the average-to-average or transaction-to-transaction methodologies.

[1] Pursuant to the Appellate Body guidelines for executive summaries, Canada confirms that the executive summary contains a total of 478 words (including footnotes) and that the overall third party submission (other than the executive summary) contains a total of 4823 words (including footnotes).

ANNEX C-3

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

I. ISSUES COVERED BY CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. China's third participant's submission focuses primarily on issues of legal interpretation that are relevant for China's own complaint against certain US measures in the parallel proceedings in *United States – Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* (DS471).

II. APPEAL ISSUES RELATING TO USDOC'S FAILURE TO COMPLY WITH THE CONDITIONS ON THE USE OF THE EXCEPTIONAL W-T COMPARISON METHODOLOGY UNDER ARTICLE 2.4.2, SECOND SENTENCE

A. The Panel did not err in its interpretation of the scope of the relevant pricing pattern under Article 2.4.2, second sentence

2. The Panel did not err when concluding that the "pattern" for purposes of Article 2.4.2, second sentence, comprises only a *subset* of the examined export transactions. A consideration of the text, context and object and purpose of Article 2.4.2 reveals that the Panel committed no error in finding that a "pattern of export prices which differ significantly among different purchasers, regions or time periods" ("relevant pricing pattern") necessarily comprises a *subset* of the entire universe of the export sales of a product as a whole by an exporter, and *not* as the United States seems to contend, *all* export sales. Specifically, a relevant pricing pattern is a subset of low-priced sales to a particular customer or a particular region, or during a particular time period.

3. Identifying a pattern of export prices characterized by *high* export prices would be inconsistent with the very concept of dumping that is at the centre of Article 2.4.2. Hence, the relevant pricing pattern referred to in Article 2.4.2, second sentence, must be one of *low* and not *high* export prices. The differences between high prices and other prices are not a justification for resort to the exceptional methodology under the second sentence. Such differences are not *significant* in the sense of Article 2.4.2.

4. Accordingly, the Appellate Body should uphold the Panel's finding that the "pattern" for purposes of Article 2.4.2, second sentence, necessarily comprises only a *subset* of the examined export transactions. The Appellate Body should modify the Panel's findings to state clearly that a "pattern" under Article 2.4.2, second sentence, may comprise only *low-priced* sales.

B. The Panel did not err in finding that USDOC's differential pricing methodology is "as such" inconsistent with Article 2.4.2, second sentence, because it aggregates random and unrelated price variations and thereby does not allow proper establishment of a relevant pricing pattern

5. The Panel did not err when finding that USDOC's so-called "differential pricing" methodology ("DPM") is inconsistent "as such" with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish a pattern of export prices which differ significantly among different purchasers, regions or time periods.

6. China agrees that the phrase "among different purchasers, regions or time periods" in Article 2.4.2, second sentence, determines the question of how the relevant pricing pattern must be identified. The Panel rightly attached significance to the use of the disjunctive "or" in this phrase, as its ordinary meaning indicates that a "pattern" can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods. This excludes the possibility of establishing a "pattern" *across* the three categories cumulatively as USDOC appears to do with the DPM. The Panel was equally right to take the view that a "pattern" of significant price differences "among" different purchasers, regions or time periods must be found in the price variation *within a group* of purchasers, regions, or time periods.

7. The Appellate Body should, therefore, uphold the Panel's finding that USDOC's DPM is inconsistent "as such" with the second sentence of Article 2.4.2.

C. The Panel erred by finding that investigating authorities are not required, under Article 2.4.2, second sentence, to consider qualitative factors

8. The Panel erred when it found that USDOC did not act inconsistently with Article 2.4.2, second sentence, of the *Anti-Dumping Agreement* by determining the existence of "a pattern of export prices which differ significantly . . ." on the basis of purely *quantitative* criteria, without any *qualitative* assessment of the reasons for the relevant price differences.

9. One *qualitative* dimension that must be considered – especially where targeted dumping is alleged with respect to a period of time – is *seasonality*. Another such qualitative dimension would be a *secular decline in costs of production* over the course of the relevant time period, which equally affects home market and export market prices for the product.

10. The Appellate Body should reverse the Panel's interpretation and find that investigating authorities must consider qualitative factors when examining, under Article 2.4.2, second sentence, whether export prices "differ significantly" among purchasers, regions, or time periods. The Appellate Body should find that the qualitative factors to be considered are factors that are unrelated to any form of unfair pricing practice but that lead to regular or predicable variations in prices. The Appellate Body should find that an authority has an obligation to examine these qualitative factors on its own initiative, i.e., regardless whether verifiable evidence has been provided by interested parties.

D. The Panel erred by finding that investigating authorities need not address the T-T comparison methodology when explaining the need to depart from the symmetrical comparison methodologies

11. The Panel erred when it rejected Korea's claim that USDOC acted inconsistently with Article 2.4.2, second sentence, by failing to explain why the observed export price differences could not be taken into account appropriately by the use of the transaction-to-transaction ("T-T") comparison methodology. China agrees with Korea that the required "explanation" must include a discussion of *both* the weighted average-to-weighted average ("W-W") and transaction-to-transaction ("T-T") comparison methodologies.

12. As a textual matter, this issue devolves upon the meaning of the word "or" in the explanation clause of the second sentence of Article 2.4.2. In order properly to interpret the use of the word "or" in that sentence, one must take into account the context provided by the first sentence of Article 2.4.2, which contains the general rule that "normally" an authority is to use a symmetrical comparison methodology. Hence, recourse to the exceptional W-T comparison methodology is allowed only if *neither* of the symmetrical comparison methodologies can take the identified "pattern" into account appropriately.

13. China agrees that Article 2.4.2 grants discretion to investigating authorities when it comes to choosing between the two comparison methodologies that are *normally* to be used. However, that initial discretion has been exhausted and thereby becomes irrelevant if the investigating authority wishes to have recourse to the exceptional W-T comparison methodology, inasmuch as that exceptional comparison methodology may be employed only if the specific conditions set forth by the second sentence of Article 2.4.2 are met.

14. The Appellate Body should therefore reverse the appealed finding by the Panel, and confirm that, under Article 2.4.2, second sentence, investigating authorities must address the reason why the T-T comparison methodology, as well as the W-W comparison methodology, cannot be used before turning to the exceptional W-T comparison methodology.

III. APPEAL ISSUES RELATING TO THE DISCIPLINES IMPOSED BY THE *ANTI-DUMPING AGREEMENT* AND THE GATT 1994 ON THE MANNER IN WHICH THE W-T COMPARISON METHODOLOGY MAY BE APPLIED

A. The Panel did not err in finding that the W-T comparison methodology under Article 2.4.2, second sentence, may only be applied to transactions that form part of the relevant pricing pattern

15. The Panel's finding that, under Article 2.4.2, second sentence, the W-T comparison methodology may not be applied to all export sales but only to those forming part of the relevant pricing pattern is *not* in error. This view finds support in the text of the *Anti-Dumping Agreement*.

16. *First*, the phrase "individual export transactions" in the text of the second sentence of Article 2.4.2 refers to the specific transactions falling within the relevant pricing pattern. Having applied the W-T comparison methodology to the individual transactions that comprise the "pattern", the non-pattern transactions must be compared with normal value on the basis of one of the symmetrical comparison methodologies. The authority would then need to aggregate all intermediate comparison results (whether W-W, T-T or W-T) in order to determine a margin of dumping for the product as a whole.

17. *Second*, it flows from the text of Article 2.4.2 that a relevant pricing pattern may only be taken into account "appropriately" and not in an unreasonable or disproportionate manner. The permission to use the W-T comparison methodology is not a blanket authorization to use that methodology for all sales. Rather, it grants limited authority to enable an authority to deal appropriately with a relevant pricing pattern that arises in respect of a subset of sales.

18. *Third*, pursuant to an established canon of treaty interpretation, exceptions (such as that expressed in the second sentence of Article 2.4.2) apply only to the extent that they conflict with the general rule from which they derogate. It follows that the alternative methodology may be applied solely to sales forming part of a relevant pricing pattern that cannot be taken into account by using a symmetrical comparison methodology.

19. Accordingly, the Appellate Body should uphold the Panel's finding that the W-T comparison methodology may not be applied to all export sales. For sales that are *not* part of the relevant pricing pattern, Article 2.4.2, second sentence, does not provide any authorization to depart from the standard rule that mandates use of the symmetrical comparison methodologies.

B. The Panel did not err in finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Article 2.4.2, second sentence

20. The Panel did not err when it found that the use of zeroing in connection with the application of the W-T comparison methodology under Article 2.4.2, second sentence, is inconsistent with the second sentence of Article 2.4.2 "as such", and "as applied" in the *Washers* anti-dumping investigation.

21. The use of zeroing when applying the W-T comparison methodology under Article 2.4.2, second sentence, violates the fundamental product-wide and exporter specific nature of the concepts of "dumping" and "margins of dumping" Because a transaction-specific (or intermediate) comparison result is *not* itself "dumping", the United States is mistaken that a transaction-specific comparison result can be *evidence* of dumping in and of itself, without aggregating the individual transaction-specific comparison result *together* with all other intermediate transaction-specific comparison results to see if there actually is "dumping".

22. Although the Panel's ultimate finding as to the WTO-inconsistency of zeroing when aggregating transaction-specific comparison results arising in the context of the W-T comparison methodology is correct, its reasoning contains an important error regarding the nature of "dumping". The Panel reasoned that, in the context of the second sentence of Article 2.4.2, when an investigating authority determines the margin of dumping for an individual exporter or foreign producer, the investigating authority is entitled to limit its analysis to the pricing behaviour of the exporter or foreign producer in respect of the transactions that form a "pattern". That approach

does not accord with the requirement to determine a margin of dumping for the product as a whole.

23. The United States insists that the second sentence of Article 2.4.2 would be inutile unless zeroing is permitted. In the United States' view, in order to avoid inutility, it is essential that the results of use of the W-T comparison methodology differ systematically from those that would arise under the W-W comparison methodology. Yet, to the extent that the investigating authority considers it necessary to ensure that the application of the W-T comparison methodology leads to a different outcome than the application of the W-W comparison methodology, it may always have recourse to the existing WTO-consistent alternative techniques for calculating the weighted average normal value.

24. Overall, although certain elements of the Panel's reasoning are problematic, the Appellate Body should uphold the Panel's finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Article 2.4.2, second sentence.

C. The Panel erred by allowing investigating authorities to disregard certain results when combining the results of W-T comparisons with other comparisons obtained through using the W-W comparison methodology

25. The Panel erred when it rejected Korea's claim that USDOC's practice of failing to give the full mathematical weight to the intermediate results of certain comparisons when aggregating those results with the intermediate results of other comparisons, amounts to a form of zeroing. Under the challenged practice, just as in other forms of zeroing, negative intermediate values are not permitted to offset positive intermediate values during the aggregation process.

26. The Panel's reasoning suggests that export prices for sales *outside* of the identified pattern may somehow be disregarded when establishing the numerator of the fraction used to calculate a margin of dumping. China considers that the Panel's asymmetrical treatment of the numerator and denominator is unsupported by the text of Article 2.4.2, and is contrary to the general principle that a margin of dumping must be calculated for the product as a whole. In order to satisfy that fundamental obligation, the numerator of the fraction must include *all* intermediate comparison results and the denominator must include the value of all sales on which those intermediate comparison results were calculated.

27. The Appellate Body should reverse the Panel's decision to reject Korea's claim that USDOC's use of what Korea calls "systemic disregarding" in the context of the DPM is inconsistent "as such" with Article 2.4.2, and Article 2.4 of the *Anti-Dumping Agreement*.

D. The Panel did not err in finding that the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994

28. The Panel did not err in finding that the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994. The United States' appeal of this finding by the Panel is fully consequential to its appeal of the Panel's finding that USDOC's use of zeroing when applying the W-T comparison methodology in original investigations is inconsistent with Articles 2.4.2, second sentence, and Article 2.4.

29. Even if the Appellate Body were to find that investigating authorities may apply zeroing procedures when using the W-T comparison methodology under the second sentence of Article 2.4.2, the United States' appeal remains devoid of merit. In essence, this is so because the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994. The United States has not even attempted to demonstrate that Article 2.4.2, second sentence applies to administrative reviews.

30. The Appellate Body should uphold the Panel's finding and find that the Panel did not err in finding that the use of zeroing in connection with the W-T comparison methodology in administrative reviews is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and with Article VI:2 of the GATT 1994.

ANNEX C-4

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION

A. Korea's claims under the Anti-Dumping Agreement

1. 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.

2. 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.

3. 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.

4. The matter before the Appellate Body 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.

5. 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.

6. 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.

7. 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.

B. Korea's claims under the SCM Agreement

8. With respect to the issue of regional specificity, the European Union considers that Korea's distinction between "enterprises" and "facilities" is artificial as facilities will normally form part of an enterprise. Korea's argument that enterprises must have legal personality is not convincing because the term "certain enterprises" in Article 2.2 also covers industries which clearly do not have legal personality. Furthermore, there is no apparent reason why subsidies should not be covered by Article 2.2 if they are granted to entities that may not necessarily have legal personality. A different interpretation could lead to the circumvention of Article 2.2.

9. The European Union considers that specificity under Article 2.2 is not called into question by the fact that the subsidy only excludes investments in 2% of Korea's land mass. The term "geographical region" in Article 2.2 is not qualified in any way and hence the designation of *any* geographical region – irrespective of its size – may trigger the application of Article 2.2. Korea's interpretation would also risk leading to significant legal uncertainty as regards determining the relevant geographic size of an area. The European Union notes further that while the Seoul overcrowding control region may only account for 2% of Korea's land mass, the city of Seoul (excluding the metropolitan area) accounts for more than 20% of Korea's total population and in 2012 created 23% of Korea's overall GDP.

10. The European Union agrees with the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that the application of one of the sub-paragraphs of Article 2.1 is not in itself determinative as regards "specificity". The European Union therefore disagrees with Korea's argument that a finding of non-specificity under Article 2.1(b) should lead to a finding of non-specificity also under Article 2.2.

11. With respect to Article VI:3 of the GATT1994 and Article 19.4 of the SCM Agreement, the European Union recalls that both provisions require a direct link between the levy of countervailing duties with respect to the product under investigation and the determination that a subsidy is found with respect to "such" (i.e. the same) product. In light of these provisions and previous case law, Members must accurately determine the per unit subsidy amount with respect to the product in question and not exceed that amount. However, in practice it may be very difficult to establish if a subsidy is clearly "tied" in law or in fact to the production or sale of a particular product. If the subsidy is not tied to any particular product, it may be presumed that the company allocated this benefit across its entire production.

12. Regarding the issue whether the tax credits in the case at hand were "tied" to Samsung's digital appliances, the European Union considers that one relevant element to consider could be whether the *eligibility criteria* for the subsidy are linked – i.e. tied - to the product in question. Other elements to consider could be whether *the use of the subsidy* is limited - i.e. tied - to the product in question or whether Samsung *in casu* did actually use the tax credits for its digital appliances.

13. Regarding the issue whether the subsidy is to be allocated to Samsung's local or worldwide activities, the European Union considers that relevant elements to consider could be whether the subsidy was granted with respect to R&D activities conducted in Korea or with respect to R&D activities also outside Korea and whether Samsung used the tax credits for its Korean or worldwide production.

ANNEX C-5

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. In this appellate proceeding, Japan will focus on the requirements of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement and the USDOC's methodologies concerning the application of the said provision. In doing so, Japan would particularly like to address the systemic issues arising out of the USDOC's continued use of zeroing when determining dumping and calculating margins of dumping by referring to the second sentence of Article 2.4.2.

2. To start with the overview of the relevant provisions of the Anti-Dumping Agreement and the understanding of dumping and margins of dumping as a background, Article VI of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement recognise dumping when "a product" is introduced into the commerce of an importing Member at less than its normal value. Through a number of prior WTO disputes, the Appellate Body has established that dumping and margins of dumping within the meaning of Article VI of the GATT 1994 and the Anti-Dumping Agreement do not pertain to individual transactions or individual models/sub-types of a product, but to a product under investigation as a whole. The Appellate Body also ruled that such interpretation must be applied in a coherent and consistent manner to all provisions of the Anti-Dumping Agreement, and for all types of anti-dumping proceedings. On this basis, the Appellate Body has consistently held zeroing to be inconsistent with the Anti-Dumping Agreement.

3. Article 2.4.2 of the Anti-Dumping Agreement sets forth three comparison methodologies for establishing the existence of margins of dumping. While the W-W and T-T comparison methodologies under the first sentence "shall normally" be used, an investigating authority may use the exceptional W-T comparison methodology under the second sentence if the requirements of its pattern clause and explanation clause are met. As clarified by the Appellate Body, the second sentence is an instrument to "unmask" "targeted dumping", i.e. dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.

4. Regarding the interpretation of the pattern clause, a "pattern" must be of export prices that differ significantly "among different purchasers, regions or time periods". In other words, export prices for *some* purchaser (or region or time period) must differ significantly from export prices for *other* purchasers (or region or time period). Further, the Appellate Body in *US – Zeroing (Japan)* explained that the export prices that fall within the relevant pricing pattern "must be found to differ significantly from other export prices."

5. In order to evaluate whether observed price differences are "significant[]", one needs to examine whether the observed price differences are "important, notable, consequential" in the context of the specific case at hand. Thus, as the Panel correctly found, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances, including the nature of the product and market in question. In addition, since an exporter generally does not sell its product at a uniform price across different purchasers, regions and time periods, the term "significantly" implies that price differences must go beyond the kind of price variations that "normally" exist in the market.

6. As to the explanation clause, 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 "taken into account appropriately" by the methodologies set forth in the first sentence of Article 2.4.2, which "shall normally" be used. Thus, an "explanation" has to be provided as to the fact that observed variations in export prices are not a mere reflection of factors or pricing patterns that normally exist or otherwise the methodologies contemplated in the first sentence cannot be used to determine an appropriate margin of dumping. Japan agrees with the Panel's finding to that effect.

7. On the other hand, Japan does not agree with the Panel's finding that the investigating authority need not provide an explanation as to why the T-T comparison methodology cannot take into account appropriately the price differences. The combination of the negative form ("cannot") and the conjunction "or" in the second sentence clearly indicate that the investigating authority must address both the W-W *and* the T-T comparison methodology under the explanation clause.

8. The appropriate scope of the application of the W-T comparison methodology under the second sentence should be determined by considering not only the term "pattern" in isolation but also its context, including, *inter alia*, its explanation clause as well as the first sentence. Since the W-W and T-T comparison methodologies under the first sentence cover situations where all export transactions are taken into account, it appears natural to limit the application of the W-T comparison methodology under the second sentence in a manner necessary and appropriate to unmask the "three kinds of" targeted dumping, i.e. dumping targeted purchasers, regions or time periods. This reading is consistent with the use of the term "may" in the second sentence, as well as the Appellate Body's explanation in *US – Zeroing (Japan)*.

9. Regarding the permissibility of zeroing under the second sentence of Article 2.4.2, neither that provision nor other provisions of the Anti-Dumping Agreement contain any language suggesting that an investigating authority is allowed to depart from the consistent interpretation of the Appellate Body that dumping and margins of dumping are product-specific, and not transaction-specific, concepts. Zeroing is also at odds with, and goes far beyond, the role and function of the second sentence of Article 2.4.2 to unmask the "three kinds of" targeted dumping. Furthermore, the mathematical equivalence argument does not warrant an interpretation that zeroing is permitted. While this argument rests on the assumption that W-W and W-T comparison methodologies always or normally use the exact same set of pricing data (i.e. normal value(s) and export prices), such assumption finds no basis in the Anti-Dumping Agreement.

10. Finally, with respect to the application of the second sentence of Article 2.4.2 to the specific methodology adopted by the USDOC, the DPM relies solely on mechanical and inflexible criteria such as +0.8 or –0.8, and 33% in order to determine whether export prices "differ significantly" from one another. Thus, the DPM fails to consider the prevailing factual circumstances on a case-by-case basis, which is inconsistent with the second sentence of Article 2.4.2. In addition, the DPM fails to identify a pattern of export prices which differ significantly "among different purchasers, regions or time periods", because it aggregates unrelated price variations *across* different purchasers, regions *and* time periods, and because it takes into account price variations among different *models* of a single product as constituting a "pattern".

ANNEX C-6

EXECUTIVE SUMMARY OF NORWAY'S THIRD PARTICIPANT'S SUBMISSION

THE USE OF ZEROING

1. The Panel found that the United States' use of zeroing when applying the "weighted-average-to-transaction" methodology is both "as applied" and "as such" inconsistent with the second sentence of Article 2.4.2 and Article 2.4 of the *Anti-Dumping Agreement*. The United States seeks review of these findings. Norway argues that the Panel's findings on these issues should be upheld.

2. In line with previous Appellate Body Reports, Norway holds that "dumping" and "margins of dumping" cannot occur at the level of individual transactions. The Appellate Body has emphasized that the concepts have the same meaning throughout the *Anti-Dumping Agreement* and for all types of proceedings. 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. The negotiation history referred to by the United States furthermore only shows that some Members were concerned about the use of zeroing when applying the comparison methodology in question. A permission of applying zeroing when using said methodology cannot be deducted.

3. Furthermore, 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*.

ANNEX C-7

EXECUTIVE SUMMARY OF VIET NAM'S THIRD PARTICIPANT'S SUBMISSION

1. The Panel correctly applied the Appellate Body's numerous rulings that the terms "dumping" and "margin of dumping" are exporter-specific concepts that require that all sales from each exporter be included so that the determination of dumping can be made on the product as a whole. The practice of "zeroing", which disregards export transactions made at prices above normal value, is necessarily inconsistent with the Appellate Body's repeated determinations concerning the meaning of the terms "dumping" and "margin of dumping".

2. Viet Nam therefore disagrees with the United States' claim that zeroing can be applied in some cases under the guise of the second sentence of Article 2.4.2 of the Anti-dumping Agreement. The United States' claim is based on a strained and improper reading of isolated words within the second sentence of Article 2.4.2. Moreover, the United States' peculiar justification because of a concept of "mathematical equivalence" is neither required by the Anti-dumping Agreement, nor correct as a matter of fact.

3. Viet Nam agrees with Korea's arguments that the Panel's acceptance of "zeroing", even when limited to the combination of sales in the W-W subgroup and those in the W-T subgroup, is inconsistent with the Anti-dumping Agreement. Viet Nam submits that the panel's conclusion in this respect is fundamentally inconsistent with the terms "dumping" and "margin of dumping" as repeatedly enunciated by the Appellate Body. Further, Viet Nam believes that there is nothing in either the language or the "object and purpose" of Article 2.4.2 that compels such an inconsistent result.

ANNEX D

PROCEDURAL RULING

ANNEX D-1

PROCEDURAL RULING OF 9 MAY 2016

1. On 5 April 2016, the United States and Korea jointly addressed a letter ("joint request") to the Chairman of the Appellate Body, requesting that the Division that would hear the appeal in this dispute adopt, pursuant to Rule 16(1) of the Working Procedures, additional procedures for the protection of business confidential information (BCI) on the record of this dispute.

2. The United States and Korea requested the Appellate Body to adopt additional procedures for the protection of BCI on the basis of the BCI procedures adopted by the Panel and attached draft procedures to their joint request. They explained that BCI procedures in this appeal would serve "the interest of fairness and orderly procedure in the conduct of an appeal", according to Rule 16(1) of the Working Procedures.

3. The United States and Korea stated that the BCI procedures adopted by the Panel were necessary to enable the parties to submit to the Panel BCI that was previously treated as confidential in the course of the anti-dumping and countervailing duty proceedings at issue in this dispute. They requested additional protection of BCI allowing third parties and their government employees to have access to BCI and requiring non-disclosure to officers or employees of enterprises engaged in the production, export or import of the products that were the subject of the investigations at issue. They requested that BCI be identified in documents and that documents containing BCI be marked as such. They further requested that parties making oral statements containing BCI be required to inform the Division, and that the Division ensure that only persons entitled to access BCI are in the room to hear the statements. They proposed that no BCI be disclosed in the Appellate Body Report. They proposed that the Appellate Body provide the participants with a confidential version of the draft Appellate Body Report and give each of them the opportunity to review the Report prior to its circulation to verify and ensure that the Appellate Body does not inadvertently disclose any information that contains BCI. Korea and the United States also proposed that these additional procedures contain further requirements: (i) to treat the information designated as BCI as confidential; (ii) not to disclose the information to non-authorized persons under the procedures; and (iii) to use the information only for the purposes of the dispute.

4. On 8 April 2016, the European Union addressed a letter to the Chairman of the Appellate Body commenting on the joint request. The European Union expressed the view that BCI procedures at the appellate stage should not be based on the Panel's BCI procedures, which it considered were, in certain respects, superseded by recent rulings by the Appellate Body. The European Union recalled recent Appellate Body decisions on the issues of BCI and argued that BCI procedures at the appellate stage should not define BCI by reference to the definition that was adopted by the Panel, which in turn referred to the definition adopted in the underlying municipal proceedings. Moreover, the European Union argued that BCI procedures at the appellate stage should provide for the possibility of review by the Appellate Body of the designation of information as BCI proposed by the participants, either at the request of any participants or third participants or on its own motion.

5. On 19 April 2016, the United States filed its Notice of Appeal. In a letter communicated to the Appellate Body on the same day, the United States sought guidance from the Appellate Body on how to proceed with filing its appellant's submission, which contained information that was designated as BCI in the panel proceedings. In a letter issued on the same day, the Chair of the Appellate Body on behalf of the Division informed the United States and the other participants that, pending a final decision on the joint request, the Division had decided to provide provisional additional protection to information marked as BCI in the United States' appellant's submission and in an eventual other appellant's submission by Korea. On 19 April 2016, the United States filed its appellant's submission. Korea filed a Notice of Other Appeal and an other appellant's submission on 25 April 2016. Both submissions contain information marked as BCI.

6. On 21 April 2016, the Chair of the Appellate Body addressed a letter on behalf of the Division hearing the appeal in this dispute to the participants, asking them to further substantiate

why certain information contained in their submissions and in the Panel record warranted special protection at the appellate stage beyond that already provided under the confidentiality standards set out in Articles 17.10 and 18.2 of the DSU, and the Rules of Conduct. Korea and the United States responded to this request with separate communications on 26 April 2016.

7. Korea noted that its other appellant's submission contained information regarding one of the Korean exporters' sales volumes and values, costs of production, including R&D expenditures, and other financial information, whose disclosure could cause this exporter to suffer competitive harm. Korea pointed out that this information is not in the public domain and was provided by the exporter under the expectation that it will be adequately protected. Korea further argued that the information for which Korea and the United States jointly requested additional protection met the criteria identified by the Appellate Body in its Procedural Ruling in *EC and certain member States — Large Civil Aircraft* and that the additional protection requested by Korea and the United States would not impinge on the duties of the Appellate Body or on the rights of the third participants.

8. The United States noted that there was no disagreement between the parties concerning whether certain information constituted BCI, and that there was no basis to doubt that the information was confidential as contemplated under Article 6.5 of the Anti-Dumping Agreement. The United States further noted that the information related to sensitive commercial data, such as sales and production data, tax information, and research and development expenses for the submitting companies, and that any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies submitting the information.

9. The United States considered that the additional protection sought by the parties, although important, was minimal and would not hinder the participation by third participants or the work of the Division in this appeal. The United States recalled that, in essence, this protection amounted to a requirement to appropriately identify and mark submissions or statements containing BCI, including when BCI is submitted by a party or third party that did not originally provide the information to the Panel, and a restriction that would preclude access to BCI by individuals representing competitor companies in order to avoid harm to the originator of the information.

10. On 26 April 2016, the Division invited the third participants to provide further comments on the joint request by Korea and the United States of 5 April 2016 and on their subsequent communications of 26 April 2016. The European Union recalled its communication of 8 April 2016 and noted that Articles 17.10 and 18.2 of the DSU already imply the protection jointly requested by Korea and the United States. The European Union considered what was requested by Korea and the United States less in the nature of "additional protection" and more in the nature of clarifications and elaborations of the protection already provided by the existing general rules. China did not provide substantive comments on the joint request and stated that it had no objection to the joint proposal of the parties for additional protection of BCI.

11. We recall that in *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered that the DSU and the *Rules of Conduct* already provide for confidentiality, and that any additional protection must be justified. The Appellate Body stated that, while "[p]articipants requesting particularized arrangements have the burden of justifying that such arrangements are *necessary* in a given case adequately to protect certain information"[1], it is the task of the WTO adjudicator and not of the parties to determine whether additional protection in the form of BCI procedures is called for. The Appellate Body considered in that dispute that the WTO adjudicator should decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection.[2]

12. The Appellate Body also stated in *EC and certain member States – Large Civil Aircraft* that "the determination of whether the particular information that was submitted deserved additional protection and the particular degree of such protection" should be based on objective criteria, which "could include, for example: whether the information is proprietary; whether it is in the public domain or protected; whether it has a high commercial value for the originator of the

[1] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 10.

[2] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

information, its competitors, customers, or suppliers; the degree of potential harm in the event of disclosure; the probability of such disclosure; the age of the information and the duration of the industry's business cycle; and the structure of the market".[3]

13. In *China – HP-SSST*, the Appellate Body stated that "[i]n determining the scope and content of such procedures, the panel must consider the effect they may have on the exercise by the panel of its adjudicative duties under the DSU and other covered agreements, the parties' rights to due process, the rights of the third parties, and the rights and systemic interests of other WTO Members."[4] The Appellate Body noted that any "additional procedures adopted by a panel to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the relevant provisions of the DSU and other covered agreements (including the Anti-Dumping Agreement)."[5] The Appellate Body stated that an obligation rested upon the panel to adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential.[6] We further note that the panel in *China – HP-SSST* removed, in a preliminary ruling, from its initial procedures for the protection of BCI, the requirement that a party must provide prior written authorization from the entity that submitted the confidential information in the underlying anti-dumping proceedings when submitting such information to the Panel.[7]

14. In *China – HP-SSST*, the Appellate Body also considered that the treatment of information as confidential by an investigative authority in domestic proceedings should not be conflated with "the confidential treatment of information provided *by a WTO Member to a panel or the Appellate Body in the context of WTO dispute settlement proceedings*"[8], and that "whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO panel".[9]

15. Bearing in mind the above-mentioned rulings by the Appellate Body on the issue of additional protection of BCI, we have decided to accord additional protection to the information, which has been designated as BCI in the submissions to the Appellate Body and in the panel record. As Korea and the United States have explained in their joint requests and substantiated further in their subsequent written clarifications, the information for which additional protection is sought relates to sensitive commercial data of the companies concerned in these proceedings. Korea noted, inter alia, that its other appellant's submission contained information marked as BCI regarding one of the exporters' sales volumes and values, costs of production, including R&D expenditures, and other financial information whose disclosure could cause this exporter to suffer competitive harm. The United States in turn submitted that the information marked as BCI in its appellant's submission related to sensitive commercial data, such as sales and production data, tax information, and research and development expenses of the submitting companies and that any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies submitting the information.

16. The additional BCI protection is provided according to the following terms:

17. No person may have access to information, which has been designated as BCI in the submissions to the Appellate Body and in the panel record, except a member of the Appellate Body

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[3] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

[4] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 8-9).

[5] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9).

[6] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.311.

[7] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.26-7.29. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.305.

[8] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.313. (emphasis original)

[9] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.316.

or the staff of the Appellate Body Secretariat, an employee of a participant or third participant, and an outside advisor for the purposes of this dispute to a participant or third participant. 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.

18. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant or third participant shall have responsibility in this regard for its employees as well as any outside advisors employed 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.

19. A participant or third participant that submits a document containing BCI to the Appellate Body, including in written submissions and oral statements, shall clearly identify such information in the document. The participant or third participant 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: [[…]]. The first page or cover of the document shall state "Contains business confidential information on pages XXX", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party or third party that intends to make an oral statement containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

20. The Appellate Body will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCl. The Appellate Body may, however, make statements of conclusion drawn from such information.