

5.306. We, therefore, reverse the Panel's finding, in paragraph 8.1.b.v of its Report⁷⁰², that "the USDOC [did not act] inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by limiting the denominator to the sales value of products produced by Samsung in Korea when allocating the benefit conferred by RSTA Article 10(1)(3) tax credit subsidies"; and find, instead, that the USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of the tax credits received by Samsung under Article 10(1)(3) of the RSTA and thereby presumptively attributing those tax credits to Samsung's domestic production.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.⁷⁰³

6.1 The relevant "pattern" for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

6.2. We agree with the Panel that, under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, "a sub-set of export transactions is set aside for specific consideration."⁷⁰⁴ We further agree with the Panel that, once prices are identified as being different from other prices, "they constitute the relevant 'pattern'" and that, "[a]lthough those prices are identified by reference to other prices pertaining to other purchasers, regions or time periods, those other prices are not part of the relevant 'pattern'."⁷⁰⁵ Although we recognize that a pattern may be identified in a variety of factual circumstances, we consider that the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 comprises prices that are significantly *lower* than other export prices among different purchasers, regions or time periods. Moreover, we consider that some transactions that differ among purchasers, taken together with some transactions that differ among regions, and some transactions that differ among time periods, cannot form a single pattern. Our interpretation does not exclude the possibility that the same exporter or producer could be practicing more than one of the three types of "targeted dumping". We also do not exclude the possibility that a pattern of significantly differing prices to a certain category (purchasers, regions, or time periods) may overlap with a pattern of significantly differing prices to another category.

6.3. We thus consider that a "pattern" for the purposes of the second sentence of Article 2.4.2 comprises *all* the export prices to one or more particular purchasers which differ significantly from the export prices to the other purchasers because they are significantly *lower* than those other prices, or *all* the export prices in one or more particular regions which differ significantly from the export prices in the other regions because they are significantly *lower* than those other prices, or *all* the export prices during one or more particular time periods which differ significantly from the export prices during the other time periods because they are significantly *lower* than those other prices.

- a. Consequently, we uphold the Panel's conclusions regarding the relevant "pattern" set out in, *inter alia*, paragraphs 7.24, 7.27-7.28, 7.45-7.46, 7.141-7.142, and 7.144 of the Panel Report.
- b. In addition, we uphold the Panel's finding, in paragraph 8.1.a.ix of the Panel Report⁷⁰⁶, that "the DPM is inconsistent 'as such' with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] 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'".

⁷⁰² See also Panel Report, para. 7.320.

⁷⁰³ One Member of the Division expressed a separate opinion on the issue of zeroing under the W-T comparison methodology. This separate opinion can be found in sub-section 5.1.10 of this Report.

⁷⁰⁴ Panel Report, para. 7.24.

⁷⁰⁵ Panel Report, para. 7.28.

⁷⁰⁶ See also Panel Report, para. 7.147.

6.2 The scope of application of the W-T comparison methodology in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

6.4. Based on the text of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, which refers to "individual export transactions", read in context and in light of the function of the second sentence of Article 2.4.2 to allow investigating authorities to identify and address "targeted dumping", we consider that the W-T comparison methodology should only be applied to those transactions that justify its use, namely, those transactions forming the relevant "pattern".

- a. Therefore, we uphold the Panel's finding, in paragraph 7.29 of the Panel Report, that "the W-T comparison methodology should only be applied to transactions that constitute the 'pattern of export prices which differ significantly among different purchasers, regions or time periods'."
- b. We further uphold the Panel's consequential finding, in paragraph 8.1.a.i of the Panel Report⁷⁰⁷, that "the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, by applying the W-T comparison methodology to transactions other than those constituting the patterns of transactions that the USDOC had determined to exist in the *Washers* anti-dumping investigation".
- c. We also uphold the Panel's consequential finding, in paragraph 8.1.a.vi of the Panel Report⁷⁰⁸, that "the DPM is inconsistent 'as such' with Article 2.4.2 of the Anti-Dumping Agreement, because it applies the W-T comparison methodology to non-pattern transactions when the aggregated value of sales to purchasers, regions, and time periods that pass the Cohen's *d* test account[s] for 66% or more of the value of total sales".

6.3 Prices which differ "significantly" under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

6.5. We consider that the Panel did not mischaracterize Korea's claim. Moreover, assessing the extent of the differences in export prices to establish whether those export prices differ *significantly* for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement entails both quantitative and qualitative dimensions. As part of the qualitative assessment, circumstances pertaining to the nature of the product or the markets may be relevant for the assessment of whether differences are "significant" in the circumstances of a particular case.

- a. Therefore, we find that the requirement to identify prices which differ *significantly* means that the investigating authority is required to assess quantitatively and qualitatively the price differences at issue. This assessment may require the investigating authority to consider certain objective market factors, such as circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. However, we agree with the Panel that an investigating authority is not required to consider the cause of (or reasons for) the price differences to establish the existence of a pattern under the second sentence of Article 2.4.2.
- b. We reverse the Panel's finding in respect of the *Washers* anti-dumping investigation, in paragraph 8.1.a.ii of the Panel Report⁷⁰⁹, to the extent that the Panel found that "a pattern of export prices which differ significantly among purchasers, regions or time periods" can be established "on the basis of purely quantitative criteria".
- c. We also reverse the Panel's finding in respect of the DPM, in paragraph 8.1.a.v of the Panel Report⁷¹⁰, to the extent that the Panel found that "a pattern of export prices which differ significantly among purchasers, regions or time periods" can be established "on the basis of purely quantitative criteria".

⁷⁰⁷ See also Panel Report, para. 7.29.

⁷⁰⁸ See also Panel Report, para. 7.119.c.

⁷⁰⁹ See also Panel Report, para. 7.52.

⁷¹⁰ See also Panel Report, para. 7.119.a.

6.4 The explanation to be provided under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

6.6. We consider that an investigating authority has to explain why both the W-W and the T-T comparison methodologies cannot take into account appropriately the differences in export prices that form the pattern. In circumstances where the W-W and T-T comparison methodologies would yield substantially equivalent results and where an explanation has been provided with respect to one of these two methodologies, the explanation to be included with respect to the other may not need to be as elaborate.

- a. Therefore, we reverse the Panel's finding, in paragraph 8.1.a.iv of the Panel Report⁷¹¹, that "Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] in the *Washers* anti-dumping investigation by failing to explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology."
- b. We also reverse the Panel's finding, in paragraph 8.1.a.viii of the Panel Report⁷¹², that "Korea failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 [of the Anti-Dumping Agreement] when, having concluded that the W-W comparison methodology cannot appropriately take into account the observed pattern of significantly different prices, it does not also consider whether the relevant price differences could be taken into account appropriately by the T-T comparison methodology".

6.5 "Systemic disregarding"

6.7. With respect to the Panel's finding under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, we consider that the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping by applying the W-T comparison methodology only to "pattern transactions" to the exclusion of "non-pattern transactions". We also consider that the second sentence of Article 2.4.2 does not permit the combining of comparison methodologies. Accordingly, we find that this provision does not envisage "systemic disregarding", as described by the Panel. The second sentence of Article 2.4.2 does not envisage a mechanism whereby an investigating authority would conduct separate comparisons for "pattern transactions" under the W-T comparison methodology and for "non-pattern transactions" under the W-W or T-T comparison methodology, and exclude from its consideration the result of the latter if it yields an overall negative comparison result or aggregate it with the W-T comparison result for the "pattern transactions" if it yields an overall positive comparison result. Thus, in circumstances where the requirements of the second sentence of Article 2.4.2 have been fulfilled, an investigating authority is allowed to establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions" and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.

- a. We, therefore, moot the Panel's finding, in paragraph 8.1.a.x of the Panel Report⁷¹³, that "Korea failed to establish that the United States' use of 'systemic disregarding' under the DPM is 'as such' inconsistent with the second sentence of Article 2.4.2". Instead, when the requirements of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement are fulfilled, an investigating authority may establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.

6.8. With respect to the Panel's finding under Article 2.4 of the Anti-Dumping Agreement, we consider that Articles 2.4 and 2.4.2 not only inform each other, but must be read together harmoniously and that the exceptional nature of the W-T comparison methodology, consistent with the function of the second sentence of Article 2.4.2 as allowing an investigating authority to identify and address "targeted dumping" by considering "pattern transactions" confirms that the "fair comparison" requirement in Article 2.4 applies only in respect of "pattern transactions".

⁷¹¹ See also Panel Report, para. 7.81.

⁷¹² See also Panel Report, para. 7.119.b.

⁷¹³ See also Panel Report, para. 7.167.

Accordingly, we conclude that the establishment of margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer, is consistent with the "fair comparison" requirement in Article 2.4.

- a. Having concluded that the second sentence of Article 2.4.2 does not permit an investigating authority to combine the W-T comparison methodology with the W-W or T-T comparison methodology and, thus, does not provide for "systemic disregarding" as described by the Panel, we moot the Panel's finding, in paragraph 8.1.a.xi of the Panel Report⁷¹⁴, that "Korea failed to establish that the United States' use of 'systemic disregarding' under the DPM is 'as such' inconsistent with Article 2.4" of the Anti-Dumping Agreement.

6.6 Zeroing under the W-T comparison methodology⁷¹⁵

6.9. With respect to the consistency of zeroing under the W-T comparison methodology with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, we do not consider the Panel to have erred in its findings. The exceptional W-T comparison methodology in the second sentence of Article 2.4.2 requires a comparison between a weighted average normal value and the entire universe of export transactions that fall within the pattern as properly identified under that provision, irrespective of whether the export price of individual "pattern transactions" is above or below normal value. While the results of the transaction-specific comparisons of weighted average normal value and each individual export price falling within the pattern will be intermediate results, the aggregation of *all* these results is required and will determine dumping and margins of dumping for the product under investigation as it relates to the identified "pattern". Zeroing the negative intermediate comparison results within the pattern is neither necessary to address "targeted dumping", nor is it consistent with the establishment of dumping and margins of dumping as pertaining to the "universe of export transactions" identified under the second sentence of Article 2.4.2. While the text of the second sentence of Article 2.4.2 allows an investigating authority to focus on "pattern transactions" and exclude from its consideration "non-pattern transactions" in establishing dumping and margins of dumping under the W-T comparison methodology, it does not allow an investigating authority to exclude certain transaction-specific comparison results within the pattern, when the export price is above normal value.

- a. We, therefore, uphold the Panel's findings, in paragraphs 8.1.a.xii and 8.1.a.xiv of the Panel Report⁷¹⁶, that "the United States' use of zeroing when applying the W-T comparison methodology is inconsistent 'as such' with Article 2.4.2 of the Anti-Dumping Agreement" and that "the USDOC acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation".

6.10. With respect to the consistency of zeroing under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 with the "fair comparison" requirement in Article 2.4, we do not consider the Panel to have erred in its findings. Setting to zero the intermediate negative comparison results has the effect of not only inflating the magnitude of dumping, thus resulting in higher margins of dumping, but it also makes a positive determination of dumping more likely in circumstances where the export prices above normal value exceed those that are below normal value. Moreover, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare *all* comparable export transactions that form the applicable "universe of export transactions" as required under the second sentence of Article 2.4.2, thus failing to make a "fair comparison" within the meaning of Article 2.4.

- a. Therefore, having found that zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 and having upheld the Panel's findings on zeroing under the second sentence of Article 2.4.2, we also

⁷¹⁴ See also Panel Report, para. 7.169.

⁷¹⁵ For the separate opinion on this issue, see sub-section 5.1.10 of this Report.

⁷¹⁶ See also Panel Report, para. 7.192.

uphold the Panel's findings, in paragraphs 8.1.a.xiii and 8.1.a.xv of the Panel Report⁷¹⁷, that "the United States' use of zeroing when applying the W-T comparison methodology is inconsistent 'as such' with Article 2.4 of the Anti-Dumping Agreement" and that "the USDOC acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation".

6.11. With respect to the consistency of zeroing with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in the application of the W-T comparison methodology in administrative reviews, we do not consider the Panel to have erred in its finding. Article 9.3 refers to the "margin of dumping" as established under Article 2. This "margin of dumping" represents the ceiling for anti-dumping duties levied pursuant to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Accordingly, if margins of dumping are established inconsistently with Article 2.4.2 by using zeroing under the W-T comparison methodology, the corresponding anti-dumping duties that are levied will also be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, as they will exceed the margin of dumping that should have been established under Article 2. Moreover, if zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 in original anti-dumping investigations, it also cannot be permitted in respect of administrative reviews.

- a. We, therefore, uphold the Panel's finding, in paragraph 8.1.a.xvi of the Panel Report⁷¹⁸, that "the United States' use of zeroing when applying the W-T comparison methodology in administrative reviews is inconsistent 'as such' with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994".

6.7 Article 2.2 of the SCM Agreement

6.12. With respect to the Panel's findings under Article 2.2 of the SCM Agreement, we agree with the Panel that: (i) the term "certain enterprises" in Article 2.2 is not limited to entities with legal personality, but also encompasses sub-units or constituent parts of a company – including, but not limited to, its branch offices and the facilities in which it conducts manufacturing operations – that may or may not have distinct legal personality; (ii) the "designation" of a region for purposes of Article 2.2 need not be affirmative or explicit, but may also be carried out by exclusion or implication, provided that the region in question is clearly discernible from the text, design, structure, and operation of the subsidy at issue; and (iii) the concept of "geographical region" in Article 2.2 does not depend on the territorial size of the area covered by a subsidy. The Panel correctly found that the RSTA Article 26 tax credit programme effectively designated the region where the relevant eligible investments were to be made in order to qualify for the subsidy at issue, thereby being "limited to certain enterprises located within a designated geographical region" within Korea's jurisdiction.

- a. We, therefore, uphold the Panel's finding, in paragraph 8.1.b.iii of the Panel Report⁷¹⁹, 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".

6.13. With respect to the issue of whether, in its analysis of regional specificity, the Panel failed to comply with its obligations under Article 11 of the DSU, we consider that the claims that Korea raised before the Panel under Article 2.2 hinged, essentially, on the interpretation of certain terms contained in that provision, and that the Panel did address all of such interpretative claims.

- a. We, therefore, find that the Panel did not act inconsistently with its duties under Article 11 of the DSU in articulating its findings on regional specificity.

⁷¹⁷ See also Panel Report, para. 7.206.

⁷¹⁸ See also Panel Report, para. 7.208.

⁷¹⁹ See also Panel Report, para. 7.289.

6.8 Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994

6.14. With respect to the Panel's affirmation of the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA were not tied to particular products, we consider that the Panel: (i) improperly endorsed a flawed tying test applied by the USDOC in the *Washers* countervailing duty investigation, whereby a subsidy is tied to a specific product only when the intended use of the subsidy is known to the granting authority and so acknowledged prior to or concurrent with the bestowal of the subsidy; and (ii) improperly upheld the USDOC's dismissal of certain evidence submitted by Samsung that was potentially relevant to the assessment of whether a portion of the tax credits Samsung claimed under such provisions was tied to the products manufactured by its digital appliance business unit.

- a. We, therefore, reverse the Panel's finding, in paragraph 8.1.b.iv of the Panel Report⁷²⁰, that "the USDOC's failure to tie the RSTA Article[s] 10(1)(3) and 26 tax credit subsidies to [d]igital [a]ppliance products is [not] inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994"; and find, instead, that the USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by: (i) applying a flawed tying test in the *Washers* countervailing duty investigation, whereby a subsidy is tied to a specific product only when the intended use of the subsidy is known to the granting authority and so acknowledged prior to or concurrent with the bestowal of the subsidy; and (ii) by dismissing certain evidence submitted by Samsung that was potentially relevant to the assessment of whether a portion of the tax credits Samsung claimed under Article 10(1)(3) and Article 26 of the RSTA was tied to the products manufactured by its digital appliance business unit.

6.15. Having reversed the Panel's finding under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, we do not find it necessary to address Korea's claim that the Panel also failed to comply with its duties under Article 11 of the DSU by stating, in paragraph 7.303 of the Panel Report, that the tax credits available under the RSTA Article 10(1)(3) tax credit programme "are not R&D subsidies".

6.16. With respect to the Panel's affirmation of the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production, we consider that the Panel: (i) erroneously conflated the concept of "recipient of the benefit" under Article 1.1(b) of the SCM Agreement with the concept of "subsidized product" under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994; and (ii) improperly upheld the manner in which the USDOC presumptively attributed the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production, thereby condoning the USDOC not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of those tax credits.

- a. We, therefore, reverse the Panel's finding, in paragraph 8.1.b.v of the Panel Report⁷²¹, that "the USDOC [did not act] inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by limiting the denominator to the sales value of products produced by Samsung in Korea when allocating the benefit conferred by RSTA Article 10(1)(3) tax credit subsidies"; and find, instead, that the USDOC acted inconsistently with the United States' obligations under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by not assessing all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of the tax credits received by Samsung under Article 10(1)(3) of the RSTA and thereby presumptively attributing those tax credits to Samsung's domestic production.

6.9 Recommendation

6.17. The Appellate Body recommends that the DSB request the United States to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994, into conformity with its obligations under those Agreements.

⁷²⁰ See also Panel Report, para. 7.307.

⁷²¹ See also Panel Report, para. 7.320.

Signed in the original in Geneva this 6th day of August 2016 by:

Thomas Graham
Presiding Member

Ricardo Ramírez-Hernández
Member

Ujal Singh Bhatia
Member