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Report of the Appellate Body

5.2.1 Background

AD	anti-dumping / anti-dumping duty
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
BCI Procedures	Additional working procedures adopted by the Panel for the protection of BCI, attached as Annex A-2 to the Panel Report
CONNUM	control number
CVD	countervailing duty
DPM	Differential Pricing Methodology that replaced the Nails II methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
GOK	Government of Korea
HRD	human resources development

SCM Committee	Committee on Subsidies and Countervailing Measures

KOR-81	GOK *Washers* CVD questionnaire response	Response dated 9 April 2012 of the Government of Korea to the USDOC's questionnaire of 15 February 2012 in the *Washers* CVD investigation [C-580-869] (excerpts) (BCI-redacted version)
KOR-82 (BCI)	GOK *Washers* CVD case brief	Case Brief of the Government of Korea, Large Residential Washers from the Republic of Korea [C-580-869] (31 October 2012) (excerpt) (contains BCI)
KOR-85	*Washers* preliminary CVD determination	USDOC [C-580-869] Large Residential Washers From the Republic of Korea: Preliminary Affirmative Countervailing Duty Determination and

KOR-141		USDOC [A-580-868] Large Residential Washers From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review; 2012–2014, *United States Federal Register*, Vol. 80, No. 179 (16 September 2015), pp. 55595-55596 USDOC [A-580-868] Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Large Residential Washers from the Republic of Korea (8 September 2015)
USA-5		Oxford English

Canada – Renewable Energy / Canada – Feed-in Tariff Program	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
China – Broiler Products	Panel Report, *China Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – GOES	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
EC – Asbestos	Appellate Body *European Communities – Measures AW*nBT/F4804Tf1 0825

investigation conducted by the USDOC concerning imports of LRWs from Korea[8] (*Washers* anti-dumping investigation); (ii) the so-called "Differential Pricing Methodology" that replaced the Nails II methodology as of March 2013 (DPM) "as such"; (iii) the DPM "as applied" in the first administrative review of the anti-dumping order imposing anti-dumping duties on LRWs from Korea issued by the USDOC on 15 February 2013[9] (*Washers* anti-dumping order); and (iv) the ongoing and future application of the DPM in connection with the *Washers* anti-dumping investigation. Korea also challenged the USDOC's use of "zeroing" in the context of the W-T comparison methodology.[10] Specifically, Korea challenged: (i) "as such" the rule or norm pursuant to which the USDOC engages in zeroing; and (ii) zeroing "as applied" in the *Washers* anti-dumping investigation.[11]

1.4. With regard to the United States' measures imposing definitive countervailing duties on imports of LRWs from Korea in connection with the *Washers* countervailing duty investigation[12], Korea challenged under the SCM Agreement the USDOC's determinations that two tax credit programmes[13] were specific. Moreover, Korea raised claims under the SCM Agreement and the GATT 1994 challenging the manner in which the USDOC calculated the *ad valorem* subsidy rate for Samsung Electronics Co., Ltd (Samsung)[14] under those programmes.[15]

1.5. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 11 March 2016, the Panel found as follows concerning the anti-dumping measures at issue:

a. with regard to the *Washers* anti-dumping investigation:

   i. the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement by applying the W-T comparison methodology to transactions other than those constituting the patterns of transactions that the USDOC had determined to exist[16];

   ii. Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement by determining the

variations, the DPM does not properly establish "a pattern of export prices which differ significantly among different purchasers, regions or time periods"[27];

vi. Korea failed to establish that the United States' use of "systemic disregarding"[28] under the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement[29]; and

vii. Korea failed to establish that the United States' use of "systemic disregarding" under the DPM is inconsistent "as such" with Article 2.4 of the Anti-Dumping Agreement[30]; and

c. with regard to zeroing:

i. 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[31];

ii. 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[32];

iii. 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[33];

iv. 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[34]; and

v. 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.[35]

1.6. In addition, the Panel found as follows concerning the countervailing duties at issue:

a. the USDOC's original and remand determinations that the "RSTA Article 10(1)(3) tax credit programme"[36] is *de facto* specific because Samsung received subsidies under that programme in disproportionately large amounts are inconsistent with Article 2.1(c) of the SCM Agreement[37];

[27] Panel Report, para. 8.1.a.ix.

[28] As we explain below, "systemic disregarding" occurs when the W-T comparison methodology applied to the transactions that pass the Cohen's *d* test is combined with the W-W comparison methodology applied to the transactions that do not pass the Cohen's *d* test and, if the latter yields an overall negative comparison result, the same is disregarded or set to zero.

[29] Panel Report, para. 8.1.a.x.

[30] Panel Report, para. 8.1.a.xi.

[31] Panel Report, para. 8.1.a.xii.

[32] Panel Report, para. 8.1.a.xiii.

[33] Panel Report, para. 8.1.a.xiv.

[34] Panel Report, para. 8.1.a.xv.

[35] Panel Report, para. 8.1.a.xvi. The Panel, however, declined to make any findings regarding Korea's allegations concerning the USDOC's use of average export prices rather than actual export prices in calculating standard deviation and the USDOC's alleged "sufficiency test". (Ibid., para. 8.2) Moreover, the Panel did not consider it necessary to address Korea's claims against zeroing under Articles 1 and 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 in the *Washers* anti-dumping investigation, in "subsequent connected stages", and "as such". Nor did it consider it necessary to address Korea's claims against zeroing under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in "subsequent connected stages" of the *Washers* anti-dumping investigation. The Panel also did not consider it necessary to address Ko

b. the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take account of the two mandatory factors referred to in the final sentence of that provision in its determination of *de facto* specificity[38];

c. Korea failed to establish that the USDOC's determination of regional specificity in respect of the "RSTA Article 26 tax credit programme"[39] is inconsistent with Article 2.2 of the SCM Agreement[40];

d. Korea failed to establish that the USDOC's failure to tie the subsidies claimed by Samsung under the RSTA Article 10(1)(3) and Article 26 tax credit programmes to Samsung's digital appliance products (including LRWs) is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994[41]; and

e. Korea failed to establish that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by limiting the denominator to the sales value of products produced by Samsung in Korea when allocating the benefit conferred to Samsung under the RSTA Article 10(1)(3) tax credit programme.[42]

1.7. In accordance with Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and having found that the United States had acted inconsistently with certain provisions of the Anti-Dumping Agreement, the SCM Agreement, and the GATT 1994, the Panel recommended that the United States bring its measures into conformity with its obligations under those Agreements.[43]

1.8. On 19 April 2016, the United States notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal[44] and appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review[45] (Working Procedures). On 25 April 2016, Korea notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal[46] and other appellant's submission pursuant to Rule 23 of the Working Procedures. On 9 May 2016, Korea and the United States each filed an appellee's submission.[47] On 9 May 2016, China filed a third participant's submission.[48] On 10 May 2016, Brazil, Canada, the European Union, Japan, Norway, and Viet Nam each filed a third participant's submission.[49] On 17 June 2016, India, Saudi Arabia, Thailand, and Turkey each notified its intention to appear at the oral hearing as a third participant.[50]

1.9. On 22 April 2016, the Appellate Body Secretariat transmitted the Working Schedule for Appeal drawn up by the Appellate Body Division

requested the Division 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 the joint request. They

raised in this appeal.[53] By letter dated 17 June 2016, the Presiding Member explained that, in light of the many issues raised in this appeal and in order to be able to complete the hearing within a reasonable time-frame, the Division did not consider that it would be appropriate to extend the time allocated for opening statements.

1.16. On 17 June 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period stipulated in Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, and informed the Chair of the DSB that the circulation date of the Appellate Body Report in this appeal would be communicated to the participants and third participants after the oral hearing.[54] The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body in 2016, scheduling difficulties arising from overlap in the composition of the Divisions hearing the different appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these concurrent appeals place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat. On 7 July 2016, the Chair of the Appellate Body notified the Chair of the DSB that the Report in this appeal would be circulated to WTO Members no later than Wednesday, 7 September 2016.[55]

1.17. The oral hearing in this appeal was held o 437.35 593.5 Tm[(sh)7(19.75 637.79 Tm[(1)] TJETBT1 0 0 1

purchaser, or a region, or a time period), while other higher-priced export

"as such" with these provisions and that the United States acted inconsistently with Article 2.4 and the second sentence of Article 2.4.2 by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation (raised by the United States).

4.2. With regard to the countervailing duties, the following issues are raised in this appeal:

a. whether the Panel erred in its interpretation and application of Article 2.2 of the SCM Agreement by upholding the USDOC's determination that the RSTA Article 26 tax credit programme was regionally specific (raised by Korea);

b. whether the Panel failed to conduct an objective assessment of the matter before it in articulating its findings on regional specificity, thereby acting inconsistently with its duties under Article 11 of the DSU (raised by Korea);

c. whether the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by upholding the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26

5.7. The USDOC initiated an administrative review of the *Washers* anti-dumping order on 1 April 2014.[72] In this administrative review, the USDOC applied the DPM, which replaced the Nails II methodology as of March 2013[73], to determine whether to apply the W-T comparison methodology to establish dumping margins for LGE.[74]

5.8. Unlike the Nails II methodology, where an allegation of "targeted dumping" from the domestic industry was required, the USDOC applies the DPM on its own motion.[75] The DPM consists of three main components.[76]

5.9. First, the "Cohen's *d* test" evaluates the extent of the difference between the mean price of a test group that comprises the sales to a particular purchaser, region, or time period and the mean price of a comparison group that comprises all other sales of comparable merchandise.[77] The Cohen's *d* test is applied by the USDOC when the test and comparison groups each have at least two observations (i.e. two transactions) and when the sales quantity for the comparison group accounts for at least 5% of the total sales quantity of the comparable merchandise. The Cohen's *d*

comparable export transactions; and (ii) the T-T comparison methodology, whereby normal value and export prices are compared on a transaction-specific basis. As the Appellate

used."[90] In the same vein, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body stated that the W-T comparison methodology "may be used only in exceptional circumstances" and that it is "an exception".[91]

5.19. We start our analysis with the United States' claims that the Panel erred in its interpretation of the relevant "pattern" and in finding that the DPM does not properly establish a "pattern", before addressing the United States' claims pertaining to the scope of application of the W-T comparison methodology. We then turn to Korea's claims concerning the identification of a pattern of prices which differ "significantly" and its claims regarding the explanation to be provided under the second sentence of Article 2.4.2. Finally, we examine Korea's claims regarding the use of "systemic disregarding" in the context of the DPM and then the United States' claims regarding the use of zeroing in the application of the W-T comparison methodology.

5.20. The first condition set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is that the investigating authority identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods". The Panel's reasoning and conclusions regarding the relevant "pattern" are interspersed throughout its Report. First, the Panel agreed with the parties that the term "pattern" refers to a "regular and intelligible form or sequence discernible in certain actions or situations" and that random price variation does not constitute a pattern.[92] On this basis, the Panel found that, "[i]f particular prices are observed to differ in respect of a particular purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period."[93] The Panel further considered that the relevant "pattern" is composed of a subset of export transactions set aside for specific consideration in the second sentence of Article 2.4.2.[94] The Panel clarified that, if particular prices are observed to differ by purchaser, region, or time period, those prices may be treated as a "pattern". The Panel stated that, although those prices are identified by reference to *other* prices pertaining to other purchasers, regions, or time periods, those other prices are not part of the relevant "pattern".[95] The Panel did not specify, however, whether the subset of export transactions set aside for specific consideration necessarily comprises export prices which differ significantly because they are significantly *lower* than other export prices or whether a pattern could comprise prices which differ significantly because they are significantly *higher* than other export prices.

5.21. Moreover, in the specific context of the DPM, which seeks to identify prices that differ significantly because they are higher or lower than other export prices, the Panel considered that "prices that are too high and prices that are too low do not belong to the same pattern".[96] In light

[90] Appellate Body Report, *US – Zeroing (Japan)*, para. 131.

[91] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97, respectively.

[92] Panel Report, para. 7.45 (referring to Korea's first written submission to the Panel, paras. 86 and 132-133; Oxford Dictionaries online, definition of "pattern" <http://www.oxforddictionaries.com/us/definition/american_english/pattern>, accessed 18 September 2014 (Panel Exhibit KOR-21); and United States' first written submission to the Panel, paras. 59 and 73).

[93] Panel Report, para. 7.46. The Panel explained that the price differences are "regular" and "intelligible" because they pertain only to that particular purchaser, region, or time period. The Panel further noted that a form or sequence of price differences may be intelligible if there is regularity to that form or sequence that may be detected in respect of a particular purchaser, region, or time period. (Ibid., paras. 7.46-7.47) Elsewhere in its Report, the Panel also stated:

> [I]n the context of the second sentence, the relevant form or sequence is determined by reference to purchasers, regions or time periods. If particular prices are observed to differ by purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period. The price differences are "regular" and "intelligible" because they pertain only to a particular purchaser, region or time period.

(Ibid., para. 7.28) Specifically, the Panel accepted Korea's argument that, to be "intelligible", the price differences must have some relationship to one another. As the Panel observed, "[t]his relationship exists when the significantly differing prices relate to the same purchaser, region or time period." (Ibid., fn 79 to para. 7.28 (referring to Korea's first written submission to the Panel, para. 132))

[94] Panel Report, para. 7.24. See also paras. 7.27-7.28.

[95] Panel Report, para. 7.28.

[96] Panel Report, para. 7.144.

of the use of the words "or" and "among" in the phrase "among different purchasers, regions or time periods" in the second sentence of Article 2.4.2, the Panel also found that a pattern cannot be found to exist *across* purchasers, regions, and time periods, "cumulatively".[97] The Panel considered that a pattern of prices which differ significantly among different purchasers must be found in "the price variation within a group of purchasers, as between one or more particular purchasers in relation to all other purchasers of the same group" (with the same being true for a pattern of prices which differ significantly among different regions or time periods).[98]

5.22. On appeal, the United States claims that the Panel erred in its interpretation of the relevant "pattern" under the second sentence of Article 2.4.2 because it concluded that "the relevant 'pattern' … comprises only low-priced export transactions to each particular 'target' (be that a purchaser, or a region, or a time period), while other higher-

5.25. The word "pattern" is not explicitly defined in the text of the Anti-Dumping Agreement. We agree with the Panel that, in the context of the second sentence of Article 2.4.2, a "pattern" can be defined as "[a] regular and intelligible form or sequence discernible in certain actions or situations".[108] As the United States notes[109], this definition of the word "pattern" is frequently used in conjunction with the word "of", such as is the case in the second sentence of Article 2.4.2 where the reference is to a "pattern *of* export prices".[110] Moreover, this definition accords with the French and Spanish versions of the Anti-Dumping Agreement. The French version refers to the term "*configuration*", which can be defined as a "[*f*]*orme extérieure d'un ensemble; relief*" (the exterior shape of a system; relief); and the Spanish version refers to the term "*pauta*", which can be defined as an "[*i*]*nstrumento o norma que sirve para gobernarse en la ejecución de algo*" (an instrument or norm that serves to govern the execution of something).[111] Understanding the word "pattern" as a regular and intelligible form means that there must be regularity to the sequence of "export prices which differ significantly" and this sequence must be capable of being understood.[112] In particular, the word "intelligible" excludes the possibility of a pattern merely reflecting random price variation, something that is not challenged on appeal.[113]

5.26. The relevant "pattern" in the second sentence of Article 2.4.2 is one of export prices which *differ* significantly. The verb "differ", which can be defined as "[t]o have contrary or diverse bearings, tendencies, or qualities; to be not the same; to be unlike, distinct, or various, in nature, form, or qualities, or in some specified respect"[114], expresses a relative concept. As such, prices that are found to differ necessarily differ from other prices. However, by its terms, the second sentence of Article 2.4.2 refers to a pattern of "prices which differ". This wording indicates that the focus in the pattern is on the prices that are found to differ, not on all prices. Therefore, whereas an investigating authority would analyse the prices of all export sales made by the relevant exporter or producer to identify a pattern[115], the distinguishing factor that allows that authority to discern which export prices form part of the pattern would be that the prices in the pattern differ significantly from the prices not in the pattern.

5.27. Our interpretation accords with the ordinary meaning of the word "pattern" as used in the context of the second sente, xt

found in the price variation within purchasers, as between one or more particular purchasers and the other purchasers (with the same applying to regions and time periods, respectively[123]).

5.32. Importantly, the terms "or" and "among" in the second sentence of Article 2.4.2 draw meaning from the immediate context in which they appear. In particular, the need to identify a pattern provides contextual support for an interpretation of the terms "or" and "among" as requiring the investigating authority to consider each category (purchasers, regions, and time periods) on its own. As we have explained, the sequence of "export prices which differ significantly" must be both regular and intelligible. As such, a pattern cannot merely reflect random price variation. This means that an investigating authority is required to identify a regular series of price variations relating to one or more particular purchasers, or one or more particular regions, or one or more particular time periods to find a pattern. A single "pattern" comprising prices that are found to be significantly different from other prices *across* different categories would effectively be composed of prices that do not form a regular and intelligible sequence.

5.33. Therefore, we consider that the words "or" and "among" as used in the phrase "among different purchasers, regions or time periods" cannot be interpreted to mean that the three categories can be considered cumulatively to find one single pattern. This means 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. Accordingly, "a pattern" has to be identified among different purchasers, or among different regions, or among different time periods, and cannot transcend these categories. In *EC – Bed Linen*, the Appellate Body also understood the three categories to work independently from one another. In that case, the Appellate Body

category may overlap with a pattern of significantly differing prices to another category. For instance, the same transactions could "target" certain purchasers in certain regions, in which case the investigating authority might find that a pattern of significantly differing prices among different purchasers and a pattern of significantly differing prices among different regions exist.

5.36. For the reasons set out above, we 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. For the purposes of this Report, we refer to these transactions forming the relevant "pattern" as "pattern transactions".

5.37. 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 its Report.

5.38. Having set out the interpretation of the relevant "pattern" for the purposes of the second sentence of Article

comparison methodology, which suggests that "something different from the first sentence should be undertaken, i.e. assessment of only the pattern transactions set aside for specific consideration."[142] Finally, the Panel relied on the object and purpose of the second sentence of Article 2.4.2 to enable investigating authorities to "'unmask' so-called 'targeted dumping'"[143], as well as on the Appellate Body report in *US – Zeroing (Japan)*, where the Appellate Body read "'individual export transactions' … as referring to the transactions that fall within the relevant pricing pattern".[144]

5.46. Accordingly, the Panel found that the W-T comparison methodology should only be applied to those transactions that constitute the "pattern of export prices which differ significantly among different purchasers, regions or time periods".[145] Consequently, the Panel found that the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation because the USDOC applied the W-T comparison methodology to all e

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allowed to apply

different from the first sentence should be undertaken, i.e. assessment of only the pattern transactions set aside for specific consideration."[162]

5.52. For the reasons set out above, we agree with the Panel that: (i) the use of the word "individual" in the second sentence of Article 2.4.2 indicates that the W-T comparison methodology does not involve all export transactions, but only certain export transactions identified individually; and (ii) the "individual export transactions" to which the W-T comparison methodology may be applied are those transactions falling within the relevant "pattern".[163] Accordingly, we read the phrase "individual export transactions" as referring to the universe of export transactions that justify the use of the W-T comparison methodology, namely, the "pattern transactions". Our interpretation gives meaning and effect to the second sentence of Article 2.4.2, whose function is to allow investigating authorities to identify and address "targeted dumping". It also accords with the object and purpose of the Anti-Dumping Agreement. Although the Anti-Dumping Agreement does not contain a preamble expressly setting out its object and purpose, it is apparent from the text of this Agreement that it deals with injurious dumping by allowing Members to take anti-dumping measures to counteract injurious dumping and imposing disciplines on the use of such anti-dumping measures.[164]

5.53. Applying the W-T comparison methodology to "pattern transactions" only is also in line with the Appellate Body's observations in *US – Zeroing (Japan)*, where the Appellate Body "[read] the phrase 'individual export transactions' … as referring to the transactions that fall within the relevant pricing pattern", and considered that "[t]his universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply."[165] The Appellate Body added that, "[i]n order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."[166]

5.54. We note that the United States makes a number of arguments that take issue with the Panel's reliance, in paragraphs 7.25 and 7.27 of its Report, on the Appellate Body's statements in *US – Zeroing (Japan)*.[167] First, the United States argues that this case did not involve the application of the second sentence of Article 2.4.2. While this is correct, the Appellate Body was nonetheless addressing legal issues raised on appeal, as the panel had drawn contextual support from the second sentence of Article 2.4.2 for its finding that zeroing is permitted under the T-T comparison methodology. Second, the United States asserts that the Appellate Body merely suggested that an investigating authority *may* limit the application of the W-T comparison methodology. While the Appellate Body's use of the word "may" could, if read in isolation, be perceived as being ambiguous, the remaining parts of the relevant paragraph in its report make

[162] Panel Report, para. 7.24.

[163] Panel Report, para. 7.22.

[164] In *US – Continued Zeroing*, the Appellate Body stated that the Anti-Dumping Agreement "deals with 'injurious dumping', and … counteract[ing] the material injury caused, or threatened to be caused, by 'dumped imports' to the domestic industry producing a 'like product'". (Appellate Body Report, *US – Continued Zeroing*, para. 284 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 98)) The United States claims that, by relying on the "object and purpose" of the second sentence of Article 2.4.2, rather than that of the Anti-Dumping Agreement as a whole, the Panel failed to apply properly the customary rules of interpretation of public international law. (United States' appellant's submission, para. 68 (quoting Panel Report, para. 7.26)) Pursuant to Article 31(1) of the Vienna Convention, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31(1) of the Vienna Convention thus refers to the object and purpose of the treaty as a whole, not of the particular provisions under interpretation. However, this does not exclude that individual provisions have a function, or a role to play in a treaty. As we have explained, the function of the second sentence of Article 2.4.2 accords with the object and purpose of the Anti-Dumping Agreement. Moreover, interpreting the second sentence of Article 2.4.2 in light of its function ensures that meaning and effect are given to that provision. The Panel correctly identified the rationale of the second sentence of Article 2.4.2. Therefore, we reject the United States' arguments pertaining to the Panel's reliance on the "object and purpose" of the second sentence of Article 2.4.2.

[165] Appellate Body Report, *US – Zeroing (Japan)*, para. 135. In *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body stated that "the universe of 2(o)-4(b6(e9ET 9p)-3378. 222f)9( )-5(1 518.26 132)en

clear that the Appellate Body excluded the possibility that the W-T comparison methodology might apply to "non-pattern transactions".[168] Finally, we disagree with the United States that the Panel's understanding of the scope of application of the W-T comparison methodology was derived exclusively from that Appellate Body report. The Panel conducted its own analysis of the second sentence of Article 2.4.2, and relied on the Appellate Body report in *US – Zeroing (Japan)* as "[f]urther support" for its interpretation.[169]

5.55. Based on the foregoing considerations, in particular in light of the function of the second sentence of Article 2.4.2 to allow investigating authorities to identify and address "targeted dumping"

authority might properly find that certain prices differ 'significantly' if those prices are notably greater – in purely numerical terms – than other prices, irrespective of the reasons for those differences."[175] As the Panel noted, those "reasons" could, however, be relevant in the context of the explanation to be provided under the second sentence of Article 2.4.2.[176] The Panel acknowledged that, in certain factual circumstances, the size or scale of a price difference may need to be assessed in light of the prevailing factual circumstances.[177] For example, a relatively minor numerical difference between two large prices may not be significant, whereas the same numerical difference between two much smaller prices may be significant. The Panel, however, found that this relates to *how*, not *why*, the relevant prices differ.[178] Accordingly, the Panel rejected Korea's claim that the United States acted inconsistently with the second sentence of Article 2.4.2 in the *Washers* anti-dumping investigation because the USDOC determined 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.[179] The Panel also found that the DPM is not inconsistent "as such" with this provision because it determines 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.[180]

5.59. Korea claims that the Panel mischaracterized its claim as if it were solely that the authority must state the reasons why prices differ.[181] Korea argues that, while it discussed the factual context of the *Washers* anti-dumping investigation in terms of the "reasons" why prices may be differing before the Panel, this was not its sole or even principal argument.[182] Moreover, Korea requests us to reverse the Panel's findings 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".[183] Specifically, Korea argues that the Panel erred in finding that the authority is not required to examine the "reasons" for the price differences to establish the existence of a pattern.[184] Korea recalls that the term "significantly" entails both qualitative and quantitative aspects. Yet, while acknowledging this, in Korea's view, the Panel effectively held that the term "significantly" can be analysed in purely quantitative terms.[185] According to Korea, qualitative considerations are relevant *both* as part of determining whether price differences are "significant" and form a "pattern" and as part of determining whether a W-W comparison can "take into

understand the word "significantly" to speak to the extent of the price differences and to suggest

the Appellate Body referred to the "highly price-competitive" nature of the market.[202] We also note that the panel in *US – Upland Cotton*, in considering a case of significant price suppression under the same provision, found that "it may be relevant to look at the degree of the price suppression … in the context of the prices that have been affected" to assess whether the price suppression is significant.[203] As the panel reasoned:

> The "significance" of any degree of price suppression may vary from case to case, depending upon the factual circumstances, and may not solely depend upon a given level of numeric significance. Other considerations, including the nature of the "same market" and the product under consideration may also enter into such an assessment, as appropriate in a given case.[204]

5.65.

respect of the *Washers* anti-dumping investigation, in paragraph 8.1.a.ii of its Report[208], 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". We also reverse the Panel's finding in respect of the DPM, in paragraph 8.1.a.v of its Report[209], 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".

5.67. We turn now to consider Korea's claims regarding the second condition set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, pursuant to which the

account appropriately by the T-T comparison methodology.[215] The Panel also found that Korea failed to establish that the DPM is inconsistent with this provision because it does not consider

sentence of Article

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.

5.77. Based on the foregoing, we reverse the Panel's finding, in paragraph 8.1.a.iv of its Report[233], that "Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2

that, when an investigating authority determines the margin of dumping for an individual exporter or foreign producer under the second sentence of Article 2.4.2, the investigating authority is

5.98. In light of the above, an investigating authority is not allowed to disregard, in establishing dumping and margins of dumping under the W-W or T-T comparison methodology provided in the first sentence of Article 2.4.2 of the Anti-Dumping Agreement

> Thus, it is evident from the design and architecture of the *Anti-Dumping Agreement* that: (a) the concepts of "dumping" and "margins of dumping" pertain to a "product" and to an exporter or foreign producer; (b) "dumping" and "dumping margins" must be determined in respect of each known exporter or foreign producer examined; (c) anti-dumping duties can be levied only if dumped imports cause or threaten to cause material injury to the domestic industry producing like products; and (d) anti-dumping duties can be levied only in an amount not exceeding the margin of dumping established for each exporter or foreign producer. These concepts are interlinked. They do not vary with the methodologies followed for a determination made under the various provisions of the *Anti-Dumping Agreement*.[283]

5.103. We observe that these statements in respect of the first sentence of Article 2.4.2, that dumping and margins of dumping have to be established for the product under investigation "as a whole", should be read in the context of the Appellate Body's finding against "model zeroing". "Model zeroing" occurs in situations where the investigating authority divides the product under investigation into product types or models for the purposes of calculating a weighted average normal value and a weighted average export price and sets to zero the negative comparison results arising in respect of certain product types or models. In *EC – Bed Linen*, in addressing "model zeroing", the Appellate Body stated that, "with respect to Article 2.4.2, the European Communities had to establish 'the existence of margins of dumping' for the *product* – cotton-type bed linen – and not for the various types or models of that product" since, "[h]aving defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition."[284] The Appellate Body found that, "[b]y 'zeroing' the 'negative dumping margins', the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found."[285]

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which the W-T comparison methodology applies – i.e. the "pattern transactions".[288] While the first sentence of Article 2.4.2 provides for symmetrical comparison methodologies that "shall normally"

dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely."[322]

5.137. We have concluded above that the second sentence of Article 2.4.2 allows an investigating authority to establish dumping and margins of dumping for an exporter or foreign producer and for the product under investigation "as a whole" by applying the W-T comparison methodology to "pattern transactions" only. We have also explained that, in doing so, while the denominator of the equation will comprise all export transactions of an exporter or foreign producer, the numerator is composed of "pattern transactions" only, while excluding "non-pattern transactions". Moreover, we have concluded that the second sentence of Article 2.4.2 does not permit the combining of comparison methodologies.

5.138. The obligation to undertake a "fair comparison" between normal value and export prices arises in respect of the applicable "universe of export transactions" to which each of the three comparison methodologies set out in Article 2.4.2 applies. 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 a

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.

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5.141. The Panel found that, since the second sentence of Article 2.4.2 of the Anti-Dumping Agreement puts particular emphasis on the exporter's pricing behaviour in respect of "pattern transactions", the entirety of the evidence of dumping in respect of that pattern must be taken into account. According to the Panel, the focus of the W-T comparison methodology is on the prices of the "individual" export transactions within the pattern, which suggests that each "pattern transaction" should be considered in its own right and with equal weight, irrespective of whether

disregards the actual prices of some of the export transactions.[337] Moreover, Korea contends that these principles apply consistently throughout the Anti-Dumping Agreement.[338] According to Korea, there is nothing in the text or context of the second sentence of Article 2.4.2 that suggests that dumping or margin of dumping should have any different meaning for the second sentence of Article 2.4.2 than for the rest of the Anti-Dumping Agreement.[339]

5.145. We have recalled above the main Appellate Body findings regarding the use of zeroing under the W-W and T-T comparison meths

5.150. In *US* –

However, the text of the second sentence of Article

methodology *inutile*."[351] According to the United States, an implication of this observation by the Appellate Body is that "it is possible to use zeroing 'to capture pricing patterns constituting "targeted dumping"'."[352] Moreover, the United States observes that "the Appellate Body has never found that it is permissible to use zeroing in connection with the alternative, average-to-transaction comparison methodology set forth in the second sentence of Article 2.4.2, when the conditions for use of that methodology have been established, just as it has never found that it is impermissible to do so, because it has never had occasion to examine that issue."[353]

5.158. We have found above that under the second sentence of Article 2.4.2 an investigating authority may focus exclusively on "pattern transactions", while excluding from its consideration "non-pattern transactions". This enables an investigating authority to "capture pricing patterns constituting 'targeted dumping'"[354] without any need to resort to the use of zeroing in the

value must remain the same.[357] According to Korea, the possibility of changing the normal value or the adjustments to the export prices breaks mathematical equivalence.[358] Korea asserts that "[a]ny equivalence reflects assumptions about how the authority is making the comparison."[359]

5.162. We note that the United States' argument on mathematical equivalence is premised on its understanding of what constitutes the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. The United States submits that, "[o]n its face", the second sentence of Article 2.4.2 "contemplates a pattern of export prices that would transcend multiple purchasers, regions, or time periods"[360] and that "[s]uch a 'pattern' necessarily includes both lower and higher export prices that 'differ significantly' from each other."[361]

5.163. We have concluded above that the "pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2 comprises only a subset of all the export transactions and that these significantly different t6(at)-4( )-32] TJETB

"pattern of export prices which differ significantly" and to which the W-T comparison methodology is applied. Once the pattern of export prices within the meaning of the second sentence has been identified by the investigating authority, the fact that the application of the W-T comparison methodology to that pattern of export prices leads to equivalent results as the application of the W-W comparison methodology to the same pattern, neither undermines the *effet utile* of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, nor does it lead to equivalent results between the application of the symmetrical comparison methodologies normally used under the first sentence to the universe of *all* export transactions and the application of the W-T comparison methodology used under the second sentence of Article 2.4.2 to the limited universe of "pattern transactions".

5.166. The United States also argues that the negotiating history of the Anti-Dumping Agreement confirms that zeroing is permissible when applying the asymmetrical and exceptional W-T comparison methodology set forth in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.[365] The United States refers to four documents in support of its arguments and submits that certain proposals from GATT Contracting Parties seeking changes to the Tokyo Round Anti-Dumping Code addressed concerns about the use of an asymmetrical comparison methodology, in which negative dumping margins would be treated as zero instead of being added to the other transactions to "offset" the dumping margin.[366] The United States considers that such proposals reveal that those GATT Contracting Parties viewed asymmetry and zeroing as one and the same problem.

5.167. We have found above that under the second sentence of Article 2.4.2, an investigating authority can use the W-T comparison methodology to identify and address "targeted dumping" by establishing margins of dumping based on the pattern of export prices which differ significantly and which are "targeted" at purchasers, regions, or time periods. We have also concluded that this exercise would allow an investigating authority not only to identify but also address "targeted dumping" without the need to have recourse to zeroing. We have, thus, reached the conclusion that zeroing under the W-T comparison methodology is not allowed based on the text and context of Article 2.4.2 read in light of the object and purpose of the Anti-

5.180. 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.

5.181. We disagree with the United States' contention that, given that the function of the second sentence of Article 2.4.2 is to "unmask targeted dumping" and that zeroing is necessary in the application of the exceptional W-T comparison methodology to give effect to the second sentence, such an approach is entirely consistent with the obligation that an investigating authority be impartial, even-handed, and unbiased. We have considered above that the *effet utile* of the second sentence in addressing "targeted dumping" is fulfilled once an investigating authority has identified the relevant "pattern" within the meaning of the second sentence of Article 2.4.2 and has established dumping and margins of dumping by applying the W-T comparison methodology exclusively to "pattern transactions". In this respect, we have explained above that zeroing under the W-T comparison methodology is not required in order for the second sentence of Article 2.4.2 to fulfil its function of allowing an investigating authority to identify and address "targeted dumping".

5.182. In light of the above and given that we have upheld the Panel's findings on zeroing under the second sentence of Article 2.4.2, we also uphold the Panel's findings, in paragraphs 8.1.a.xiii and 8.1.a.xv of its Report[378], 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".

5.183. We turn now to consider the United States' appeal of the Panel's finding under Article 9.3 of the Anti-Dumping Agreement and Article

Anti-Dumping Agreement and Article VI:2 of the GATT 1994.[382] Moreover, in *US – Stainless Steel (Mexico)*, the Appellate Body stated that, "under Article VI:2 and Article 9.3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of the subject merchandise from that exporter."[383]

5.186. On appeal, the United States submits that, like its findings under Article 2.4, the Panel's findings under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 are based on the Panel's earlier flawed findings under Article 2.4.2.[384] The United States adds that a margin of dumping established by the use of the W-T comparison methodology when the conditions for its use have been fulfilled is a margin of dumping properly determined under Article 2 and, consequently, any anti-dumping duty levied pursuant to such a margin of dumping would not breach either Article 9.3 of the Anti-Dumping Agreement, or Article VI:2 of the GATT 1994.[385] Accordingly, the United States requests that the Panel's findings be reversed.[386]

5.187. We have concluded above that, while the second sentence of Article 2.4.2 allows an investigating authority to exclude from its consideration "non-pattern transactions" and to establish dumping and margins of dumping based exclusively on a comparison of a weighted average normal value with "pattern transactions", it does not allow an investigating authority to use zeroing when applying the W-T comparison methodology to "pattern transactions". We, therefore, also conclude that, in levying anti-dumping duties under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, an investigating authority cannot exceed the margin of dumping that would be established under the second sentence of Article 2.4.2 without having recourse to zeroing.

5.188. 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. We, therefore, agree with the Panel that, since the use of zeroing in the context of the W-T comparison methodology would artificially inflate the margin of dumping, any duties collected would necessarily be excessive.[387]

5.189. We further note that, 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. In this respect, we recall that, in *US – Stainless Steel (Mexico)*, the Appellate Body stated that it did not consider that there was "a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as 'dumped' for purposes of determining the existence and magnitude of dumping in the original investigation and as 'non-dumped' for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review."[388]

5.190. In light of the above, we uphold the Panel's finding, in paragraph 8.1.a.xvi of its Report[389], 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".

[382] Appellate Body Report, *US – Zeroing (EC)*, para. 133.
[383] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102. (emphasis original)
[384] United States' appellant's submission, para. 216.
[385] United States' appellant's submission, para. 217.
[386] United States' appellant's submission, para. 218.
[387] Panel Report, para. 7.208.
[388] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 107.
[389] See also Panel Report, para. 7.208.

5.191. This dissent is limited to whether zeroing is permitted for "pattern transactions". My

5.202. Thus, I believe that allowing an investigating authority to zero within the "pattern" under the second sentence of Article 2.4.2 not only is a permissible interpretation within the meaning of the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement, but that it is a more defensible interpretation within the meaning of the first sentence of that provision.

5.203. For these reasons, I disagree with the finding of the majority that zeroing within the "pattern" under the W-T comparison methodology of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is not permissible. Consequently, I also disagree with the findings of the majority on zeroing under Article 2.4 of the Anti-

lapsed on 31 December 2011.[409] Under the version of the

within a designated geographical region within the jurisdiction of the authority providing the subsidy", and, therefore, concluded that the programme in question was regionally specific.[430] The USDOC reaffirmed its conclusion in its final countervailing duty determination.[431] Before the Panel, Korea claimed that, in reaching such conclusions, the USDOC acted inconsistently with Article 2.2 of the SCM Agreement. As mentioned above[432], the Panel found that the USDOC's determination is not inconsistent with Article 2.2. Korea requests us to reverse the Panel's finding, complete the legal analysis, and find that the USDOC's determination is inconsistent with the United

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Article 2.1 of the SCM Agreement, the term "ce47.7>> B4BT1 0 0 1 17245203(rm)-JETBT-47ce4pr TJsces"7("(rm

permit recipients to maintain their headquarters outside that region, would not be regionally specific.[457]

5.220. We note that the term "certain enterprises" is a key component of the first sentence of Article 2.2. Indeed, a finding of regional specificity depends on whether a subsidy programme limits availability to "enterprises" that are located in a designated geographical region within the jurisdiction of the subsidizing Member. As observed by the Appellate Body, the word "certain" is defined as "[k]nown and particularized but not explicitly identified: (with sing. noun) a particular, (with pl. noun) some particular, some definite".[458] Thus, in order for a subsidy to be specific, the group of eligible enterprises must be something less than the whole of the economy of a Member. The Appellate Body, however, has cautioned that any determination of what constitutes "certain enterprises" can only be made "on a case-by-case basis".[459] Further, the term "certain enterprises" is expressly defined in the chapeau of Article 2.1 as "an enterprise or industry or group of enterprises or industries".[460] As that provision stipulates, this definition applies throughout the whole SCM Agreement, including Article 2.2.[461] In *US – Anti-Dumping and Countervailing Duties (China*), the Appellate Body noted that the word "enterprise" means "[a] business firm, a company"[462], whereas the word "industry" signifies "[a] particular form or branch of productive labour; a trade, a manufacture".[463] Based on these definitions, the Appellate Body considered that the term "certain enterprises" refers to some particular business firms or companies that are known and particularized, but need not be explicitly identified.[464] In turn, we observe that the term "business" encompasses "[t]rade and all activity relating to it … ; commercial transactions, engagements, and undertaking4(a)-11()((s,)5( )-11a3( )-394(t)7(o)] TJETBT1 0.15eW*n))] TJETBT-3(art)-4(i)-5(c

door to circumvention of the disciplines of Article 2.2.[479] For example, the recipient companies may be incorporated or headquartered outside the relevant geographical region designated by a subsidy programme, but manufacture their *entire* production within that region at facilities that do not enjoy distinct legal personality. Under Korea's interpretation, the subsidy programme in question would not be considered regionally specific, thereby escaping scrutiny under the SCM Agreement and frustrating the function of Article 2.2.

5.225. In sum, we agree with the Panel that the term "certain enterprises" in Article 2.2 of the SCM Agreement is not limited to entities with legal personality.[480] Rather, an "enterprise" may be located in a certain region for purposes of Article 2.2 if it effectively establishes its commercial presence in that region, including by setting up a sub-unit, such as a branch office or manufacturing facility, which may or may not have distinct legal personality.[481]

5.226. Before the Panel, Korea contended that the RSTA Article 26 tax credit programme was not specific under Article 2.2 of the SCM Agreement because it did not explicitly "designate" the geographical region for subsidization, but rather covered the entire Korean territory except for the Seoul overcrowding area.[482] The Panel observed that there is no requirement in Article 2.2 that the designation of the relevant region for subsidization be "explicit". Rather, as one of the definitions of the verb "designate" is "indicate"[483], the Panel took the view that the designation of a region for purposes of Article 2.2 "might also be accomplished through less direct means that nevertheless make the region known".[484] The Panel thus held that, by granting subsidies in connection with certain investments outside the Seoul overcrowding area, the RSTA Article 26 tax credit programme effectively designated the geographical region where the eligible investments were located.[485]

5.227. On appeal, Korea maintains that, by allowing for the indirect designation of a geographical region, the Panel selectively relied on one of the possible definitions of the term "designate", and effectively replaced that term with the term "indicate".[486] In Korea's view, the designation of a region must be "an act of identification by the granting authority that is done affirmatively, not by implication or suggestion", lest the term "designated" in Article 2.2 be rendered meaningless.[487] For Korea, the RSTA Article 26 tax credit programme could not be said to affirmatively designate a geographical region, as it merely disqualified certain investments made in the Seoul overcrowding area from eligibility for subsidies that would otherwise be available.[488]

5.228. The

region fo22 puose22 of 2.2 need( )-20(n)6(o)-5(t)-5( )-127(b)-3(e)-32( )-20(af)6(f)5(i)-5(rmat)-4(i)-5(v)5(e)
question i8 0(b)10(e)-38(180(k)5(n)6(o)-5(w)5(area.)] TJETq0.00125 -0.09137 595.44 842.01 reW*nBT/F1 6 Tf1

terms does not detract from the fact that the programme in question directed resources to particular geographical regions, thereby interfering with the market's allocation of resources.[491]

5.229. We note that, as the Panel observed, the verb "designate" means "[p]oint out, indicate, specify … [c]all by name or distinctive term; name, identify, describe, characterize".[492] As the Panel correctly stated, certain aspects of this definition – such as "specify" and "[c]all by name" – point to an act of explicit or affirmative identification. We therefore

Article 2.2 of the SCM Agreement refers simply to a "geographical region" without qualifying such concept in any way, and therefore held that "*any* geographical region – no matter how small or how large – would suffice to trigger the application of Article 2.2".[501]

5.234. On appeal, Korea reiterates that, since the Seoul overcrowding area accounts for only 2% of the national territory, the area covered by the RSTA Article 26 tax credit programme – i.e. the remainder of the country – was too large, too unbounded, and insufficiently demarcated or cohesive to be considered as a "designated geographical region".[502] In Korea's opinion, "a subsidy that is available for investments made in 98% of the granting authority's jurisdiction is effectively as broadly available as if it were available in 100% of the jurisdiction."[503] In support of its argument that the RSTA Article 26 tax credit programme was broadly available, Korea stresses that the subsidy programme was based on neutral and objective eligibility criteria, consistently with Article 2.1(b) of the SCM Agreement

the RSTA Article 26 tax credit programme were clearly delineated in the relevant regulations. Thus, we see no reason why such "identified tract of land" would not qualify as a "designated geographical region".

5.237. In support of its argument that the RSTA Article 26 tax credit programme was broadly available and, therefore, not trade distortive, Korea further stresses that the subsidy programme set out neutral and objective eligibility criteria, consistently with Article 2.1(b).[514] Confronted with a similar argument, the Panel stated that nothing in the SCM Agreement suggests that "a finding of specificity under Article 2.2 is somehow subject to further examination under Article 2.1(b)".[515] Like the Panel, we observe that the text of these provisions does not suggest any hierarchy between them. Rather, Articles 2.1 and 2.2 set forth two distinct and independent ways in which a subsidy may be specific. While the former provision addresses limitations "by reason of the eligible recipients", the latter focuses on limitations "by reason of the geographical location of beneficiaries".[516] Therefore, the fact that a subsidy may set out neutral and objective eligibility criteria with respect to a given region does not, in and of itself, exclude the possibility that that subsidy is regionally specific.

5.238.

5.241. We, therefore, uphold the Panel's finding, in paragraph 8.1.b.iii of its Report[521], that "Korea failed to establish that the USDOC's determination of regional specificity in respect of the RSTA Article 26 tax scheme is inconsistent with Article 2.2 of the SCM Agreement".

5.242. Korea claims that, in articulating its findings on regional specificity, the Panel failed to conduct an objective assessment of the matter before it, thereby acting inconsistently with its duties under Article 11 of the DSU. In particular, Korea claims that the Panel did not adequately review the USDOC's determination of regional specificity.[522] The United States responds that the Panel did evaluate the "key piece of evidence" on which the USDOC relied, namely, Article 23 of the RSTA Enforcement Decree.[523] In any event, the United States argues that Article 11 of the DSU did not require the Panel to cite explicitly the USDOC's determination in assessing Korea's claims.[524]

5.243. We note that the Panel's only description of the USDOC's determination is contained in paragraph 7.212 of its Report, where the Panel observed that, with respect of the RSTA Article 26 tax credit programme, "[t]he USDOC found specificity under Article 2.2 of the SCM Agreement, on the basis … that the programme was limited to certain enterprises located within a designated geographical region."

5.244. However, the extent to which the Panel was required, in order to comply with its duties under Article 11 of the DSU, to examine the USDOC's determination depended on the nature and scope of the claims raised by Korea under Article 2.2. Those claims were not directed at the USDOC's handling of the evidence before it, nor did they require the Panel to delve deeply into the specifics of the USDOC's determination or the facts on the record of the investigation. Indeed, the text, design, structure, and operation of the RSTA Article 26 tax credit programme were not disputed. Rather, the thrust of Korea's argumentation touched, essentially, on the interpretation of Articles 2.1(b) and 2.2 of the SCM Agreement. In particular, Korea claimed that the USDOC erred by: (i) failing to take into account that the programme was non-specific pursuant to Article 2.1(b)[525]; (ii) improperly expanding the scope of Article 2.2 to cover not only "enterprises", but also investments in facilities[526]; (iii) finding the area covered by the programme to be a "designated geographical region" within the meaning of Article 2.2[527]; (iv) holding that the programme was regionally specific although the tax credits were available to all enterprises investing in the designated area[528]; and (v) disregarding the fact that the programme was essentially a "zoning measure" aimed at relieving over-congestion in the Seoul overcrowding region.[529]

5.245. The Panel did address all the interpretative arguments put forward by Korea. In particular, it analysed the relationship between Article 2.1(b) and Article 2.2[530], the meaning of the term "certain enterprises" in Article 2.2[531], the meaning of the term "designated geographical region" in Article 2.2[532], and the propriety of the "double-specificity" test proposed by Korea.[533] At several

[521]

by the investigating authority are reasoned and adequate".[563] What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but some relevant "lines of inquiry" can be identified.[564] First, a panel must ascertain whether the investigating authority has "evaluated all of the relevant evidence in an objective and unbiased manner", including by "tak[ing] sufficient account of conflicting evidence and respond[ing] to competing plausible explanations of that evidence".[565] Second, the panel must "test[] the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning".[566] Finally, the adequacy of an investigating authority's explanations "is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute".[567]

5.259. Based on the above, the Panel was tasked with assessing whether the explanations provided in the USDOC's determination were "reasoned and adequate" in light of the evidence on the investigation record, so as to ascertain whether, by reaching such a determination, the USDOC acted consistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.[568] Our overview of the Panel's findings shows that, indeed, the Panel considered that the USDOC's two-step reasoning constituted reasoned and adequate explanations. First, the Panel appears to have affirmed the test applied by the USDOC in the *Washers* countervailing duty investigation, whereby a subsidy is tied to a product only if the intended use of that subsidy is known to the granting authority and so acknowledged prior to or concurrent with its bestowal. Second, in light of that test, the Panel agreed with the USDOC's dismissal of the relevance of certain evidence submitted by Samsung, which purportedly showed the amount of eligible expenditures made by the digital appliance business unit, as well as the tax credits that those expenses generated under

theory a recipient's discretion to use a subsidy would make all subsidies untied.[589] Rather, in the United States' view, the Panel grounded its conclusions on the "nature of the subsidies" at issue.[590]

5.265. We begin our assessment by examining the requirements of the provisions invoked by Korea, namely, Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Article 19.4 and footnote 51 of the SCM Agreement read:

> No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
>
> _____
>
> [51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

5.266. Article VI:3 of the GATT 1994 reads:

> No countervailing duty shall be levied on any product of the territory of any Member imported into the territory of another Member in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

5.267. Under both provisions, Members must not levy countervailing duties in an amount greater than the amount of the subsidy found to exist.[591] Thus, in order to determine the proper amount of a countervailing duty, an investigating authority must first "ascertain the precise amount of [the] subsidy" to be offset.[592] Article 19.4 further requires that the amount of the subsidy be calculated "in terms of subsidization per unit of the subsidized and exported product". The term "per unit" indicates that an investigating authority is permitted to calculate the rate of subsidization "on an aggregate basis"[593], i.e. by dividing the total amount of the subsidy by the total sales value of the product to which the subsidy is attributable. The Appellate Body, however, has cautioned that, in an aggregate investigation, the correct calculation of a countervailing duty rate requires "*matching* the elements taken into account in the numerator with the elements taken into account in the denominator".[594] In turn, the product to which the subsidy is attributable for purposes of calculating per unit subsidization is defined in Article VI:3 as the product for whose "manufacture, production or export" a subsidy has been "granted, directly or indirectly" in "the country of origin or exportation".

5.268. The per unit subsidization rate of the subsidized product constitutes the benchmark against which to establish the proper amount of the related countervailing duty. As the Appellate Body has noted, the subsidies that justify the imposition of a countervailing duty are those pertaining to "the imported products *under investigation*".[595] Thus, Article 19.4 and Article VI:3 establish the rule that investigating authorities must, in principle, ascertain as accurately as possible the amount of

[589] United States' appellee's submission, paras. 386 and 393.
[590] United States' appellee's submission, para. 391.
[591] Appellate Body R71 Tc[( )]

subsidization bestowed on the investigated products.[596] It is only with respect to those products that a countervailing duty may be imposed, and only within the limits of the amount of subsidization that those products received. This rule finds further support in Article 10 of the SCM Agreement, according to which "Members shall take all necessary steps to ensure that the imposition of a countervailing duty" on any imported product "is in accordance with the provisions of Article VI of [the] GATT 1994 and the terms of [the SCM] Agreement". The wording of Article 10 – and especially the phrase "take all necessary steps to ensure" – indicates that the obligation to establish precisely the amount of subsidization requires a proactive attitude on the part of the investigating authority. Indeed, the Appellate Body has held that authorities charged with conducting an investigation "must actively seek out pertinent information"[597], and may not remain "passive in the face of possible shortcomings in the evidence submitted".[598]

5.269. Within these confines, the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, and does not specify explicitly which elements should be taken into account in the numerator and the denominator. Thus, an investigating authority has the discretion

production or sale of the product concerned.[603] An assessment of whether this connection or conditional relationship exists will inevitably depend on the specific circumstances of each case.[604] In conducting such an assessment, an investigating authority must examine the design, structure, and operation of the measure granting the subsidy at issue and take into account all the relevant facts surrounding the granting of that subsidy. In certain cases, an assessment of such factors may reveal that a subsidy is indeed connected to, or conditioned upon, the production or sale or a specific product. A proper assessment of the existence of a product-specific tie is not necessarily based on whether the subsidy *actually* results in increased production or sale of the product in question, but rather on whether the subsidy operates in a manner that can be *expected* to foster or incentivize the production or sale of the product concerned.[605]

5.271. Applying these considerations to the Panel's review of the USDOC's determination, we note that the Panel briefly referred to certain features of Article 10(1)(3) of the RSTA. The Panel observed, for instance, that tax credits under the RSTA Article 10(1)(3) tax credit programme "are provided after the underlying R&D activities have been undertaken, in an amount determined by reference to total R&D activities."[606] It also noted that Samsung's tax return "did not specify the merchandise for which [the tax credits were] to be provided".[607] However, despite those references, the Panel ultimately grounded its affirmation of the USDOC's test on the fact that, under Article 10(1)(3) of the RSTA, Samsung: (i) was able to claim the tax credits only after it had

"had no way to know the intended use at the time [Samsung] was authorized to claim the tax credits".[609]

5.272. The fact that the recipient obtains the proceeds of a subsidy before, at the same time as, or after conducting the eligible activities is not, in and of itself, dispositive of whether that subsidy is tied to a particular product. The proceeds deriving from certain types of financial contribution, such as grants or loans, are usually paid before the recipient undertakes a certain activity. By

5.274. In sum, based on the foregoing, the Panel applied a flawed test in reviewing the USDOC's determination and, in particular, in evaluating whether a portion of the tax credits that Samsung received under Articles 10(1)(3) and 26 of the RSTA was tied to the products manufactured by its

R&D expenditures of Samsung's digital appliance business unit to the products manufactured by that unit.[626]

5.278. The United States contends that Articles 10(1)(3) and 26 of the RSTA set forth "undifferentiated, broadly applicable" tax credit programmes, which do not require recipients to specify the products in respect of which the eligible expenditures were made in their tax returns.[627] For the United States

5.280. Applying this standard to the Panel's review of the USDOC's determination, we observe that the USDOC did examine certain relevant features of the RSTA Article 10(1)(3) and Article 26 tax credit programmes. In particular, the USDOC noted that neither programme expressly conditions access to the tax credit on product-specific activities. Article 10(1)(3) of the RSTA conditions the bestowal of tax credits upon a showing that the applicant company has undertaken R&D and HRD expenditures during the course of the relevant tax year[640], without specifying any product in connection to which those expenditures are to be made. Likewise, Article 26 of the RSTA bestowed tax credits on certain qualifying investments

the explanations provided by the USDOC were "reasoned and adequate"[648] in light of the evidence placed on the investigation record.

5.284. In light of the above, we conclude that the Panel: (i) improperly endorsed a flawed test applied by the USDOC in the *Washers* countervailing duty investigation for ascertaining whether the tax credits bestowed under Articles 10(1)(3) and 26 of the RSTA were tied to particular products; 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.

5.285. Therefore, we reverse the Panel's finding, in paragraph 8.1.b.iv of its Report[649], 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 applying a flawed test for ascertaining whether

in the *Washers* and *Refrigerators* anti-dumping investigations[654], the USDOC determined that Samsung's R&D activities in Korea benefitted all of its digital appliance subsidiaries.[655] Finally, Samsung pointed to the royalties and sales commissions paid by Samsung's overseas subsidiaries in order to compensate their parent company for its R&D activities in Korea.[656]

5.289. The USDOC observed that its own regulations set forth "a very high threshold" to find that subsidies provided by a government can benefit the production of merchandise produced in another country.[657] Indeed, according to those regulations, the USDOC applies a "presumption that government subsidies benefit domestic production", and, therefore, normally attributes those subsidies solely to "products produced … within the country of the government that granted the subsidy".[658] In order to rebut this presumption, the USDOC explained, the subsidizing government must have "'explicitly stated that the subsidy was being provided for more than domestic production'

R&D activities, since Samsung is free to spend the tax credit cash as it sees fit.[668] Therefore, the

received under Article 10(1)(3) of the RSTA across its worldwide production.[694] Samsung's arguments and evidence related to the specifics of the design, structure, and operation of the RSTA Article 10(1)(3) tax credit programme, as well as to the specific structure and location of Samsung's production operations. These submissions were, at least potentially, relevant evidence surrounding the bestowal of tax credits under Article 10(1)(3) of the RSTA. Thus, the USDOC was required to review those arguments and to evaluate that evidence in order to identify the "subsidized products" for purposes of calculating per unit subsidization.

5.302. Instead, in its determination, the USDOC relied mainly on a "presumption that government subsidies benefit domestic production".[695] While that presumption could, in principle, be rebutted, the USDOC determined that the only way to do so was for Samsung to show that the Government of Korea "'explicitly stated that the subsidy was being provided for more than domestic production' in the application and/or approval documents".[696] The USDOC determined that Samsung had not made that showing, as "there is no indication in the statutory provisions" or in "the tax returns themselves" that "a company could claim a tax credit on ... a facility located outside of Korea".[697]

5.303. The expressed intent of a subsidizing authority, as evinced by the face of the measure granting the subsidy, cannot be the sole factor relevant to the allocation of that subsidy to the products produced by the recipient in the context of calculating per unit subsidization. Although neither Article 10(1)(3) of the RSTA nor the related tax returns show the Government of Korea's express intent to subsidize overseas production, this does not exhaust the scope of the relevant arguments and evidence submitted by the interested parties concerning the bestowal of the subsidy, which the USDOC was required to examine. By focusing solely on the face of the statutory provisions and of the tax returns submitted by Samsung, the USDOC failed to "evaluate[] all of the relevant evidence"[698] and to provide "reasoned and adequate" explanations for its determination.[699]

5.304. Despite these deficiencies, the Panel upheld the USDOC's determination, thus condoning the USDOC's failure to assess meaningfully all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of tax credits on Samsung under Article 10(1)(3) of the RSTA. Thus, we consider that the Panel improperly concluded that, having evaluated all of the relevant evidence[700], the USDOC had provided "reasoned and adequate" explanations.[701]

5.305. In light of the above, we conclude 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.

5.306. We, therefore, reverse

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

Accordingly, we conclude that the establishment of margins of dumping by comparing a weighted

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; (ii) failed to find that 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

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