

*United States – Anti-Dumping and Countervailing Duties on Certain Products  
and the Use of Facts Available*

**(DS539)**

**OPENING ORAL STATEMENT OF THE UNITED STATES  
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES**

July 24, 2019

Ms. Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel. The United States appreciates this opportunity to present its views on the issues in this dispute.
2. Korea’s first written submission covers numerous as applied claims and an as such claim. The as applied claims cover six anti-dumping duty determinations and two countervailing duty determinations by the U.S. Department of Commerce (“Commerce” or “USDOC”).
3. As discussed at length in our first written submission, Korea’s arguments with respect to the eight determinations are without merit for several reasons. In this opening statement, we will highlight two of the basic flaws in Korea’s arguments. First, for each of these determinations, Korea provides arguments that are based both on mischaracterizations of facts, and on omissions of relevant evidence. We will highlight some of those mischaracterizations and omissions in today’s statement.
4. Second, Korea asks the Panel to improperly reevaluate all the record evidence that was before Commerce in each of the eight determinations, and to substitute the Panel’s judgment for that of Commerce. In essence, Korea is asking for a *de novo* review of each of the challenged determinations, in an attempt to attain modifications of objective and unbiased determinations. However, the WTO does not exist to excuse non-cooperation or to provide a *de novo* appeal of anti-dumping and countervailing duty investigations where a panel would re-weigh the evidence and arrive at its own conclusion.
5. Korea’s as such claim also fails. Korea’s panel request included an as such claim against a single alleged unwritten measure. Its first written submission, however, fails to make arguments focused on the alleged unwritten measure described in Korea’s panel request. Instead, Korea’s unfocused first written submission discusses at length a variety of issues unrelated to the alleged unwritten measure it supposedly is challenging. Included in this are multiple analyses of the U.S. statute, which is a written measure that Korea is not challenging. In short, Korea has failed to make out a *prima facie* case that the alleged unwritten measure described in its panel request even exists, much less breaches Article 6.8 and Annex II of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“Anti-Dumping Agreement”) or Article 12.7 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).

## **I. STANDARD OF REVIEW**

6. As explained in the U.S. First Written submission, the Panel’s task in this dispute is to assess whether Commerce properly established the facts and evaluated them in an unbiased and objective way.<sup>1</sup> The Panel’s task is not to determine whether it would have reached the same

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<sup>1</sup> See, e.g., *US – Countervailing Measures on Certain EC Products (21.5) (Panel)*, para. 7.82 (referring to the Appellate Body report in *US – Cotton Yarn*).

results as Commerce. Put differently, the Panel’s task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as Commerce, could have—not would have—reached the same conclusions that Commerce reached.

7. Under the standard of review set out in the WTO Agreement, the Panel must not conduct a *de novo* evidentiary review, but instead should “bear in mind its role as *reviewer* of agency action” and not as an “*initial trier of fact*.”<sup>2</sup> Indeed, it would be inconsistent with a panel’s function under Article 11 of the DSU to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.<sup>3</sup>

## II. KOREA’S AS APPLIED CLAIMS

8. As noted, Korea is challenging Commerce’s application of facts available in six antidumping determinations and two countervailing duty determinations. As demonstrated in the U.S. first written submission, for each of the determinations, Korea fails to establish that in applying facts available, Commerce acted inconsistent with Article 6.8 and Annex II of the Antidumping Agreement or with Article 12.7 of SCM Agreement.

9. Moreover, the records for all eight determinations support Commerce’s findings that the Korean respondents failed to provide requested information and Commerce properly resorted to facts available, properly applied facts available, and properly selected a replacement for the missing necessary information. Korea’s claims to the contrary ignore the record evidence and ask the Panel to re-weight the record evidence in a manner favorable to the Korean respondents. As noted, that is not the Panel’s role.

### A. Commerce Properly Resorted to Facts Available in the Anti-Dumping Determinations.

10. For each of the eight determinations, Korea does not dispute Commerce’s findings that Korean respondents failed to provide the requested missing information. Rather, Korea asserts that the information was not necessary, that respondents struggled to provide the missing information or did not have access to the missing information, or that Commerce failed to specify the information required as soon as possible and failed to provide a reasonable time for supplying the information. The record does not support Korea’s claims.

#### 1. *Korea Takes the Untenable Position that Korean Respondents, not Commerce, Determine What Information Is Necessary.*

11. The record shows that the Korean respondents attempted to substitute their own views of what information was necessary with Commerce’s judgement, thus depriving Commerce of an opportunity to complete the requisite calculations. The records of the six anti-dumping proceedings show that the missing information was necessary, that Commerce specified the

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<sup>2</sup> US – *Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis original).

<sup>3</sup> US – *Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.

information required as soon as possible, and provided a reasonable time for the respondents to respond, but the respondents chose not to do so.

12. In *Egypt – Steel Rebar*, the Panel stated that “{o}n the question of the ‘necessary’ information, reading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to ‘specify ... the information required from any interested party.’”<sup>4</sup>

13. Korea’s arguments are directly contrary to this common-sense proposition. As examples, we will address Korea’s arguments for four of the six anti-dumping proceedings.

14. *Corrosion Resistant Steel*: Korea claims that necessary information was not missing from the Corrosion Resistant Steel antidumping (“AD”) investigation, as Hyundai had submitted data using an “alternative methodology” for calculating further manufactured products.<sup>5</sup> However, Korea’s argument ignores Commerce’s finding that the respondent’s methodology was flawed, and thus rejected by Commerce as an alternative to the requested information.<sup>6</sup> Respondents were required to submit the information requested by Commerce, not information that they deemed suitable for an alternative calculation.

15. *Hot-Rolled and Cold Rolled Steel*: Similarly, in the Hot-Rolled Steel and Cold-Rolled Steel AD investigations, it is not for Korea to decide that Hyundai’s inaccurate reporting of CONNUMs can be ignored. This was information Commerce found necessary to complete its calculation. Hyundai was not at liberty to appropriate that determination for itself, and it is improper in this setting to second guess Commerce’s unbiased and objective finding that this information was “required to complete {the} determination.”<sup>7</sup>

16. Moreover, in those investigations, Commerce rejected reported data regarding service expenses between affiliated parties because it could not verify that the submitted data represented arm’s length transactions.<sup>8</sup> Korea’s claim that it had provided the necessary information to calculate any adjustments for the service expenses sidesteps the issue.<sup>9</sup> The

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<sup>4</sup> *Egypt – Steel Rebar* (Panel), para 7.155.

<sup>5</sup> Korea First Written Submission (“Korea FWS”), para. 132.

<sup>6</sup> U.S. First Written Submission (“US FWS”), paras. 64-65.

<sup>7</sup> US FWS, paras. 165-166.

<sup>8</sup> US FWS, para. 129.

<sup>9</sup> Korea FWS, paras. 262, 488.

question is not whether Hyundai correctly reported service expenses, but rather whether the reported data represented services provided at arm’s length.<sup>10</sup>

17. *Large Power Transformers:* With respect to the three reviews on Large Power Transformers (“LPT”), Korea argues that the missing data on service-related revenue was not necessary because it was not necessary in previous segments.<sup>11</sup> However, this ignores Commerce’s finding that Hyundai had previously misreported data by not reporting separately service-related revenues and expenses.<sup>12</sup> As Commerce explained, “although we permitted Hyundai to include service-related revenues in the gross unit price on the basis of Hyundai’s claim in prior segments, the record evidence in this review indicates that there are separate line items for revenues from service-related revenues, as shown in purchase orders and/or invoices.”<sup>13</sup> In other words, in subsequent reviews, Commerce gained a better understanding of the information and how the respondent had chosen to report such information. Based on its better understanding, Commerce determined that Hyundai was required to submit certain information it had failed to submit in the past. In short, Hyundai was not at liberty to withhold the information required by Commerce.

**2. *Korea Improperly Attempts to Shift the Blame to Commerce for Failure of Korean Respondents to Respond to Requests for Information***

18. Korea argues that Commerce acted inconsistent with paragraph 1 of Annex II for failing to specify the information required as soon as possible and failing to provide a reasonable time for respondents to supply the information. These claims also are not supported by the records. We would like to address Korea’s paragraph 1 claims with respect to the Corrosion Resistant Steel (“CORE”) investigation and the second review on Large Power Transformers (“LPT”).

19. *Corrosion Resistant Steel:* Korea mischaracterizes the facts with respect to the CORE investigation, arguing Commerce failed to specify the necessary information required as soon as possible and “suddenly” required Hyundai to provide data on further manufactured sales.<sup>14</sup>

20. To the contrary, from the initial questionnaire, Hyundai was notified that data regarding further manufactured sales may be required.<sup>15</sup> Hyundai, however, requested to be exempt from reporting further manufactured sales.<sup>16</sup> Commerce nevertheless engaged with Hyundai regarding

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<sup>10</sup> US FWS, paras. 150-151.

<sup>11</sup> Korea FWS, para. 769.

<sup>12</sup> US FWS, paras. 216-217.

<sup>13</sup> LPT I&D Memo (March 6, 2017) (Exhibit KOR-121) at 22.

<sup>14</sup> US FWS para. 72.

<sup>15</sup> US FWS para. 68.

<sup>16</sup> US FWS para. 74.

its request. Any delay in Commerce informing Hyundai that it would indeed need to report further manufactured sales was a result of that lengthy engagement in response to Hyundai's request. Following Hyundai's request to be excluded from reporting further manufactured sales and Commerce's subsequent denial, Hyundai was given nearly four months to respond.<sup>17</sup> Hyundai had more than ample time to gather and provide the required information. Korea's claim to the contrary is meritless.

21. *Large Power Transformers:* The record undermines Korea's claim that, if necessary information was missing in the LPT second review, it was missing because Commerce failed to specifically request the information.<sup>18</sup> Hyundai was requested in the initial questionnaire to report service revenues separately. It chose not to do so.<sup>19</sup> Moreover, like Korea's claim that the information was not necessary, Korea ignores Commerce's finding that Hyundai had previously misreported data by not reporting service-related revenues and expenses separately.<sup>20</sup>

22. The records also show that consistent with paragraph 6 of Annex II, and contrary to Korea's claims, Commerce told respondents when information was deficient, the reasons for the deficiencies, and respondents were provided an opportunity to provide further explanations. Korea fails to demonstrate otherwise.

23. *Corrosion Resistant Steel:* Korea argues that in the CORE investigation Hyundai experienced difficulties in reporting further manufactured sales and Commerce refused to help. The record tells a different story.<sup>21</sup> Rather, Commerce provided additional written guidance, met with Hyundai on three occasions to discuss Hyundai's difficulties, and issued three supplemental questionnaires with pointed follow-up questions that identified deficiencies in Hyundai's responses.<sup>22</sup> As discussed in the U.S. first written submission, consistent with paragraph 6 of Annex II, Commerce provided significant detail regarding deficiencies and inconsistencies in Hyundai's reporting and why the information could not be verified.<sup>23</sup>

24. With respect to the Hot-Rolled Steel and Cold-Rolled Steel AD investigations, Korea makes much of the fact that Hyundai and the affiliated party were two legally separate entities and therefore Hyundai supposedly did not have access or control over the requested contracts to demonstrate the arm's length nature of the transactions.<sup>24</sup> However, based on the close

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<sup>17</sup> US FWS paras. 73-76.

<sup>18</sup> Korea FWS paras. 771-774.

<sup>19</sup> Department of Commerce Draft Results of Redetermination Pursuant to Remand (January 9, 2018) (Exhibit USA-27 (BC)) at 11.

<sup>20</sup> US FWS, paras. 216-217.

<sup>21</sup> Korea FWS para. 153.

<sup>22</sup> US FWS paras. 44-51, 77

<sup>23</sup> US FWS paras. 79-85.

<sup>24</sup> US FWS paras. 156-157.

relationship between Hyundai’s management and the two largest shareholders of the affiliated service provider, Commerce rejected this argument. Specifically, both companies are members of Hyundai Motor Group and the two largest shareholders of the affiliated company were father and son, and were, respectively, part owner of Hyundai Steel and the Vice-Chairman of Hyundai Steel. Based on this, Commerce reasonably found that the two companies were commonly owned and controlled by the same family members. As Commerce noted, “Hyundai Steel defined the companies that are members of the Hyundai Motor Group and/or held by the Chung family as being affiliated parties via control by a ‘group,’ which has the ability to directly or indirectly control its group members, and are expected to cooperate with the Department’s antidumping investigation.”<sup>25</sup>

**B. Commerce Properly Resorted to Facts Available in the Countervailing Duty Determinations.**

25. With respect to the two countervailing duty (“CVD”) determinations, contrary to Korea’s arguments, the records show that Commerce acted consistently with Article 12.7 of the SCM Agreement in resorting to facts available in the Hot-Rolled and Cold-Rolled CVD investigations. Again, the records show a Korean respondent substituting its judgement for that of Commerce regarding the information necessary for Commerce’s determination. Rather than provide Commerce’s requested data regarding cross-owned input suppliers, POSCO determined for itself that since the inputs were negligible and not primarily dedicated to the production of subject product, it was not necessary for POSCO to provide a response for the cross-owned companies.<sup>26</sup> However, as Commerce noted, had POSCO not simply responded in the negative, Commerce would have had the opportunity to follow-up and verify POSCO’s claim that the affiliated companies only provided negligible amounts.<sup>27</sup> Instead, POSCO deprived Commerce of the chance to examine the data based on its own assessment.

26. Korea also blames Commerce for the missing information on cross-owned input suppliers, asserting that Commerce failed to focus on the issue before verification. However, this ignores POSCO’s consistent reporting that “no affiliated companies located in Korea provided inputs used in the production of subject merchandise.”<sup>28</sup> Based on POSCO’s response that no cross-owned input suppliers provided inputs, no additional follow-up was necessary, with the exception of Commerce’s verification of POSCO’s response. As a result, it was only at the Cold-Rolled Steel verification that it was discovered that there were four affiliated companies in Korea that produced inputs that could be used in the production of subject merchandise.<sup>29</sup>

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<sup>25</sup> HRS I&D Memo (August 4, 2016) (Exhibit KOR-67) at 18-19.

<sup>26</sup> Korea FWS, paras. 351-352, 589-592.

<sup>27</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 64; HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 61.

<sup>28</sup> US FWS, para. 395.

<sup>29</sup> US FWS, paras. 393-394.

27. Korea also claims that because Commerce’s request at verification for additional information about POSCO’s FEZ facility was “unreasonable” for being “untimely and unexpected,” there was no basis for Commerce to resort to facts available. Again, Korea ignores the fact that POSCO had failed to timely report the FEZ facility. As a result, Commerce had no opportunity to follow-up prior to verification, denying Commerce the opportunity to verify and analyze what was produced at the FEZ facility and whether the facility benefited from certain subsidies.<sup>30</sup>

28. Regarding DWI’s failure to report certain loans, Korea’s characterization of POSCO’s reporting of the additional use of the loan program at verification as a minor correction ignores the facts. Given the magnitude of the unreported loans notified at such a late stage of the investigation, Commerce was not able to fully examine the use of the program.

29. In sum, Korea’s arguments for why Korean respondents failed to provide requested information, a point not contested by Korea, should be rejected, as they are nothing more than an attempt to have the Panel substitute itself as the trier of fact and review Commerce’s findings *de novo*.

### C. Commerce Properly Applied Facts Available

30. Korea’s claims regarding paragraph 3 and 5 of Annex II likewise fail, as the records show that the Korean respondents failed to cooperate to the best of their ability.

31. As demonstrated in the U.S. first written submission, in each proceeding, Commerce provided respondents multiple opportunities to submit the requested necessary data, but the respondents chose not to or provided incomplete data. Moreover, because the information did not meet the criteria of paragraph 3 of Annex II, they do not implicate paragraph 5 of Annex II, which “is supplemental to paragraph 3 and not an exception to it.” Paragraph 5 indicates that imperfections in information that satisfies the requirements of paragraph 3 should not justify disregarding that information.”<sup>31</sup> It is thus inapplicable to treatment of information that fails to satisfy the requirements of paragraph 3.

32. As examples, we will address Korea’s arguments regarding the CORE investigation, the Hot-Rolled and Cold Rolled AD investigations, the third and fourth review for Large Power Transformers, and the Hot-Rolled Steel CVD investigation.

33. *Corrosion Resistant Steel*: In the CORE investigation Hyundai was given at least six opportunities to provide Commerce with usable data on further manufactured sales, including three supplemental questionnaires, which identified specific deficiencies with Hyundai’s submitted data.<sup>32</sup> Nonetheless, Hyundai’s reporting on further manufactured sales remained

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<sup>30</sup> US FWS, paras. 409-413.

<sup>31</sup> *China - Broiler Products*, para 7.344, citing *US – Steel Plate*, para. 7.65.

<sup>32</sup> US FWS, para. 69.

incomplete and contained numerous inconsistencies, rendering the information unverifiable and unreliable.<sup>33</sup> Due to the delays and because Hyundai consistently provided unusable data, Commerce concluded that Hyundai impeded the proceeding by failing to cooperate to the best of its ability.<sup>34</sup>

34. *Hot-Rolled Steel and Cold-Rolled Steel (AD)*: With respect to Hot-Rolled Steel and Cold-Rolled Steel AD investigations, the records show that Commerce decided not to verify the transactions between Hyundai and the affiliated service providers only after Hyundai failed to provide the requested documents to demonstrate that the transactions with affiliated service providers took place at arm's length.<sup>35</sup> Indeed, Commerce attempted to verify Hyundai's reported information regarding the transactions with affiliated suppliers, but Hyundai did not provide Commerce with the documents that would have allowed Commerce to do so. Thus, by not submitting the requested contracts, Hyundai denied Commerce the opportunity to verify whether the transactions with the affiliated service providers were at arm's length. Information is verifiable when the accuracy and reliability of the information can be assessed by an objective process of examination.<sup>36</sup> Here the accuracy and reliability of the information could not be established due to the respondent's failure to cooperate to the best of its ability.

35. *Large Power Transformers (3<sup>rd</sup> and 4<sup>th</sup> Review)*: With respect to third and fourth review in LPTs, Korea ignores the record in arguing that Commerce disregarded verifiable, appropriately submitted information.<sup>37</sup> The record lacked verifiable or appropriately submitted information regarding the service related revenues, as the respondent failed to provide the relevant information.<sup>38</sup> Korea's argument that Commerce's rejection of all of HHI's and Hyosung's data in the subsequent reviews should be similarly rejected.<sup>39</sup> Korea's argument ignores Commerce's finding that, despite multiple opportunities, HHI and Hyosung failed to provide, in a timely manner, requested and necessary information for Commerce to calculate a weighted average dumping margin.<sup>40</sup> Commerce determined that neither company acted to the best of its ability, provided incomplete and untimely responses and with a lack of explanation, thus rendering the reporting unreliable. As Commerce determined that each company failed to act to the best of its ability, Commerce's rejection of reported information was consistent with U.S. obligations under Annex II or Article 6.8.

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<sup>33</sup> US FWS, para. 71.

<sup>34</sup> US FWS, para. 70.

<sup>35</sup> US FWS, paras. 171-176.

<sup>36</sup> *US – Steel Plate*, para. 7.71; *EC – Salmon (Norway)*, para. 7.357.

<sup>37</sup> US FWS, para. 221.

<sup>38</sup> US FWS, paras. 222-223.

<sup>39</sup> US FWS, paras. 259-260, 341-342.

<sup>40</sup> US FWS, paras. 259-260, 341-342.

36. *Hot-Rolled Steel (CVD)*: Contrary to Korea’s claim that in the CVD investigation of Hot-Rolled Steel POSCO submitted the data “within a reasonable period of time,” as it submitted the information a month before verification, the information was late and properly rejected as untimely and unsolicited. In rejecting the information, Commerce noted, under Commerce’s regulations, the deadline for new factual information was 30 days before the preliminary investigation, which passed nearly four months prior to POSCO submitting the data.<sup>41</sup> Moreover, “due to untimely presentation of the data and the large amount of analysis required to verify the data,” Commerce did not verify the validity of the input amounts.<sup>42</sup> In sum, Korea fails to demonstrate that Commerce acted inconsistent with Article 12.7 of SCM Agreement in applying facts available.

**D. Commerce Properly Selected a Replacement for Missing Information.**

37. Korea claims that Commerce acted inconsistent with paragraph 7 of Annex II when selecting replacements for the missing necessary information. Korea’s claims, however, have no legal basis under the WTO Agreement. Rather, Korea simply appears to be dissatisfied with Commerce’s selection of less favorable rates to replace missing necessary data. Indeed, Korea points to nothing on the record to demonstrate that the rates used to replace the missing data are unreasonable replacements. Rather, without evidence, Korea claims that the rates Commerce used are punitive, in the hopes of getting this Panel to reevaluate the evidence and find more favorable rates.

38. As noted in the U.S. first written submission, Korea repeatedly relies on the phrase “comparative evaluation” as if it is text from the covered agreements.<sup>43</sup> However, neither Article 6.8 nor Annex II of the Anti-Dumping Agreement contains the term “comparative evaluation.” The Appellate Body has reasoned that “the extent to which an ‘evaluation’ of the ‘facts available’ is required under Article 12.7, and the form it should take, depend on the particular circumstances of a given case, including the quantity and quality of the available facts on the record, and the types of determinations to be made in a given investigation.”<sup>44</sup> For example, as the Appellate Body noted, “a comparative approach to the evaluation required would not be feasible where there is only one set of reliable information on the record that is relevant to a particular issue and may thus serve as a factual basis for a determination.”<sup>45</sup>

39. Paragraph 7 provides that “if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is

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<sup>41</sup> Letter from Department of Commerce Rejecting POSCO’s Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93).

<sup>42</sup> HRS I&D Memo (August 4, 2016) (Exhibit KOR-98) at 64.

<sup>43</sup> See, e.g., Korea FWS, paras. 71, 76, 193, 196, 198, 210, 311, 322, 461, 485, 528, 662, 766, 859, 880-881, 924, 974, 1005.

<sup>44</sup> *India – Carbon Steel (AB)*, para. 4.434.

<sup>45</sup> *India – Carbon Steel (AB)*, para. 4.434.

less favorable to the party than if the party did cooperate.” As the Appellate Body has recognized, “non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement of an unknown fact.” That the outcome is less favorable than Korea would have liked does not mean Commerce’s application of facts available was somehow inconsistent with Article 6.8.<sup>46</sup>

40. A non-cooperating party’s knowledge of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those “facts available” on which to base a determination.<sup>47</sup> While the use of facts available should not be used to “punish non-cooperating parties by choosing adverse facts for that purpose,”...“the authorization to use an inference that is adverse to the interests of a non-cooperating party is not necessarily inconsistent.”<sup>48</sup>

41. In replacing the missing information in the six antidumping determinations, Commerce acted consistent with paragraph 7 of Annex II. Korea fails to provide a clear explanation for why Commerce’s process for selecting the replacement facts is inconsistent with the Anti-Dumping Agreement. Rather, Korea appears to be disappointed in the rate Commerce applied.

42. We first address Commerce’s replacement of the missing necessary information in the Hot-Rolled Steel and Cold-Rolled Steel AD investigations, and the second review of Large Power Transformers, with respondents own reported data. We then address Commerce’s replacement of the missing necessary information in the CORE investigation and the third and fourth review of Large Power Transformers with data from the petitions. Last, we will address the Hot-Rolled and Cold-Rolled Steel CVD investigation.

***1. Commerce’s replacement of missing information in the Anti-Dumping Duty Investigations.***

43. In the Hot-Rolled Steel and Cold-Rolled Steel AD investigations Commerce replaced the missing necessary information with Hyundai’s own reported information.<sup>49</sup> Similarly, Commerce replaced the missing necessary information in the second administrative review on LPTs with the respondents’ own reported data.<sup>50</sup> Commerce noted that this information was a reasonable replacement for the missing necessary data, given its relevance and reliability.<sup>51</sup> This

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<sup>46</sup> *US – Carbon Steel (AB)*, para. 4.426.

<sup>47</sup> *US – Carbon Steel (AB)*, para. 4.426.

<sup>48</sup> *US - Carbon Steel (AB)*, para. 4.419, 4.469.

<sup>49</sup> US FWS, paras. 182-198.

<sup>50</sup> US FWS, paras. 226-230.

<sup>51</sup> US FWS, para. 227.

is consistent with Article 6.8 of the Anti-Dumping Agreement and Korea fails to demonstrate otherwise.

44. In the CORE investigation, Commerce replaced the missing data with a rate from the petition.<sup>52</sup> Similarly, Commerce used a rate from the petition to replace missing necessary information in the third and fourth administrative reviews on LPTs.<sup>53</sup> Use of a petition rate is fully consistent with paragraph 7 of Annex II, which acknowledges that investigating authorities may replace missing necessary information with “information supplied in the application for the initiation of the investigation,” and simply indicates that they should undertake special circumspection in doing so. Commerce did just that.

45. With respect to the CORE investigation, in selecting data from the petition, Commerce noted that no information on the record called into question the relevance of the petition rate.<sup>54</sup> Moreover, company-specific sales during the period of investigation provided by Hyundai supported the probative value of the rate from the petition.<sup>55</sup> That is, the rates chosen from the petition were within the range of Hyundai’s own specific margins. Additionally, the petition rates had been corroborated, as they were derived from the CORE steel industry and were based on price quotes for sales of CORE produced and exported from Korea.<sup>56</sup>

46. With respect to the petition rates used in the LPTs administrative reviews, in its pre-initiation analysis of the probative value of the petition rate, Commerce examined information from various independent sources to determine the relevance and reliability of the rate, and no information on the record called into question the relevance of the petition rate.<sup>57</sup> Additionally, Commerce noted that the petition rate was based on sales declarations and prices for LPTs manufactured in Korea and offered for sale in the United States, reinforcing its probative value.<sup>58</sup> Moreover, Commerce compared the petition rate to transaction-specific data in the review and found the highest transaction-specific rate exceeded the petition rate.<sup>59</sup> In sum, the record shows that, consistent with paragraph 7 of Annex II, Commerce used special circumspection in using petition rates.

47. Korea argues that Commerce’s use of the highest or lowest rate when choosing from the available record facts to replace missing information violates paragraph 7 of Annex II because it is not the “best information.” As an initial matter, “best information available” is the title of

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<sup>52</sup> US FWS, paras. 97-110.

<sup>53</sup> US FWS, paras. 263-273.

<sup>54</sup> US FWS, para. 101.

<sup>55</sup> US FWS, para. 101.

<sup>56</sup> US FWS, para. 101.

<sup>57</sup> US FWS, para. 268.

<sup>58</sup> US FWS, para. 268.

<sup>59</sup> US FWS, para. 268.

Annex II, not a substantive provision that may be used to frame a legal inquiry. The substantive provisions of the Annex are what matter and any analysis should focus on the text of those provisions. It would be error to read the title of the annex as containing an additional obligation that does not exist in the ensuing provisions.

48. In any event, Korea fails to show that any rates relied upon by Commerce are unreasonable or punitive. Indeed, Korea has provided no evidence to demonstrate that the rates used by Commerce were somehow objectively inferior to other available facts. Indeed, because the respondents failed to provide Commerce with complete information, it is not known what replacement rates would most closely reflect respondents’ actual rates. While Korea asserts there is better information on the record, it offers no alternative.<sup>60</sup> It is not enough to simply infer that the adoption of an adverse inference invariably leads to a rate that could not be selected by an objective trier of fact. The adoption of an adverse inference in the case of a non-cooperative party simply does not, without more, breach Article 6.8 or paragraph 7 of Annex II.

49. Indeed, nothing in Article 6.8 or Annex II limits the application of facts available to those facts that are *most favorable to the interests* of a party who fails to cooperate, nor does the ordinary meaning of the term “facts available” speak to which facts should be selected. Rather, the discretion to apply the “facts available” in making a determination pursuant to Article 6.8 means that an administering authority, when faced with a situation in which necessary facts are missing, may resort to facts that are otherwise available. There quite justifiably is no guarantee that the selected facts will be favorable to the non-cooperative party and, when selecting among multiple available facts, nothing requires the administering authority to ignore the fact of non-cooperation.

## ***2. Commerce’s replacement of missing information in the Countervailing Duty Investigations.***

50. Finally, contrary to Korea’s claims, Commerce’s selection of facts available in the two CVD determinations was not with a view to obtaining a result adverse to the interests of POSCO, rather than making an accurate determination. Indeed, Korea points to nothing on the record to demonstrate that Commerce’s determination is not accurate. Like the margins used by Commerce in the anti-dumping determinations, Korea’s claims appear to be based solely on its disappointment in Commerce’s use of less favorable rates to replace the missing information. However, Article 12.7 of the SCM Agreement, properly interpreted, “acknowledges that non-cooperation could lead to an outcome that is less favourable for the non-cooperating party.”<sup>61</sup>

51. Korea also alleges that in selecting the facts available, Commerce does not provide any analysis as to why the rates applied to missing information are appropriate or relevant to POSCO

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<sup>60</sup> Korea FWS, para. 860.

<sup>61</sup> *US – Carbon Steel (India) (AB)*, para. 4.426 (discussing relevance of Annex II(7) of the Anti-Dumping Agreement in interpreting Article 12.7 of the SCM Agreement).

or DWI and that Commerce failed to corroborate or apply the chosen information for facts available with special circumspection.<sup>62</sup> The record does not support Korea’s assertion.

52. The starting point for Commerce’s facts available analysis was the calculated subsidy rates of cooperating companies. These rates reflect the *actual subsidy practices* of the government in Korea as reflected in the actual experience of companies in Korea. Second, the logical inference applied in selecting from among the facts available in this situation is that where a company refuses to provide information, it is reasonable to conclude that the company has benefitted from the subsidy program at least as much as the cooperating company in the same industry who received the higher benefit amount. The refusing company may have benefitted to a greater extent than a company that provided the necessary information when requested. However, Commerce cannot know the true extent of the benefit without obtaining the actual data from the company or government. Thus, given the refusal of the company to provide the necessary information, Commerce applies the higher calculated rate for the particular subsidy program at issue, unless information on the record indicates that that rate is inaccurate or inappropriate.

53. Because these proceedings were investigations, where Commerce looked at new subsidies never examined before, and thus found there were no subsidy rates available for some identical or similar programs, Commerce examined the subsidy rates from countervailing duty proceedings involving Korea.<sup>63</sup> Nothing in the text of Article 12.7 provides that rates initially determined in other investigations are somehow precluded from qualifying as an available fact. Further, this interpretation would be contrary to Article 12.7 which, as the Appellate Body has observed, is “to ensure that the failure of an interested party to provide necessary information does not hinder an agency’s investigation.”<sup>64</sup>

54. In each case in which Commerce identified the particular subsidy rate to be applied as facts available, as a final step, it examined the reliability and relevance of such rates to the extent practicable.<sup>65</sup> In this investigation, no evidence on the record contradicted or raised a question about the subsidy rates that were applied as facts available. Thus, contrary to Korea’s

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<sup>62</sup> US FWS, para. 419.

<sup>63</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 12.

<sup>64</sup> *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293.

<sup>65</sup> See CRS I&D Memo (July 20, 2016) (Exhibit KOR-77) at 15; see also, Results of Redetermination Pursuant to Court Remand in *POSCO et al. v. United States*, pertaining to the cold-rolled steel investigation (in which Commerce explained, that in accordance with the statute, “when {Commerce} relies on secondary information rather than on information obtained in the course of an investigation or review, {Commerce}, shall, to the extent practicable corroborate that information from independent sources that are reasonably at their disposal.” “Corroborate means that the Secretary will examine whether the secondary information to be used has probative value.”) (June 6, 2018) (Exhibit USA-58) at 19. The court affirmed Commerce’s redetermination of POSCO’s subsidy rate in *POSCO et al. v. United States*, Slip Op. 18-115 (September 10, 2018) (Exhibit USA-59).

assertion,<sup>66</sup> because the subsidy rate for each program was on a par with the same or similar subsidy programs, the rate provides a reasonable estimate of the level of subsidization provided by the government.

#### **E. Korea’s Article 9.4 Claim**

55. Moreover, Korea fails to make out a *prima facie* case with respect to its claim that the LPT fourth period of review (“POR4”) all others rate breaches Article 9.4 of the Anti-Dumping Agreement.<sup>67</sup> Article 9.4 contains a single directive—that the all-others rate, in certain circumstances, shall not exceed a cap set by a methodology contained in that provision. Korea has not even alleged what the cap was in that review, which is a pre-requisite to establishing that the all others rate exceeded the cap. Accordingly, its claim fails.

56. Article 9.4 requires that facts available rates and zero or *de minimis* rates be excluded from the calculation of the cap. In the LPT POR4 proceeding, there would be no rates left once rates based on facts available are disregarded. Korea attempts to rely on what the Appellate Body has referred to as a lacuna in Article 9.4.<sup>68</sup>

57. As an initial matter, the United States has serious concerns about the Appellate Body statements in this regard. A perceived lacuna—or gap—in an agreement means that the Members have not, in fact, agreed on any disciplines in the relevant area. “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”<sup>69</sup> To the extent that a “gap” exists, only the Members are permitted to address it. In the case of Article 9.4, where no cap can be calculated, by its own terms agreed to by the Members, the provision is inoperative. The Members have not agreed on any alternative cap.

58. In the *US – Zeroing* report relied upon by Korea, the Appellate Body ultimately found that, as the participants failed to suggest an alternative methodology to calculate the maximum allowable all others rate (*i.e.*, cap), it did not need to resolve the issue in that appeal.<sup>70</sup> Thus, its problematic reasoning is best understood as *obiter dictum*. In any event, as in that case, the parties here also have not proposed any alternative methodology for calculating the cap in Article 9.4 (likely because there is not one based in the text of the Agreement). Therefore, Korea has failed to make out a *prima facie* case, and the Panel need not resolve the issue to dispose of Korea’s claim.

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<sup>66</sup> Korea FWS, paras. 449-450.

<sup>67</sup> Korea FWS, paras. 865-872.

<sup>68</sup> Korea FWS, para. 869.

<sup>69</sup> DSU, Art. 3.2.

<sup>70</sup> *US—Zeroing (EC) (21.5) (AB)*, para. 453.

### III. KOREA’S AS SUCH CLAIM AGAINST AN ALLEGED UNWRITTEN MEASURE

59. In both our preliminary ruling request and first written submission, the United States exposed the incoherence in Korea’s first written submission with respect to its claim that an unwritten measure is “as such” inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement. Korea’s failure in this respect does not stem from a disagreement about its burden. To the contrary, Korea acknowledges that it bears the burden of establishing the very existence of this unwritten measure, and that it must establish the alleged measure’s precise content, that the measure is attributable to the relevant Member, and that the measure has general and prospective application.<sup>71</sup> Korea, of course, would also have the burden of then establishing that such a measure breaches one or more provisions of the covered agreements. Korea has not met its burden.

#### A. Alleged Unwritten Measure

60. As the Appellate Body has recognized, as such challenges seek to prevent Members *ex ante* from engaging in certain conduct.<sup>72</sup> The implications of such challenges therefore are more far-reaching than as applied claims.<sup>73</sup> Accordingly, these are very serious challenges.<sup>74</sup> And, it is very important that a responding party be provided with a fair opportunity to defend its interests, which in the case of as such claims is necessary to avoid the improper *ex ante* preclusion of conduct that does not breach a Member’s WTO obligations.

61. There are significant risks involved with challenges to unwritten measures. With a written measure, there is generally certainty as to the content of the measure.<sup>75</sup> This allows the responding party to know which measure is being challenged and defend its interests accordingly. However, a particularly high threshold must be met with respect to unwritten measures, because their very existence cannot be assumed.<sup>76</sup> Moreover, if uncertainty exists with respect to an alleged unwritten measure, the responding member is fundamentally deprived of a fair opportunity to defend its interests.

62. Accordingly, as Korea acknowledges, a challenge to an alleged unwritten measure must identify the *precise* content of the supposed unwritten measure. Precise means marked by exactness and accuracy of expression or detail. In other words, there can be no uncertainty. But Korea’s rambling discussion of the “precise content” in its first written submission lacks clarity and fuels uncertainty. Arguments extend for pages on issues that have no relevance to the only

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<sup>71</sup> Korea FWS, para. 886.

<sup>72</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

<sup>73</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

<sup>74</sup> *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

<sup>75</sup> *See US – Zeroing (EC) (AB)*, para. 197.

<sup>76</sup> *See US – Zeroing (EC) (AB)*, paras. 196, 204.

alleged unwritten measure that is within the Panel’s terms of reference.<sup>77</sup> As a result, Korea’s attempt to establish the precise content of the challenged unwritten measure is markedly insufficient.

63. In its preliminary ruling, the Panel explains that the unwritten measure challenged by Korea “as such” that is within the Panel’s terms of reference is described in Section I.C of Korea’s panel request.<sup>78</sup> Specifically, Korea alleges that the United States maintains the following unwritten measure:

Under this ongoing conduct or norm, whenever the USDOC makes a finding that a producer or exporter has failed to cooperate by not acting to the best of its ability, it adopts adverse inferences and, in determining the duty rate for this producer or exporter, selects facts from the record that are adverse to the interests of this producer or exporter without establishing (i) that such inferences can reasonably be drawn in light of the degree of cooperation received, and (ii) that such facts are the “best information available” in the particular circumstances.<sup>79</sup>

64. Thus, the Panel has found that this is the alleged unwritten measure that Korea must both (1) prove the existence of; and (2) prove that the measure, if in existence, necessarily breaches a WTO obligation. To be clear, Korea must prove the existence of each element of this alleged unwritten measure. If Korea cannot prove any one element, then the measure alleged by Korea has not been proven to exist, and Korea’s as such claim must fail.

65. The alleged unwritten measure, according to Korea’s panel request, has four elements. Whenever Commerce finds that a producer or exporter has failed to cooperate by not acting to the best of its ability, according to Korea, Commerce:

- (1) adopts adverse inferences;
- (2) selects facts from the record that are adverse to the interests of the relevant producer or exporter;
- (3) does not establish that such inferences can reasonably be drawn in light of the degree of cooperation received; and
- (4) does not establish that such facts are the best information available in the particular circumstances.

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<sup>77</sup> The United States notes that it discusses the measure within the Panel’s terms of reference on the basis of the Panel’s preliminary ruling. However, this characterization is only for purposes of clarifying argumentation in this proceeding and should not be construed as an admission that this or any unwritten measure properly falls within the Panel’s terms of reference.

<sup>78</sup> Preliminary Ruling Request, para. 2.1.

<sup>79</sup> Korea Panel Request, para. 9.

66. Put differently, if the United States were to adopt a law in writing setting out what Korea alleges to already be an unwritten measure, it would read as follows (or substantially similar):

Any time a producer or exporter fails to cooperate to the best of its ability, Commerce:

- (1) shall adopt adverse inferences;
- (2) shall select facts from the record that are adverse to the interests of the relevant producer or exporter;
- (3) shall not establish that such inferences can reasonably be drawn in light of the degree of cooperation received; and
- (4) shall not establish that such facts are the best information available in the particular circumstances.

67. To put it mildly, Korea has failed to prove the existence of any such measure with these elements.

68. First, Korea has not shown that, upon a finding of non-cooperation, an unwritten measure requires adoption of adverse inferences. To the contrary, even Korea acknowledges that the adoption of adverse inferences in such circumstances is discretionary.<sup>80</sup>

69. Second, Korea likewise fails to establish that, upon a finding of non-cooperation, an unwritten measure requires Commerce to select facts from the record that are adverse to the interests of the relevant producer or exporter. Again, Commerce has discretion in selecting from among the facts otherwise available.

70. Indeed, it is certainly correct that Commerce maintains discretion to not adopt adverse inferences despite that a party has failed to cooperate to the best of its ability. For example, in a countervailing duty investigation concerning *Stainless Steel Bar from Italy*, the respondent-company refused to respond to Commerce’s questionnaire and provide necessary information, as requested, and Commerce determined that the company failed to cooperate to the best of its ability.<sup>81</sup> However, Commerce did not adopt adverse inferences. Instead, it determined the subsidy rate by relying on information supplied by the foreign government regarding certain subsidies given to the company.<sup>82</sup> Commerce explained that, “{a}lthough CAS failed to

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<sup>80</sup> See Korea FWS, para. 910.

<sup>81</sup> *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163, Jan. 23, 2002, (*Issues & Decision Memorandum* at Comment 1). (Exhibit USA-62).

<sup>82</sup> *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163, Jan. 23, 2002, (*Issues & Decision Memorandum* at Comment 1). (Exhibit USA-62). See also *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia*, 64 Fed. Reg. 73155, 73162, Dec. 29, 1999 (Exhibit USA-63); *Final Results of Countervailing Duty Administrative Review*;

cooperate to the best of its ability in refusing to respond to our questionnaire, we cannot ignore the information reported to us by the GOI and EC regarding subsidies given to CAS.”<sup>83</sup>

71. After examining this case and others administered by Commerce, the Appellate Body correctly concluded that “where there is information on the record that may not represent the worst possible inference but could nonetheless lead to a ‘more precise subsidy rate’, it may be used as the basis for determination notwithstanding the non-cooperation of a party, and ‘{w}here circumstances indicate that the information is not appropriate as {adverse facts available}’, the USDOC’s practice in the application of the measure suggests that it ‘will not use it.’”<sup>84</sup>

72. Similarly, in an antidumping duty investigation of *OCTG from Korea*, Commerce found that one of the Korean respondents, NEXTEEL, may have lacked candor and made misleading implications in its questionnaire responses, but Commerce declined to adopt adverse inferences because doing so may have resulted in an “excessive estimate” of warranty expenses. In that instance, Commerce considered that other information available on the record allowed for a more accurate estimate of such expenses:

We disagree with the petitioners that the Department should apply adverse facts available for warranty expenses. While NEXTEEL may have been less than candid in its questionnaire responses and may have implied it had not received any warranty claims for the POI, failing initially to provide its three year warranty expense data, it does appear that NEXTEEL did not incur any warranty expenses during the POI, as it stated in its questionnaire responses, and NEXTEEL did later submit its three year warranty expense data. Use of all of the outstanding balances of NEXTEEL’s customer to determine NEXTEEL’s expenses as facts available may yield an excessive estimate, given it is not evident that the outstanding balances are all due to warranty claims, nor is it obvious that all claims would result in actual warranty expenses. Use of the Department’s standard historical average methodology, adjusted to exclude the third year (2012) because of admitted unresolved claims for that year and expenses incurred by its affiliated customer and that affiliate’s customer, is the most appropriate methodology for estimating NEXTEEL’s warranty expenses for the POI.<sup>85</sup>

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*Certain In-Shell Pistachios from the Islamic Republic of Iran*, 70 Fed. Reg. 54027, Sep. 13, 2005, at 7-8 (Comment 1). (Exhibit USA-64).

<sup>83</sup> *Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3163, Jan. 23, 2002, (*Issues & Decision Memorandum* at Comment 1).

<sup>84</sup> *US – Carbon Steel (India) (AB)*, para. 4.480.

<sup>85</sup> *See Certain Oil Country Tubular Goods from the Republic of Korea*, 79 Fed. Reg. 41,983 (Dep’t Comm. July 18, 2014) (*Issues & Decision Memorandum* at 81 (Comment 22)) (Exhibit USA- 65).

73. As these cases show, Korea is simply wrong that there is an “automatic link between the finding of a failure to cooperate to the best of its ability and the drawing of adverse inferences in the sense of selecting from the facts on the record those that are adverse to the interests of the producer.”<sup>86</sup> This conclusively disproves the existence of a measure that, upon a determination by Commerce of non-cooperation, requires the adoption of adverse inferences (*i.e.*, a measure with the first element alleged by Korea). Accordingly, Korea’s as such claim necessarily fails without the need to consider any additional issues.

74. Furthermore, this conclusively disproves the existence of a measure that, upon a determination by Commerce of non-cooperation, requires the selection of facts adverse to the interests of the relevant producer or exporter (*i.e.*, a measure with the second element alleged by Korea).<sup>87</sup> This too provides an independent basis that alone is sufficient to foreclose Korea’s as such claim and obviates the need to consider any additional issues.

75. However, we will address the additional issues in Korea’s as such claim to demonstrate that they too reveal deficiencies. Korea phrases the third element of the alleged unwritten measure as follows: “without establishing (i) that such inferences can reasonably be drawn in light of the degree of cooperation received.” It is unclear what Korea means by “establishing” in this context. It is also unclear whether Korea is alleging that the alleged unwritten measure *fails to require* Commerce to establish that adverse inferences can reasonably be drawn in light of the degree of cooperation received, or instead that the alleged written measure *precludes* Commerce from establishing as much. Either way, Korea has made no effort to prove that any such unwritten measure with this element as part of its precise content exists.

76. The same problems plague the fourth element of the alleged unwritten measure. Korea does not clarify what “establishing” means in this context. Korea does not differentiate between failing to require establishment that the facts are the best information available in the particular circumstances and precluding establishment of the same. And Korea, in any event, makes no effort whatsoever to prove that any unwritten measure containing this element as part of its precise content exists.

77. Rather than attempt to systematically prove the existence of each of the four elements of the supposed unwritten measure, Korea instead focuses a significant portion of the “precise content” section of its submission reviewing the U.S. statute, which of course is a written measure with respect to which Korea abandoned its as such claim.<sup>88</sup>

78. Moreover, the statute Korea discusses explicitly states that, if the administering authority (Commerce) finds that an interested party failed to cooperate by not acting to the best of its ability, the administering authority “*may* use an inference that is adverse to the interests of that

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<sup>86</sup> Korea FWS, para. 919.

<sup>87</sup> See Korea Panel Request, para. 9. See also Preliminary Ruling, para. 2.1.

<sup>88</sup> See Korea FWS, paras. 897-909.

party in selecting from among the facts otherwise available.”<sup>89</sup> Rather than supporting the existence of the alleged unwritten measure, this directly contradicts the first and second elements of that supposed measure by making clear that adopting adverse inferences is *not mandatory*, and neither is the selection of any particular facts.

79. After a lengthy discussion of a statute that Korea does not challenge, Korea then turns to supposed consistent practice by Commerce and U.S. court findings. From the start, Korea refers to Commerce’s exercise of discretion.<sup>90</sup> A policy of discretion to make case-specific determinations—which is enshrined in the statute—could not possibly *necessarily* breach WTO obligations, which is what an as such claim requires.<sup>91</sup> Even assuming *arguendo* that the exercise of that discretion in a particular manner in light of particular facts would breach WTO obligations, the potential for breach would be limited to those instances in which the discretion was exercised in that particular manner in light of those particular relevant facts. That is the very definition of an “as applied” claim. It would be improper to find a breach “as such” in such circumstances.

80. When Korea addresses the “general and prospective application” requirement, it too fails to attempt to structure an argument that would apply to the alleged unwritten measure indicated in its panel request. Korea discusses the supposedly general application of the U.S. statute.<sup>92</sup> Korea discusses the broad spectrum of cases in which, Korea argues, Commerce has adopted adverse inferences of some kind.<sup>93</sup> But, as the Panel’s preliminary ruling clarified, Korea’s as such claim does not challenge the statute or the adoption of adverse inferences generally. It challenges a specific alleged unwritten measure, but Korea fails to attempt a showing of general and prospective application with respect to that alleged measure.

81. Korea continues its failure to address the actual alleged measure it is challenging in resorting to previous reports. For example, Korea states that the use of AFA as a “practice” was confirmed in *US – Carbon Steel (India)*.<sup>94</sup> Again, Korea’s as such claim does not challenge the use of adverse inferences *in toto*. (Korea also commits an error in logic in attempting to ascribe a finding to the Appellate Body report in that proceeding.)<sup>95</sup>

82. Korea also attempts to rely on *US – Anti-Dumping Methodologies*. However, again, the measure at issue in that dispute is not the same as the alleged measure indicated in Korea’s panel

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<sup>89</sup> Korea FWS, para. 900 (purporting to reproduce 19 USC § 1677e(b)(1)(A), although Korea never actually places a copy of the statute on the record of this proceeding (emphasis added)).

<sup>90</sup> See Korea FWS, para. 910.

<sup>91</sup> See *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

<sup>92</sup> See Korea FWS, para. 930.

<sup>93</sup> See Korea FWS, paras. 931-932.

<sup>94</sup> Korea FWS, paras. 966-974.

<sup>95</sup> See Korea FWS, para. 973.

request. Unlike the measure in that dispute, Korea’s challenge has nothing whatsoever to do with NME-wide entities.<sup>96</sup> Conversely, to the extent Korea is addressing a measure with “identical content” to the measure in *US – Anti-Dumping Methodologies*,<sup>97</sup> it is arguing about a measure that it did not include in its panel request and is outside the Panel’s terms of reference.

83. Korea continues this flawed approach in raising *US – Supercalendered Paper*.<sup>98</sup> Yet again, the measure there—“USDOC asking the ‘other forms of assistance’ question, and where the USDOC ‘discovers’ information that it deems should have been provided in response to that question, applying AFA to determine that the ‘discovered’ information amounts to countervailable subsidies”—is completely different from the alleged measure included in Korea’s panel request.<sup>99</sup> Korea recognizes as much, but then states that “the same reasoning applies to this dispute.”<sup>100</sup> However, Korea offers no analysis or evidence to support this conclusory assertion.

84. Finally, in the portion of its brief addressing the supposed existence of an unwritten measure in the form of ongoing conduct—which we showed in our first written submission is moot<sup>101</sup>—Korea dedicates much of its discussion to three alleged methodologies that also differ substantially from the alleged measure included in Korea’s panel request—the sole alleged unwritten measure within the Panel’s terms of reference. This discussion, like so much of Korea’s first written submission, is irrelevant to the as such claim regarding the sole alleged unwritten measure in Korea’s panel request. Thus, this discussion further reinforces Korea’s failure to establish the existence of the alleged unwritten measure it supposedly is challenging.

## **B. Alleged As Such Breach**

85. Following its flawed attempt to establish the existence of the alleged unwritten measure included its panel request, Korea turns to the task of arguing that the alleged measure breaches Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement in Section VI of its first written submission.

86. Korea begins by arguing that the relevant legal standard is that Commerce must “undertake a comparative evaluation and assessment of all of the available evidence when selecting facts available.”<sup>102</sup> As the United States explained, this is not a proper reading of the

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<sup>96</sup> “NME” is used to abbreviate “non-market economy.”

<sup>97</sup> See Korea FWS, para. 995.

<sup>98</sup> See Korea FWS, paras. 997-1000.

<sup>99</sup> *US – Supercalendered Paper (Panel)*, para. 7.316.

<sup>100</sup> See Korea FWS, Section V.6.1.

<sup>101</sup> See US FWS, para. 436.

<sup>102</sup> Korea FWS, para. 1001.

covered agreements.<sup>103</sup> In particular, the Appellate Body has reasoned that “the extent to which an ‘evaluation’ of the ‘facts available’ is required under Article 12.7, and the form it should take, depend on the particular circumstances of a given case, including the quantity and quality of the available facts on the record, and the types of determinations to be made in a given investigation.”<sup>104</sup> Accordingly, Korea’s arguments necessarily fail because they are premised on the breach of an obligation that does not exist. In any event, Korea’s arguments based on this faulty premise are still otherwise erroneous.

87. In attempting to show the WTO inconsistency of the alleged unwritten measure, Korea advances two arguments: (1) a supposed statistical analysis; and (2) a “substantive analysis.” We will address each in turn.

### ***1. Supposed Statistical Analysis***

88. Korea argues that statistics confirm the breach of the covered agreements.<sup>105</sup> However, what follows has nothing to do with statistics. Instead, Korea starts with a universe of cases it selected on the basis that these cases included the adoption of adverse inferences in some respect.<sup>106</sup> It then introduces a series of other criteria to further limit the cases, ultimately arriving at a subset of 90 cases.<sup>107</sup> This is not a statistical analysis. It is just a sorting exercise within a preselected universe based on criteria chosen by Korea that it does not even bother to explain.

89. Korea then states—without evidentiary support or the slightest bit of reasoning or argumentation—that, “{i}n all of these 90 cases, the USDOC applied AFA in a mechanistic manner solely based on the finding that party failed to cooperate to the best of its ability and without engaging in the required comparative process of reasoning and evaluation and as assessment of the available facts on the record to identify the facts that lead to an accurate determination.”<sup>108</sup> To state the obvious, this too fails to qualify as a statistical analysis. Nor does this unsupported assertion establish a breach of any kind.

### ***2. Korea’s “Substantive Analysis”***

90. Korea next provides what it characterizes as a “substantive analysis.”<sup>109</sup> Korea argues that Commerce resorts to the adoption of adverse inferences without considering the specific facts

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<sup>103</sup> See US FWS, paras. 34-35.

<sup>104</sup> *India – Carbon Steel (AB)*, para. 4.434.

<sup>105</sup> Korea FWS, paras. 1009-1018.

<sup>106</sup> See Korea FWS, para. 1009.

<sup>107</sup> See Korea FWS, paras. 1013-1015.

<sup>108</sup> Korea FWS, para. 1017.

<sup>109</sup> See Korea FWS, Section V.6.2.

that led to the finding of non-cooperation.<sup>110</sup> Korea also argues that Commerce pursues the adoption of adverse inferences as an end in and of itself, and that Commerce does so to the exclusion of reasoning and evaluating all of the facts available and corroborating such information with a view to arriving at an accurate determination.<sup>111</sup> Korea’s arguments in this respect are confusing. They reference different concepts and invoke various words or phrases that have either appeared in previous WTO reports or appear in the U.S. law, such as “corroborate,” without explaining how these arguments fit together in light of the text of the covered agreements.

91. Nevertheless, the United States endeavors to address these arguments as Korea’s submission presents them. What is clear is that the supposed deficiencies raised by Korea are meritless.

92. First, Korea argues that Commerce resorts to the adoption of adverse inferences without considering the specific facts that led to the finding of non-cooperation.<sup>112</sup> The remainder of the relevant paragraph makes clear that the phrase “the specific facts that led to the finding of non-cooperation” contemplates differentiating between various potential manners in which a party can fail to cooperate to the best of its ability.<sup>113</sup> However, Korea has never established that the Anti-Dumping Agreement or the SCM Agreement requires Commerce, in adopting adverse inferences, to consider whether necessary information is missing due to fraud, withholding of information, or some other manner of failing to cooperate to the best of a party’s ability.

93. Indeed, no such requirement exists. What is relevant, in the first instance, is that information that is necessary to complete a calculation is missing. What may become relevant as Commerce fills the gap left by the party’s non-cooperation is the very fact of non-cooperation, which the Appellate Body has acknowledged is a relevant consideration.<sup>114</sup> Korea seemingly is suggesting that the covered agreements require a calibration that punishes the worst crimes with the worst sentences. But this is exactly the type of punitive objective that is *not* permissible under the covered agreements.<sup>115</sup> It is curious that, after wrongly accusing Commerce of seeking punitive ends, Korea effectively argues that the covered agreements require it.

94. Second, Korea argues that Commerce pursues the adoption of adverse inferences as an end in and of itself, and that Commerce does so to the exclusion of reasoning and evaluating all of the facts available and corroborating such information with a view to arriving at an accurate

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<sup>110</sup> See Korea FWS, para. 1023.

<sup>111</sup> See Korea FWS, paras. 1025, 1027, 1031-1032.

<sup>112</sup> See Korea FWS, para. 1023.

<sup>113</sup> See Korea FWS, para. 1023.

<sup>114</sup> See *US – Carbon Steel (AB)*, para. 4.426.

<sup>115</sup> See Korea FWS, para. 183; *Viet I-Mei Frozen Foods Co. v. United States* (U.S. Court of International Trade 2015), pp. 11-12 (indicating that the statute does provide for dumping margins to be a punitive measure) (Exhibit USA-61).

determination.<sup>116</sup> Korea’s argument ignores the realities of the various factual circumstances Commerce frequently encounters and fails to understand that the fact of a party’s non-cooperation *is* relevant and probative of what is accurate. Korea also is wrong that Commerce does not evaluate all of the facts available or corroborate information, which in any event is not an element of the unwritten measure Korea is supposedly challenging. We will discuss both of these errors, before concluding with brief comments about Korea’s invocation of TPEA Amendments, the relevance of which Korea has not explained.

95. Korea’s discussion and examples focus overwhelmingly on anti-dumping calculations. In these scenarios, the missing information is often a particular, company-specific input into the margin calculation. For example, it might be a company’s selling expenses during the period of review. If the company does not cooperate to the best of its ability, resulting in the absence of these selling expenses from the record, this information is not plausibly going to exist elsewhere on the record.

96. At that point, Commerce must fill this gap by finding a proxy for the missing information. Perhaps Commerce will use the selling expenses of another respondent company that did cooperate. We would pause here to observe that this choice constitutes reasoning, or what Korea refers to as “comparative evaluation.” Commerce could just pick a number out of thin air, but that would of course be arbitrary. Without more, it would be equally arbitrary to select as a proxy a measure of some unrelated variable, like transportation expenses. The United States raises these extreme examples to draw into stark relief that the decision to use one party’s selling expenses as a proxy for another party’s selling expenses indeed constitutes reasoning regarding the most appropriate facts otherwise available to use. The logic, however, is so obvious that it hardly warrants mentioning explicitly in a determination.

97. At this point, however, if selling expenses exist on the record for multiple other parties, there is no way to know which other party’s selling expenses in the period of review were closest to the non-cooperative company’s selling expenses, which would require knowing the non-cooperative company’s selling expenses—the very information that is missing. This is where the fact of non-compliance can play an important role in increasing the likely accuracy of determinations.

98. Korea regularly attempts to imply that any resort to the “highest” measure of a proxy is inherently suspect, but Korea conspicuously omits any mention of what approach would be more likely to be accurate. Suppose in this situation, there are three other companies that cooperated and have selling expenses on the record. Would Korea have Commerce choose the lowest of the three?

99. The truth is, as a direct result of the party’s failure to cooperate, Commerce does not know which of the three selling expenses most closely reflects the non-cooperative party’s selling expenses. But it is reasonable to conclude that, if the party’s actual selling expenses were

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<sup>116</sup> See Korea FWS, paras. 1025, 1027, 1031-1032.

similar to the very lowest on the record, it would have cooperated to the best of its ability to provide them. Where the party did not cooperate to the best of its ability, the best, most reasonable inference is that its unreported selling expenses are likely to be at least equal to those of the highest on the record, which we recall would still reflect actual selling expenses of a cooperating party. (Indeed, there is good reason to believe the non-cooperative party’s selling expenses may be even higher.) In other words, the adoption of adverse inferences is not an impediment to pursuing the most accurate determination. It directly reflects information—the fact of non-cooperation—that assists in arriving at the most accurate determination.

100. This is reinforced by the Appellate Body’s observation that paragraph 1 of Annex II of the Anti-Dumping Agreement

makes a connection between the “awareness” of an interested party, and the ability for an investigating authority to have recourse to the “facts available” under Article 6.8. This suggests that the knowledge of a non-cooperating party of the consequences of failing to provide information can be taken into account by an investigating authority, along with other procedural circumstances in which information is missing, in ascertaining those “facts available” on which to base a determination and in explaining the selection of facts.<sup>117</sup>

Not only does the Anti-Dumping Agreement not prohibit an investigating authority from considering the fact of a party’s non-cooperation, it acknowledges the validity of such consideration.<sup>118</sup>

101. Moreover, paragraph 5 of Annex II provides:

Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, ***provided the interested party has acted to the best of its ability.***<sup>119</sup>

This provision thus indicates whether or not an interested party has acted to the best of its ability is directly relevant to whether certain information should be used in a calculation. Indeed, it implies that, in one circumstance (*i.e.*, cooperation to the best of a party’s ability) imperfect information should not be disregarded, but the exact same information perhaps should be disregarded in the case of non-cooperation. Therefore, paragraph 5 of Annex II also underscores that the AD Agreement supports the validity of considering the fact of non-cooperation in resorting to facts otherwise available.

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<sup>117</sup> *US – Carbon Steel (India) (AB)*, para. 4.426.

<sup>118</sup> *See US – Carbon Steel (India) (AB)*, para. 4.426.

<sup>119</sup> Emphasis added.

102. Korea is also mistaken that Commerce does not seek to corroborate information with a view to arriving at an accurate determination.<sup>120</sup> We note that Korea has not alleged that failure to corroborate is an element of the supposed unwritten measure it challenges.<sup>121</sup> But, in any event, according to Korea itself, the U.S. statute specifically states that, when Commerce relies on secondary information rather than information obtained in the course of an investigation or review, Commerce *shall*, to the extent practicable, corroborate the information from independent sources that are reasonably at its disposal.<sup>122</sup> Therefore, the United States cannot possibly maintain an unwritten measure that precludes corroboration of information.

103. Korea attempts to rely on a limited exception included in the TPEA Amendments—and, therefore, also included explicitly in the statute that Korea does *not* challenge. Specifically, according to Korea’s own submission, the exception to the general rule of corroboration applies only in the limited circumstance in which Commerce fills gaps with a dumping margin or countervailing duty applied in a separate segment of the same proceeding.<sup>123</sup> Therefore, even assuming *arguendo* that the failure to corroborate in this limited circumstance constituted a breach of the United States’ WTO obligations—and it does not—it would be insufficient to support an “as such” finding because the alleged measure challenged by Korea is not limited to this narrow circumstance.

104. Moreover, there is nothing problematic about this provision. Where Commerce resorts to a dumping margin or countervailing duty from a separate segment of the same proceeding, it is relying on a proxy that Commerce itself already determined and corroborated the first time around. Therefore, it is efficient to not require Commerce to re-corroborate this same dumping margin or countervailing duty in a subsequent segment.

105. Furthermore, at various points, Korea makes arguments that rely on other provisions of the U.S. statute that resulted from the TPEA Amendments. Korea does not challenge the statute, or any other written measure, as such. All such arguments, like the limited corroboration exception, are therefore irrelevant to Korea’s claim. Accordingly, there is no need for the United States to address them.

106. However, the United States does wish to make clear that none of these aspects of the statute breach its WTO obligations. Moreover, Korea’s references to these provisions underscore the incoherence in its scattershot approach. In some instances, Korea’s arguments

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<sup>120</sup> See Korea FWS, paras. 1027-1028.

<sup>121</sup> See Korea Panel Request, para. 9.

<sup>122</sup> See Korea FWS, para. 900 (purporting to reproduce 19 USC § 1677e(c)(1), although Korea never actually places a copy of the statute on the record of this proceeding).

<sup>123</sup> See Korea FWS, para. 900 (purporting to reproduce 19 USC § 1677e(c)(2), although Korea never actually places a copy of the statute on the record of this proceeding).

elsewhere actually support the WTO consistency of the U.S. statutory provisions highlighted by Korea rather than calling into question their validity.

107. For example, Korea asserts that Commerce does not determine, or make any adjustments to, a countervailable subsidy rate or dumping margin “based on any assumptions about information the interested party would have provided if the interest party had complied with the request for information.”<sup>124</sup> But Korea argues repeatedly that an investigating authority *cannot* resort to non-factual assumptions or speculation and must take into account all substantiated facts on the record.<sup>125</sup>

108. The bottom line remains that, while the United States maintains no measure, written or unwritten, that as such breaches Article 6.8 and Annex II of the Anti-Dumping Agreement or Article 12.7 of the SCM Agreement, Korea’s unfocused approach fails to credibly pursue any coherent as such claim against the lone alleged unwritten measure included in its panel request.

### CONCLUSION

109. This concludes our oral statement. We look forward to answering any questions the Panel may have. Thank you.

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<sup>124</sup> Korea FWS, para. 901. *See also ibid.*, paras. 909, 911.

<sup>125</sup> Korea FWS, paras. 74, 294, 306 (relying on *US – Carbon Steel (India) (AB)*, para. 4.417).