

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

(DS539)

**RESPONSES OF THE UNITED STATES
TO THE QUESTIONS FROM THE PANEL
FOLLOWING THE FIRST SUBSTANTIVE MEETING**

Contains BCI on pages 14-26, 28-33, 43-44

September 3, 2019

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USA-12	<i>Certain Cold-Rolled Steel Flat Products From Brazil, the People's Republic of China, India, Japan, the Republic of Korea, the Netherlands, the Russian Federation, and the United Kingdom: Initiation of Less-Than-Fair-Value Investigations</i> , 80 Fed. Reg. 51,198 (Dep't of Commerce) (August 24, 2015)	
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USA-16	Cold-Rolled Steel Flat Products from the Republic of Korea: Hyundai Steel Company Verification of Sales Agenda (April 15, 2016)	
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USA-21	Letter from ABB., Large Power Transformers from the Republic of Korea – Request for Administrative Review (August 29, 2014)	
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USA-25	Antidumping Administrative Review of Large Power Transformers from Korea: Supplemental Questionnaire for	BCI

	Sections B and C of Hyundai Heavy Industries and Hyundai Corporation USA's Responses (May 22, 2015)	
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USA-27	Department of Commerce Draft Results of Redetermination Pursuant Court Remand of the Antidumping Duty Administrative Review (January 9, 2018)	BCI
USA-28	Letter from Hyundai: Antidumping Administrative Review of Large Power Transformers from Korea – Response to First Sales Supplemental Questionnaire Section A (Narrative and Attachment SS-17) (May 13, 2015)	BCI
USA-29	Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018)	BCI
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USA-33	Hyundai Heavy Industries Co., Ltd. Case Brief (January 5, 2017)	BCI

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USA-41	Large Power Transformers from South Korea: Second Cost Supplemental Response (July 24, 2017)	BCI
USA-42	Large Power Transformers from South Korea: 2 nd Supplemental Sales Response (Part II) (June 27, 2017)	BCI
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USA-44	Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2015-2016: Hyosung First Sales Supplemental Questionnaire (April 12, 2017)	BCI
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USA-46	Department of Commerce Initial Anti-Dumping Questionnaire Hyosung (January 5, 2017)	
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USA-49	19 CFR 351.104(a)(2)	
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USA-52	Investigation of Certain Cold-Rolled Steel Flat Products: Initial Countervailing Duty Questionnaire (September 16, 2015)	
USA-53	Countervailing Duty Investigation: Certain Cold-Rolled Steel Flat Products from the Republic of Korea; Verification of POSCO and its Cross-Owned Affiliates' Questionnaire Responses (March 7, 2016)	BCI

USA-54	Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Countervailing Duty Questionnaire (September 24, 2015)	
USA-55	Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea; Verification of POSCO and its Cross-Owned Affiliates' Questionnaire Responses (May 6, 2015)	BCI
USA-56	Decision Memorandum for the Preliminary Negative Determination: Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea (December 15, 2015)	
USA-57	Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Request to Take Action on Certain Barcodes (April 21, 2016)	BCI
USA-58	Results of Redetermination Pursuant to Court Remand in <i>POSCO et al. v. United States</i> (June 6, 2018)	
USA-59	<i>POSCO et al. v. United States</i> , Slip Op. 18-115 (September 10, 2018)	
USA-60	USDOC Public Hearing, In The Matter Of: Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-882, (June 17, 2016)	
USA-61	<i>Viet I-Mei Frozen Foods Co. v. United States</i> (U.S. Court of International Trade 2015)	
USA-62	<i>Final Affirmative Countervailing Duty Determination: Stainless Steel Bar From Italy</i> , 67 Fed. Reg. 3163, Jan. 23, 2002 (<i>Issues & Decision Memorandum</i> (Comment 1))	
USA-63	<i>Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia</i> , 64 Fed. Reg. 73155, 73162, Dec. 29, 1999	

USA-64	<i>Final Results of Countervailing Duty Administrative Review; Certain In-Shell Pistachios from the Islamic Republic of Iran</i> , 70 Fed. Reg. 54027, Sep. 13, 2005	
USA-65	<i>Certain Oil Country Tubular Goods from the Republic of Korea</i> , 79 Fed. Reg. 41,983, July 18, 2014 (<i>Issues & Decision Memorandum</i> (Comment 22))	
USA-66	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Case Brief on Behalf of United States Steel Corporation (April 22, 2016)	BCI
USA-67	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Rebuttal Brief on Behalf of United States Steel Corporation (April 28, 2016)	BCI
USA-68	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Case Brief of Hyundai Steel Company (April 22, 2016)	BCI
USA-69	<i>Certain Corrosion-Resistant Steel Products from the Republic of Korea</i> , Rebuttal Brief of Hyundai Steel Company (April 28, 2016)	BCI
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USA-73	<i>Certain Oil Country Tubular Goods from the Republic of Korea</i> , Issues and Decision Memorandum (July 10, 2014)	
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USA-78	19 U.S.C. § 1677a	
USA-79	19 CFR § 351.102	
USA-80	<i>Large Power Transformers from the Republic of Korea</i> , Issues and Decision Memorandum (July 2, 2012)	
USA-81	<i>Ripe Olives from Spain</i> , Issues and Decision Memorandum (June 11, 2018)	
USA-82	<i>Steel Concrete Reinforcing Bar from Mexico</i> , Issues and Decision Memorandum (July 16, 2019)	
USA-83	<i>Silicon Metal from Norway</i> , Issues and Decision Memorandum (February 27, 2018)	
USA-84	<i>Certain Lined Paper Products from India</i> , Issues and Decision Memorandum (August 8, 2006)	
USA-85	<i>Certain Cold-Rolled Flat Steel Products from the Russian Federation</i> , Issues and Decision Memorandum (July 20, 2016)	

TABLE OF REPORTS

Short Title	Full Case Title and Citation
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014

1 AS APPLIED CLAIMS

1.1 Anti-Dumping Duties on Certain Corrosion-Resistant Steel Products from the Republic of Korea (USDOC investigation number A-580-878)

Question 1 (Korea/United States)

Korea argues that no "necessary" information was missing from the record because Hyundai Steel provided all of the relevant input data (raw material input and sales quantity data) that would have allowed the USDOC to apply "any alternative methodology" (Korea's first written submission (FWS), para. 132).

- a. Korea: Is it your view that the relevant input data supplied by Hyundai Steel was sufficient for purposes of the USDOC's standard methodology?*
- b. United States: Did the USDOC determine that the raw data as provided by Hyundai Steel was not adequate for calculating the constructed export price using the USDOC's standard methodology, and if so where is this explained?*

1. The United States understands the phrase "raw data" in this question to refer to the further manufactured sales data submitted in Hyundai's Section E response filed on November 2, 2015, and in the subsequent responses to three supplemental questionnaires from USDOC.

2. USDOC found the relevant raw data to be "unusable, unreliable, and unverifiable."¹ USDOC's reasoning for disregarding Hyundai's initial and three supplemental responses is set out in USDOC's preliminary determination² and in its final determination.³ Contrary to the argument in para. 133 of Korea's first written submission, the record shows that USDOC provided "reasonable and adequate explanation" for finding that Hyundai's responses were unverifiable.⁴ Indeed, in its preliminary and final determinations, USDOC devoted multiple pages (nearly thirteen pages in its final determination) to explaining the multiple deficiencies in Hyundai's further manufactured sales data and responses and USDOC's reasoning for applying facts available. Moreover, the record shows the extensive efforts by USDOC to help Hyundai to correct these errors with each subsequent supplemental questionnaire, by identifying deficiencies and asking for specific responses to clarify Hyundai's responses.

3. Specifically, on November 2, 2015, Hyundai submitted its first Section E response.⁵ As explained in its Issues and Decision Memorandum, USDOC determined that Korea's response

¹ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Issues and Decision Memorandum for the Final Affirmative Determination (May 24, 2016), p. 16 ("CORE I&D Memo") (Exhibit KOR-5).

² *Certain Corrosion-Resistant Steel Product from the Republic of Korea*, Decision Memorandum for the Preliminary Determination (December 21, 2015), pp. 10-14 ("CORE PDM") (Exhibit USA-8).

³ CORE I&D Memo, pp. 7-19 (Exhibit KOR-5).

⁴ Korea First Written Submission ("FWS"), para. 133.

⁵ *Certain Corrosion-Resistant Steel Products From Korea*, Hyundai Steel's Response to the Department's Request for Section E and Additional Sales Data (November 2, 2015) (Exhibit KOR-15 (BCI)).

“was deficient and that the databases were unusable.”⁶ USDOC “noted that Hyundai failed to provide a description of each data field included in the further manufacturing dataset, the formula demonstrating how the reported amounts in those fields were derived, and supporting documentation.”⁷ Additionally, “{t}he reported transactions were not reported by subject CONNUM, the unit measure was missing to convert pieces into metric tons as subject CORE is reported, and there were overlapping databases, etc.”⁸ In sum, “the response did not fully explain or support the data, and the database was not useable for the Department to run its margin analysis program.”⁹

4. With respect to Hyundai Steel’s first supplemental Section E response, submitted on November 30, 2015, USDOC noted in its preliminary determination that its initial analysis of Hyundai’s response indicted that Hyundai’s response contained significant issues and that Hyundai’s “databases had significant issues that potentially affected all of Hyundai’s sales of further manufactured merchandise.”¹⁰ Moreover, USDOC noted that while Hyundai had stated in its initial Section E response “that the CORE used in the production of TWBs undergoes slitting, shearing, blanking, and welding, and reported a fully processed cost for TWB,” in its first supplemental questionnaire, “Hyundai revised its reported further manufacturing cost of manufacturing (FURCOM) for TWBs downward without any explanation in its narrative response, indicating that the aforementioned processing steps may have been dropped in part or altogether from Hyundai’s FURCOM.”¹¹

5. Because of the insufficient explanations and unsubstantiated reporting, USDOC preliminarily determined not to rely on Hyundai’s further-manufactured sales data to calculate Hyundai’s weighted average dumping margin.¹² As noted, the response and database submitted by Hyundai on November 2, 2015, were found to be deficient and unusable. USDOC further explained that while it was still analyzing the data and response submitted with Hyundai’s first supplemental Section E response, USDOC’s review of these responses had been hindered by the lack of explanation in the narrative response to explain revisions in Hyundai’s databases.¹³ USDOC preliminarily determined that, as a result, it was unable to reliably assess whether further manufactured sales would display a pattern of differential pricing and thus warrant

⁶ CORE I&D Memo, p. 10 (Exhibit KOR-5).

⁷ CORE I&D Memo, p. 10 (Exhibit KOR-5).

⁸ CORE I&D Memo, p. 10 (Exhibit KOR-5).

⁹ CORE I&D Memo, p. 10 (Exhibit KOR-5).

¹⁰ CORE I&D Memo, p. 10 (Exhibit KOR-5).

¹¹ CORE I&D Memo, p. 10 (Exhibit KOR-5).

¹² CORE PDM, p. 13 (Exhibit USA-8).

¹³ CORE PDM, p. 13 (Exhibit USA-8).

application of an alternative comparison method.¹⁴ Therefore, USDOC found that, because necessary information was missing from the record and Hyundai had significantly impeded the proceeding due to issues surrounding its further-manufactured sales responses, the use of facts available was necessary.¹⁵

6. Similarly, with respect to Hyundai's second supplemental Section E response, submitted on December 29, 2015, USDOC's analysis of Hyundai's response and databases "indicated that the response was inconsistent with Hyundai's prior reporting of FURCOM" in previous submissions.¹⁶ USDOC noted "Hyundai again made unexplained and unsolicited changes to its further manufacturing database, as well as to its home market and U.S. sales databases."¹⁷ Moreover, "when comparing the reported further manufacturing cost reported for TWBs in the December 29, 2015 database to the narrative explanation and worksheets in Hyundai's December 29, 2015 submission, the Department observed that data showed different values."¹⁸

7. Additionally, "Hyundai submitted an unsolicited, revised U.S. sales database that contained significant changes to the further manufacturing expense (FURMANU) that Hyundai reported for its sales of skelp, sheet, and blanks."¹⁹ USDOC explained that these unexplained changes were not related to questions in USDOC's second supplemental questionnaire.²⁰ Recalling the different values for tailor welded blanks ("TWBs") in the database compared to the narrative explanation, USDOC noted that "the cumulative effect of the weighted average cost of the various processing steps performed does not appear to be reported in the further manufacturing database. In addition, shearing costs were left out despite the fact that a substantial portion of the CORE used the shearing line."²¹

8. With respect to Hyundai's third supplemental Section E response, USDOC explained:

Our analysis of this response indicates that Hyundai again failed to explain and document the difference in the quantities reported in QTY2U and FURMANQTYU, citing undocumented yield losses and the inclusion of non-subject control numbers (CONNUMs) in the further manufactured product as the cause of any discrepancies. In addition, Hyundai's allocation methodology for

¹⁴ CORE PDM, p. 13 (Exhibit USA-8).

¹⁵ CORE PDM, p. 14 (Exhibit USA-8).

¹⁶ CORE I&D Memo, p. 11 (Exhibit KOR-5).

¹⁷ CORE I&D Memo, p. 11 (Exhibit KOR-5).

¹⁸ CORE I&D Memo, p. 11 (Exhibit KOR-5).

¹⁹ CORE I&D Memo, p. 11 (Exhibit KOR-5).

²⁰ CORE I&D Memo, p. 11 (Exhibit KOR-5).

²¹ CORE I&D Memo, p. 11 (Exhibit KOR-5).

deriving the actual quantity of subject merchandise CONNUMs used in the finished non-subject further manufactured product is mathematically incorrect.²²

9. Thus, despite USDOC's significant efforts to provide Hyundai Steel with opportunities to revise or correct each submission, Hyundai's responses and databases remained unverifiable and unusable. The record shows that USDOC spent considerable time and effort to review each submission, identify the multiple deficiencies present in each submission, formulate questions for Hyundai to correct or clarify specific responses, and issue Hyundai Steel not one, not two, but *three* additional supplemental questionnaires in an effort to obtain sufficient useable, verifiable further-manufactured sales information to rely on for purposes of its margin calculation.²³ Nonetheless, in response Hyundai Steel made unsolicited changes to each of the supplemental databases it provided to USDOC, creating uncertainty and undermining the reliability of the previously-reported data and the revised data. Moreover, the responses remained inaccurate or incomplete. In the end, after reviewing all four of Hyundai Steel's Section E-related submissions, USDOC determined that the reported information was "unusable, unreliable, and unverifiable."²⁴

10. In considering Korea's dissatisfaction with the rejection of the Hyundai's Section E-related submissions, as context, the United States would note that the only data USDOC determined Hyundai Steel failed to provide, or found to be unusable (to the extent that USDOC needed to replace it with reasonable information), was the data relating to Hyundai Steel's further manufactured sales for sheet, skelp, blanks, after-service auto parts and TWBs.²⁵ Indeed, USDOC used and relied on the vast majority of Korea's reported data and was able to calculate the constructed export price (CEP) using USDOC's standard methodology.²⁶

Question 2 (Korea/United States)

Korea argues that Hyundai Steel did not refuse access to necessary information and, in fact, provided all the information to the USDOC, despite highlighting certain reporting difficulties with respect to the USDOC's Section E Questionnaire on further-manufactured sales in the context of the specific facts and circumstances of this case (Korea's FWS paras. 136-139) and despite receiving no guidance from the USDOC after multiple requests (Korea's FWS, para. 146).

- a. Korea: The United States points out that, following Hyundai Steel's request for guidance on 22 October 2015, USDOC officials met with Hyundai Steel on 27 October and 24 November 2015 and provided guidance to Hyundai Steel. Given***

²² CORE I&D Memo, p. 11 (Exhibit KOR-5).

²³ CORE I&D Memo, pp. 10-14 (Exhibit KOR-5).

²⁴ CORE I&D Memo, pp. 16, 38, and 41 (Exhibit KOR-5).

²⁵ CORE I&D Memo, pp. 7-19 (Exhibit KOR-5).

²⁶ CORE I&D Memo, pp. 19-20 (Exhibit KOR-5); *See also* CORE PDM, pp. 25-26 (detailing comparison of calculated normal value to calculated constructed export price and export price) (Exhibit USA-8).

that the USDOC met Hyundai Steel on two occasions following its request for guidance dated 22 October 2015, on what basis do you maintain that the USDOC provided "no guidance" to Hyundai Steel?

b. United States: To what extent did the USDOC take into account the reporting difficulties alleged by Hyundai Steel with respect to the Section E questionnaire on further-manufactured sales in the facts and circumstances of this investigation.

11. As noted in the U.S. first written submission, USDOC took into account the difficulties raised by Hyundai in reporting the information and provided guidance and several opportunities for Hyundai to sufficiently respond.²⁷ The record shows that USDOC went to great lengths to understand and address Hyundai's purported difficulties.²⁸ Hyundai's responses, however, failed to address USDOC's concerns and were ultimately found to be "unusable, unreliable, and unverifiable."²⁹ Moreover, while USDOC took into account Hyundai's alleged difficulties and provided Hyundai with several opportunities to provide requested data, USDOC also rejected Hyundai's claims of difficulty, finding that Hyundai's claims were ultimately "discredited" or "inaccurate."³⁰

12. The record leaves no doubt that USDOC went to great lengths to engage with Hyundai to understand its purported difficulties and to communicate what USDOC required. As discussed in the U.S. first written submission, USDOC's request for Hyundai to provide a response to Section E followed a lengthy dialogue with Hyundai to understand and address Hyundai's alleged difficulties in submitting a Section E questionnaire and Hyundai's request to be exempt from reporting sales of further manufactured products and from providing a Section E response.³¹ Over nearly two months, USDOC engaged with Hyundai to clarify Hyundai's request and to provide Hyundai guidance on the information required to substantiate Hyundai's request for exemption. Specifically, USDOC had an in-person meeting with Hyundai to discuss

²⁷ *Antidumping duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015) (Exhibit USA-3); *Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Hyundai Steel Company's Exclusion Request (October 15, 2015) (Exhibit KOR-11); *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Second Supplemental Questionnaire to Sections B&C, and First Supplemental to Further Manufacturing (November 19, 2015) (Exhibit USA-5 (BCI)); *Antidumping Duty Less Than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Supplemental Questionnaire to Section E (2nd) (December 15, 2015) (Exhibit USA-10 (BCI)); *Antidumping Duty Less Than Fair Value Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Supplemental Questionnaire to Section E (3rd) (February 5, 2016) (Exhibit USA-9).

²⁸ CORE I&D Memo, pp. 16, 30, and 41 (Exhibit KOR-5).

²⁹ CORE I&D Memo, p. 16 (Exhibit KOR-5).

³⁰ CORE I&D Memo, pp. 16, 30, and 41 (Exhibit KOR-5).

³¹ U.S. FWS, paras. 40-46.

Hyundai's request;³² issued a request for additional information to Hyundai;³³ held a telephone call with Hyundai to provide additional guidance;³⁴ and issued additional written guidance and instructions to Hyundai.³⁵ Moreover, USDOC excused Hyundai from reporting further manufactured sales when the first sale of corrosion-resistant steel to an unaffiliated party was a completed automobile.³⁶

13. Although USDOC provided Hyundai with additional guidance and gave Hyundai several opportunities to address deficiencies in Hyundai's request for exclusion, Hyundai failed to do so. Accordingly, on October 15, 2015, USDOC determined that Hyundai's submitted information was flawed. Specifically, USDOC found that Hyundai Steel failed to report the exact quantities of CORE coil shipped to each of its customers and further failed to detail the quantities it sought to exclude at each of the stages of the further manufacturing process.³⁷ This incomplete reporting made it impossible for USDOC to determine precisely what percentage or what amount of its total sales Hyundai Steel intended to report or that it intended to exclude.³⁸ Furthermore, Hyundai's value-added calculations for TWBs treated one imported CORE component as part of the value added in the United States to the other imported CORE component, then doubled the purchase price for the further manufactured product as part of the overall value-added calculation – the effect of which was to inflate the overall value-added calculation in an attempt to approach the 65% regulatory threshold for exemption.³⁹ Thus, USDOC instructed Hyundai Steel to provide a response to Section E.⁴⁰

³² *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Ex Parte Meeting with Hyundai Steel Company (August 21, 2015), p.1 (Exhibit KOR-8).

³³ *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Extension to Respond to Sections B through D of the Initial Questionnaire (September 11, 2015), p. 2 (Exhibit USA-3).

³⁴ *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Teleconference with Hyundai Steel Company (September 14, 2015) (Exhibit KOR-9).

³⁵ *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Additional Guidance on Information Required to Substantiate Hyundai Steel Corporation's Request for Alternative Calculation Method (September 16, 2015), Attachment 1 (Exhibit USA-4).

³⁶ *Antidumping Duty Investigation of Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Extension to Respond to Sections b through D of the Initial Questionnaire (11 September 2015), p. 2 (Exhibit USA-3).

³⁷ CORE I&D Memo, p. 8 (Exhibit KOR-5).

³⁸ CORE I&D Memo, p. 8 (Exhibit KOR-5).

³⁹ CORE I&D Memo, p. 9 (Exhibit KOR-5); *Certain Corrosion-Resistant Steel Products From Korea*, Response to the Department's Request for Additional Information (September 28, 2015) (Exhibit KOR-10 (BCI)).

⁴⁰ *Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Hyundai Steel Company's Exclusion Request (October 15, 2015) (Exhibit KOR-11).

14. As discussed in the U.S. response to Question 1, Hyundai submitted its initial Section E response on November 2, 2015 and following Hyundai's response, USDOC issued three supplemental questionnaires. These supplemental questionnaires provided specific guidance to Hyundai by identifying deficiencies with Hyundai's responses and providing questions to help Hyundai correct or clarify its responses. Moreover, Hyundai was given nearly four months to provide USDOC with usable data.⁴¹ These four months were in addition to the nearly two months during which USDOC was engaged with Hyundai to clarify Hyundai's request for exemption from reporting further manufactured sales.

15. Additionally, USDOC met with Hyundai in person on two additional occasions to discuss Hyundai's further manufactured sales. On October 22, 2015, Hyundai submitted a letter to USDOC seeking guidance and requesting a meeting with USDOC officials.⁴² USDOC officials met with Hyundai on October 27, 2015.⁴³ USDOC officials met with Hyundai again on November 24, 2015.⁴⁴

16. While Korea has argued that any "perceived shortcomings in the data were due to the reporting difficulties for which Hyundai Steel repeatedly sought guidance from USDOC, but received no input,"⁴⁵ the record provides no basis to find that Commerce's assessment was biased or not objective.⁴⁶ Indeed, Commerce's conclusions were entirely predictable in light of Hyundai's repeated statements of a similar nature that ultimately proved false. As USDOC noted, Hyundai made "a series of inaccurate statements with respect to its ability to provide requested information for its further manufactured sales and costs."⁴⁷

17. USDOC pointed out that initially Hyundai reported that one of the complications in its reporting was that neither Hyundai Steel, "nor its processor customers track the manufacturer of the CORE to the final product. Hyundai went on to state that its sole requirement in selecting the

⁴¹ Hyundai was first instructed to submit a Section E response on October 15, 2015 and Hyundai's third supplemental Section E response was due on February 10, 2016. *See Certain Corrosion-Resistant Steel Products (CORE) from the Republic of Korea*, Hyundai Steel Company's Exclusion Request (October 15, 2015) (Exhibit KOR-11); *Certain Corrosion-Resistant Steel Products from Korea: Hyundai Steel Third Supplemental Section E Questionnaire Response* (February 10, 2016) (Exhibit KOR-17 (BCI)).

⁴² *Certain Corrosion-Resistant Steel Products from Korea*, Request for Extension and Additional Guidance Concerning the Department's Instructions to Report Sales of Further Manufactured Products (October 22, 2015) (Exhibit KOR-13).

⁴³ *Antidumping Duty Investigation of Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (Hyundai) (October 27, 2015) (Exhibit KOR-14).

⁴⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Meeting with Counsel to Hyundai Steel Company (November 27, 2015) (Exhibit KOR-16).

⁴⁵ Korea FWS, para. 146.

⁴⁶ For a full discussion of the standard of review in this proceeding, please *See* Section I of the U.S. first written submission.

⁴⁷ CORE I&D Memo, p. 41 (Exhibit KOR-5).

CORE used in the components is that it meets the technical specifications and that the components may have been manufactured from corrosion-resistant steel sourced from multiple manufacturers.”⁴⁸ Subsequently, Hyundai reported that it “does not mix different steel types or suppliers in individual production runs.... {and if Hyundai Steel America} uses Hyundai steel manufactured CORE coil in a given production run for the first component, it also used Hyundai Steel manufactured CORE coil for the second component.”⁴⁹

18. Similarly, “Hyundai first claimed that it would be too complicated to report its further manufactured sales of TWBS and auto parts because there was no electronic means to gather the information it needed to report its sales of TWBs and that it would have {to} manually review each production record to collect the necessary data.”⁵⁰ Subsequently, Hyundai “reported that it had been able to identify through electronic means the second source of coil used in the production of most, but not all, TWB products during the POI.”⁵¹

19. Additionally, in its initial Section E response, “Hyundai claimed that ‘because of the magnitude and overall burden’ involved, it was ‘unable to report the CONNUM’ of many sales.”⁵² However, in its first supplemental questionnaire response, “Hyundai reported that it was able to identify the CONNUM for the vast majority of sales by ‘reviewing data from affiliated parties for the purposes of this submission, including reviewing bills of materials for particular parts.’”⁵³

20. Hyundai also “originally claimed that it could not provide the unit weight per piece (MTPERPCU) for a substantial portion of its sales due to data limitations.” However, in a supplemental questionnaire response, Hyundai “reported the MTPERPCU by calculating the weight of input materials, weighing the products, or using weights associated with similar parts.”⁵⁴

21. Finally, “Hyundai claimed that it was unable to eliminate those products that did not contain Hyundai Steel-manufactured subject merchandise from its sales database.” It “subsequently stated that it was able to identify further manufactured products that did not contain CORE produced by Hyundai Steel.”⁵⁵

⁴⁸ CORE I&D Memo, p. 40 (Exhibit KOR-5).

⁴⁹ CORE I&D Memo, p. 40 (Exhibit KOR-5).

⁵⁰ CORE I&D Memo, p. 40 (Exhibit KOR-5).

⁵¹ CORE I&D Memo, p. 40 (Exhibit KOR-5).

⁵² CORE I&D Memo, p. 40 (Exhibit KOR-5).

⁵³ CORE I&D Memo, p. 40 (Exhibit KOR-5).

⁵⁴ CORE I&D Memo, p. 40 (Exhibit KOR-5).

⁵⁵ CORE I&D Memo, p. 40 (Exhibit KOR-5).

22. In sum, the record shows that USDOC took into account Hyundai's alleged reporting difficulties. The record shows USDOC provided Hyundai with multiple opportunities to correct its Section E submissions, met with Hyundai personally to discuss the alleged difficulties, and provided Hyundai with specific guidance. Moreover, Hyundai's credibility with respect to reporting difficulties was significantly undermined by repeated instances in which Hyundai was able to subsequently respond to questions it had previously indicated were too complicated or could not respond to. Thus, USDOC reasonably concluded, "{t}he record demonstrates that Hyundai has: submitted a series of inaccurate value added calculations with respect to the sales at issue; made claims of difficulty in gathering data which were inaccurate; and submitted Section E responses that were unusable, unreliable, and unverifiable."⁵⁶ Because the record fully supports that this is a determination that could have been made by an unbiased and objective authority, Korea's claim with respect to this matter has no merit.

Question 3 (Korea)

How do you reconcile your assertion that Hyundai Steel received only 14 days to provide the information "suddenly" (Korea's FWS, paras. 151, 155) requested by the USDOC with the United States' position that the USDOC provided Hyundai Steel "multiple opportunities" over the course of almost five months – from 11 September 2015 until 20 February 2016 – to respond adequately to the USDOC's request for further manufactured sales information, including by issuing a total of five supplemental requests (United States' first written submission, para. 76)

Question 4 (United States)

Did the USDOC take into account the raw input data provided by Hyundai Steel for the margin calculation in the preliminary determination?

23. As discussed in the U.S. response to Question 1, due to Hyundai Steel's insufficient explanations and unsubstantiated reporting in its responses, USDOC preliminarily determined not to rely on Hyundai's further-manufactured sales data to calculate Hyundai's weighted average dumping margin.⁵⁷ As noted above, USDOC found the response and database submitted by Hyundai on November 2, 2015, to be deficient and unusable. Moreover, USDOC explained that, while it was still analyzing the data and response submitted with Hyundai's first supplemental Section E response, USDOC's review of these responses had been hindered by the lack of explanation in the narrative response to explain revisions in Hyundai's databases.⁵⁸ As a result, USDOC preliminarily found that, because necessary information was missing from the

⁵⁶ CORE I&D Memo, p. 41 (Exhibit KOR-5).

⁵⁷ CORE PDM, p. 13 (Exhibit USA-8).

⁵⁸ CORE PDM, p. 13 (Exhibit USA-8).

record and Hyundai had significantly impeded the proceeding due to issues surrounding its further-manufactured sales responses, the use of facts available was necessary.⁵⁹

Question 5 (Korea)

Do you only challenge the Final Determination of 24 May 2016? What purpose would the Panel's findings on that final determination serve now, after the redetermination pursuant to the issuance of the USCIT remand?

Question 6 (United States/Korea)

As part of its first written submission, Korea appears to take issue with the USDOC's reliance on the product-specific margins for coils that were at or above the petition rate (Korea's FWS, paras. 190 and 191).

- a. United States: Please respond to Korea's argument that simply checking whether there are product-specific margins of an amount similar to the petition rate, irrespective of their aberrational nature or relevance to the missing data, is not sufficient when better information is available on the record or when record evidence contradicts the relevance of the information relied upon (Korea's FWS, para. 191).***

24. Korea's argument in the cited portion of its first written submission is nothing more than an attempt to substitute its own preferred conclusions for those of USDOC. This is not a proper basis for a claim under the AD Agreement.⁶⁰ Rather, Korea would need to show that a reasonable, unbiased person, looking at the same evidentiary records as USDOC, could not have reached the same conclusion as USDOC, and Korea has no basis for making such an assertion.

25. As the question notes, Korea asserts that “{s}imply checking whether there are product-specific margins of an amount similar to the petition rate, irrespective of their aberrational nature or relevance to the missing data, is not sufficient when better information is available on the record or when record evidence contradicts the relevance of the information relied upon.”⁶¹ However, this assertion merely reflects Korea's unsubstantiated characterizations. Nothing establishes that the petition rate is “aberrational.” Nothing establishes that it is irrelevant to the missing data. Nothing establishes that better information was available on the record. And nothing establishes that record evidence contradicted the relevance of the information relied upon. These unsubstantiated views are incapable of serving as essential premises for a finding of WTO inconsistency.

26. Annex II of the AD Agreement is very clear that “investigating authorities may replace missing necessary information with “information supplied in the application for the initiation of

⁵⁹ CORE PDM, p. 14 (Exhibit USA-8).

⁶⁰ For a full discussion of the standard of review in this proceeding, please *see* Section I of the U.S. first written submission.

⁶¹ Korea FWS, para. 191.

the investigation.”⁶² When doing so, the investigating authority must exercise special circumspection.⁶³ USDOC clearly fulfilled this obligation in the relevant determination, and Korea fails to prove otherwise.

27. The petitioners in the relevant investigation argued that USDOC should use the highest transaction-specific margin calculated for the company’s non-further manufactured merchandise as the replacement for the missing information.⁶⁴ Hyundai Steel did not present any alternatives as potential replacements for the missing information.⁶⁵ However, USDOC opted not to use the highest transaction-specific margin for the company’s non-further manufactured merchandise, as urged by the petitioners. Instead, it opted to use a petition rate, which was more favorable to the Korean company.

28. In reaching this determination, USDOC found the petition rates to be both relevant and probative. USDOC found the petition rates to be relevant because they were derived from the CORE steel industry and based on information related to aggregate data involving the CORE steel industry.⁶⁶ Additionally, USDOC found the rates relevant to Hyundai, as they were based on price quotes/offers for sales of CORE produced in and exported from Korea and had taken into account differences in the Korean industry.⁶⁷ And no information on the record called into question the relevance of the petition rates.⁶⁸

29. Moreover, USDOC “review{ed} the adequacy and accuracy of the information in the petition” and concluded that the petition rates had probative value.⁶⁹ Furthermore, USDOC noted that Hyundai’s margin program output showed product-specific margins for coil at or above the petition rate.⁷⁰ In other words, the rate used to replace the missing information was lower than some of the product-specific (coil) transaction rates that comprise the respondent’s

⁶² AD Agreement, Annex II, para. 7.

⁶³ AD Agreement, Annex II, para. 7.

⁶⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Case Brief on Behalf of United States Steel Corporation (April 22, 2019), pp. 25-26 (Exhibit USA-66 (BCI)); *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Rebuttal Brief on Behalf of United States Steel Corporation (April 28, 2019), pp. 17-18 (Exhibit USA-67 (BCI)).

⁶⁵ *Corrosion-Resistant Steel Products from the Republic of Korea*, Case Brief of Hyundai Steel Company (April 22, 2016), pp. 18-25 (Exhibit USA-68 (BCI)); *Corrosion-Resistant Steel Products from the Republic of Korea*, Rebuttal Brief of Hyundai Steel Company (April 28, 2016), pp. 3-37 (Exhibit USA-69 (BCI)).

⁶⁶ CORE I&D Memo, p. 18 (Exhibit KOR-5).

⁶⁷ CORE I&D Memo, pp. 18-19 (Exhibit KOR-5).

⁶⁸ CORE I&D Memo, p. 18 (Exhibit KOR-5).

⁶⁹ CORE I&D Memo, p. 18 (Exhibit KOR-5).

⁷⁰ CORE I&D Memo, p. 19 (Exhibit KOR-5); see Final Determination Margin Calculation for Hyundai Steel Company (Hyundai) (May 31, 2016) (Exhibit USA-11 (BCI)).

own, actual sales and pricing behavior; it was not aberrational contrary to one premise of Korea's argument.⁷¹

30. Thus, USDOC undoubtedly considered the facts available on the record and provided support for its reasoned result. Korea simply does not like that result. Thus, it is not true – as Korea's argument incorrectly assumes – that there was better information on the record. That is just Korea's opinion. Korea puts forward a cursory, incomplete, and unsupported attempt to undermine the reliability of the petition rate relied upon by USDOC in a few sentences at the end of paragraph 191. Korea still does not identify what information on the record would have been better, but more importantly, this is hardly the time or forum for such arguments. Notably, Hyundai itself did not put forward an alternative replacement in the briefing to USDOC.

31. In sum, Korea has failed to show that a reasonable, unbiased person, looking at the same evidentiary records as the USDOC, could not have relied on the petition rate to replace the missing information.

b. Korea: Is there any other information that the USDOC could have used as a more "accurate" basis for its final determination?

Question 7 (Both Parties)

When the USDOC relies on information provided by the exporter, for example Hyundai Steel, as facts available, is it under an obligation to corroborate such information?

32. As an initial matter, the United States notes that neither Article 6.8 of the AD Agreement, nor Annex II, includes any form of the word "corroborate." Therefore, there is no obligation to "corroborate" in any circumstance, and the use of this term risks confusion with use of the term corroborate in U.S. domestic law. The obligation that is most similar conceptually is found in paragraph 7 of Annex II, which states: "If the authorities have to base their findings...on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection."

33. The question inquires about the use of data provided by an exporter, which is not information from a secondary source. Therefore, by its own terms, the special circumspection requirement in paragraph 7 is not triggered by the use of data provided by an exporter.

Question 8 (United States)

United States: Insofar as you assert that the USDOC correctly relied on the petition rate as there was nothing on the record that contradicted the petition rate, is an interested party's participation in an investigation as a respondent sufficient to establish an objection to the petition rate?

⁷¹ CORE I&D Memo, pp. 17-19 (Exhibit KOR-5).

34. No. Parties selected as mandatory respondents are required to participate and provide requested information. Even if such a party agrees with the petition rate, it is not excused from cooperating in the investigation. In short, participation does not establish an objection (or consent) of any kind.

35. Moreover, even if a party explicitly took the position that a petition rate was incorrect, that position alone would not contradict or otherwise undermine the probative value of the petition rate. As USDOC noted, and as discussed in detail in USDOC’s Initiation Checklist, USDOC “confirmed the accuracy and validity of the information underlying the derivation of the margins in the petition by examining source documents and affidavits, as well as publicly available information.” In other words, prior to initiation, USDOC examines materials to confirm the accuracy and validity of the petition rates. Thus, if a party wished to question a petition rate, it would need to explain the basis for its objection.⁷²

Question 9 (United States)

Was there a range of dumping margins in the petition? If yes, how did the USDOC choose the specific margin in the final determination?

36. Yes, there was a range of dumping margins alleged in the petition.⁷³ The petitioners provided four estimated dumping margins, two based on price-to-price comparisons and two based on comparisons to constructed value.⁷⁴ The estimated margins for the price-to-price comparisons range from 46.80 to 56.39 percent and the estimated margins for the price-to-constructed value comparisons range from 73.78 to 86.34 percent.⁷⁵

37. As previously noted, based on Hyundai Steel’s failure to provide verifiable and usable data for its further manufactured sales of sheet, skelp, blanks, after-service auto parts and TWBs, USDOC found that necessary information pertaining to further manufactured sales was missing from the record.⁷⁶ Moreover, USDOC found that Hyundai significantly impeded the proceeding through the delays it caused in reporting the requested data and because it consistently provided unusable information.⁷⁷ USDOC determined that with respect to Hyundai’s further manufactured sales, Hyundai Steel “failed to cooperate by not acting to the best of its ability to

⁷² CORE I&D Memo, p. 18 (Exhibit KOR-5); *see also Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Initiation Checklist (June 23, 2015) (Exhibit USA-70).

⁷³ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Initiation Checklist (June 23, 2015), p. 12 (Exhibit USA-70).

⁷⁴ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Initiation Checklist (June 23, 2015), p. 12 (Exhibit USA-70).

⁷⁵ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Initiation Checklist (June 23, 2015), p. 12 (Exhibit USA-70).

⁷⁶ CORE I&D Memo, p. 14 (Exhibit KOR-5).

⁷⁷ CORE I&D Memo, p. 14 (Exhibit KOR-5).

comply with requests for information,” and thus “an adverse inference is warranted in selecting from the facts otherwise available.”⁷⁸

38. In applying an adverse inference, USDOC assigned to those further manufactured sales to the United States a rate of 86.34 percent, which is the highest rate among the four alleged in the petition.⁷⁹ Consistent with paragraph 7 of Annex II of the AD Agreement, USDOC used special circumspection in selecting the highest rate alleged in the petition as the reasonable replacement for the missing further manufactured sales information. This analysis is detailed at pages 17-19 of USDOC’s Issues and Decision Memorandum.⁸⁰

1.2 Anti-Dumping Duties on Certain Cold-Rolled Steel Flat Products from the Republic of Korea (USDOC investigation number A-580-881)

Question 10 (Korea/Both Parties)

According to Korea, the USDOC first requested information relating to [[]] contracts with unaffiliated customers at the time of verification (Korea’s FWS, paras. 265-266).***

- a. Korea: Do you still maintain this position in light of the United States’ reference to the USDOC’s Supplemental Questionnaire dated 19 January 2016 (Panel Exhibit USA-15), where the USDOC asked Hyundai Steel to “[s]ubmit copies of all contracts that [[***]] has with all unaffiliated parties...” (question 3)?***
- b. Both parties: At what stage of the investigation did the USDOC first request copies of [[***]] contracts with unaffiliated customers? Please answer with reference to the panel record.***

39. USDOC first requested that Hyundai Steel provide copies of [[***]] contracts with unaffiliated customers in its November 24, 2015, Supplemental Sections B-C Questionnaire.⁸¹ As noted below in the U.S. response to Question 12, this request followed USDOC’s review of Hyundai Steel’s initial Sections B and C responses, where USDOC found that Hyundai Steel had not provided sufficient information to establish that the transactions between [[***]] and Hyundai Steel were at arm’s length.

40. USDOC’s requests for information relating to [[***]] contracts with unaffiliated customers from the November 24, 2015, Supplemental Sections B-C Questionnaire are reproduced in full below.

⁷⁸ CORE I&D Memo, pp. 16-17 (Exhibit KOR-5).

⁷⁹ *Certain Corrosion-Resistant Steel Products from the Republic of Korea*, Initiation Checklist (June 23, 2015), p. 12 (Exhibit USA-70).

⁸⁰ CORE I&D Memo, pp. 17-19 (Exhibit KOR-5).

⁸¹ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015) (Exhibit USA-72 (BCI)).

Question 11⁸² (Section B: Home Market Sales):

At B-28 and Exhibit B-11-12, you claim that Hyundai Steel “believes the rates paid to... [[***]]” represent arm’s length prices. However, you never explained why the transactions between Hyundai Steel and [[***]] for inland freight and warehousing are at arm’s-length. Please demonstrate how these transactions should be consider at arm’s length when its between two [[***]] companies.

- a) Provide a complete copy of the freight contract, including all [[***]].
- b) Provide copies of all freight contracts with [[***]] and all unaffiliated freight providers that cover the full POI.

Question 11⁸³ (Section C: U.S. Sales):

At C-27 and Exhibit C-7, you claim because [[***]] reported operating profits for its inland freight services (transportation of cold-rolled from factory to the port), which indicates that the services provided to Hyundai Steel were at arm's-length.

- a) Please explain why you did not report any expenses for Hyundai Steel's [[***]] sales.
- b) Please demonstrate why you cannot link Hyundai Steel's exports to HSA's CEP sales to report sales specific freight expenses.
- c) Provide a complete copy of the freight contract, including a translation of the [[***]].
- d) Provide copies of all freight contracts with [[***]] and all unaffiliated freight providers that cover the full POI.

Question 14⁸⁴ (Section C: U.S. Sales):

⁸² *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁸³ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 8 (Exhibit USA-72 (BCI)).

⁸⁴ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 9 (Exhibit USA-72 (BCI)).

At C-29-30 and Exhibit C-10, you reported Hyundai Steel's international freight expenses.

- a) Please submit a fully English translated Exhibit C-10.
- b) Provide copies of all international freight contracts between [[***]] and its unaffiliated customers.
- c) If all possible, provide a price quote from [[***]] sub-contractor to another customer showing the arm's-length transaction comparisons between Hyundai Steel and [[***]], and [[***]] and its subcontractor.
- d) Please explain why you reported [[***]] for Hyundai Steel's EP sales that were not sold on an FOB vessel basis.
- e) Demonstrate that Hyundai Steel, HSA, and Hyundai Corp. USA cannot tie international freight to its U.S. sales by tying the date of shipment and the port of departure and entry, and the type of cold-rolled steel included in the shipment (based on packing list).
- f) Please explain why Hyundai Steel reported [[***]]. For CEP sales, [[***]]

41. As noted in the U.S. first written submission, on January 19, 2016, USDOC made a second request for the same information.⁸⁵ To confirm Hyundai Steel's claim that the transactions between Hyundai Steel and [[***]] a third and final request for [[***]] contracts with unaffiliated parties was made at verification.⁸⁶ In sum, contrary to Korea's claim, USDOC did not first request information relating [[***]] contracts with unaffiliated customers at the time of verification.

Question 11 (United States)

Please respond to Korea's argument that [[]] did not have any contracts with unaffiliated customers for shipment to the United States, but the USDOC nonetheless applied AFA with respect to Hyundai Steel's US-destined ocean freight expenses "for there being no unaffiliated third-party contracts" (Korea's FWS, para. 264).***

⁸⁵ U.S. FWS, para 121. *See also Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questionnaire for Sections B-C (January 19, 2016), Question 3(C) (Exhibit USA-15 (BCI)); *see also* Hyundai Steel's Second Supplemental Sections B-C Questionnaire Response (February 2, 2016), p. 2 (Exhibit KOR-37 (BCI)).

⁸⁶ Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), p. 42 (Exhibit KOR-47 (BCI)).

42. As an initial matter, it is not clear to the United States what Korea is arguing in para. 264 of its first written submission. For purposes of responding to this question, the United States assumes that Korea is asserting that it was illogical for USDOC to apply facts available due to Hyundai Steel's failure to provide [[***]] contracts with unaffiliated customers for shipments to the United States, as [[***]] has no such contracts, and thus the missing "necessary" information "does not exist."⁸⁷ This argument completely misses the point. USDOC needed contracts with unaffiliated customers, regardless of location, to verify the arm's-length nature of the transactions between Hyundai Steel and [[***]].

43. As the record shows, USDOC never limited its request to [[***]] contracts with unaffiliated parties for shipments to the United States. Rather, USDOC requested "all freight contracts with [[***]] and all unaffiliated freight providers that cover the full POI," with the purpose of establishing whether Hyundai Steel's transactions with [[***]] were at arm's length.⁸⁸ This could be established, regardless of the unaffiliated parties' location.

44. Thus, contrary to what Korea appears to be arguing, USDOC did not apply facts available due to Hyundai Steel's failure to provide contracts between [[***]] and its unaffiliated customers for shipments to the United States, but because Hyundai Steel failed to provide [[***]] contracts with any unaffiliated parties, regardless of the party's location, which in turn was necessary to verify the arm's-length nature of the transactions between Hyundai Steel and [[***]]. Additionally, as discussed in Question 12, Hyundai Steel failed to provide this information despite USDOC's multiple requests, Hyundai Steel's admission that [[***]] did in fact have contracts with unaffiliated parties for shipments to third countries, and record evidence showing that Hyundai Steel and [[***]] "were held and commonly controlled by the same family members during the POI."⁸⁹

Question 12 (United States)

Korea argues that no "necessary" information was missing as Hyundai Steel provided specific information indicating that the transactions with [[]] were at arm's length (Korea's FWS, paras. 223, 258). The United States responds, in these panel proceedings, that the information so provided was "not comprehensive, provided only sample or example contracts ... and were not responsive to the request for the actual contracts between the affiliated service provider and its unaffiliated customers" (United States' FWS, para. 173). Did the USDOC provide these reasons as part of its determination? If yes, please provide appropriate references to the determination and/or the I&D memo where the USDOC provided these specific reasons as to the basis for the insufficiency of the information provided by Hyundai Steel.***

⁸⁷ Korea FWS, para. 264.

⁸⁸ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁸⁹ *Certain Cold-Rolled Steel Products from the Republic of Korea*, Issues and Decision Memorandum (July 20, 2016), p. 74 ("CRS I&D Memo") (Exhibit KOR-41).

45. As context, the United States notes that the proceeding involved service transactions between affiliated parties. In order to determine whether these affiliated transactions were provided at arm's length, USDOC sought to compare the prices between the affiliated parties to prices for the same services charged by the affiliated service provider to unaffiliated parties, or to prices for the same services paid by the respondent to unaffiliated parties.⁹⁰ As Hyundai Steel reported that it does not use unaffiliated freight companies for similar services, it was not possible to consider contracts between Hyundai Steel and unaffiliated parties in evaluating whether the transactions between Hyundai Steel and [[***]] were at arm's length.⁹¹ Thus, to determine whether the transactions between Hyundai Steel and [[***]] were at arm's length, for purposes of USDOC's determination it was necessary to have [[***]] contracts with unaffiliated customers.

46. Following several questionnaires and requests for information, USDOC found that the information Hyundai Steel submitted, failed to demonstrate the arm's-length nature of the services provided by Hyundai Steel's affiliated company.⁹² The reasons why the information submitted by Hyundai Steel was not sufficient to demonstrate that the transactions between Hyundai Steel and [[***]] were at arm's length is contained in USDOC's supplemental questionnaires.

47. As discussed in the U.S. first written submission, Hyundai Steel initially reported in its Section A questionnaire response that it received [[***]] from an affiliated party, [[***]] and noted that the company would "demonstrate in its forthcoming Sections B and C responses that transactions with affiliated service providers are at arm's length."⁹³ To demonstrate that Hyundai Steel's transactions with [[***]] were at arm's length, in its Section B response, Hyundai Steel provided calculations from [[***]] financial statements, noting that, "Hyundai Steel negotiates and transacts with this company on arm's length basis and because this company earned a profit during the POI, Hyundai Steel believes these transactions reflect arm's length prices."⁹⁴ Additionally, Hyundai Steel provided contracts between Hyundai Steel and [[***]] and between [[***]] and one of [[***]] subcontractors, which Hyundai Steel claimed "show that these transactions are at arm's length," but provided no additional explanation.⁹⁵

48. After reviewing Hyundai Steel's Sections B and C responses, USDOC found that the information Hyundai Steel submitted failed to establish that the transactions between [[***]] and

⁹⁰ *Certain Oil Country Tubular Goods from the Republic of Korea*, Issues and Decision Memorandum (July 10, 2014), pp. 36-37 (Exhibit USA-73).

⁹¹ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel's Section B Response (6 November 2015), p. B-30 (Exhibit KOR-36 (BCI)).

⁹² CRS I&D Memo, p. 74 (Exhibit KOR-41).

⁹³ See Hyundai Steel's Section A Response (October, 16, 2015), p. A-13 (Exhibit KOR-28 (BCI)).

⁹⁴ Hyundai Steel Section B Response (December 6, 2016), p. 31 (Exhibit KOR-36 (BCI)).

⁹⁵ Hyundai Steel Section B Response (December 6, 2016), p. 31 (Exhibit KOR-36 (BCI)).

Hyundai Steel were at arm's length. Specifically, in its supplemental Sections B-C questionnaire, USDOC noted: "The net profit information provided for [***] does not show that [***]"⁹⁶ Additionally, "you claim that Hyundai Steel 'believes the rates paid to . . . [***] represent arms' length prices. However, you never explained why the transactions between Hyundai Steel and [***] . . . are at arm's-length.'"⁹⁷ Hyundai Steel was then asked to "demonstrate how these transactions should be consider{ed} at arm's length when its between two [***] companies."⁹⁸

49. As discussed above in Question 10, in its first Supplemental Sections B-C Questionnaire, USDOC requested that Hyundai Steel: (1) Provide copies of all freight contracts with [***] and all unaffiliated freight providers that cover the full POI; (2) Provide copies of all international freight contracts between [***] and its unaffiliated customers; and (3) If at all possible, provide a price quote from [***] sub-contractor to another customer showing the arm's-length transaction comparisons between Hyundai Steel and [***], and [***] and its subcontractor.⁹⁹

50. In response to USDOC's request for "copies of all freight contracts with [***] and all unaffiliated freight providers that cover the full POI," Hyundai Steel responded:

[***] has contracts with almost forty subcontractors. Therefore, Hyundai Steel provides as a representative sample the following contracts with its subcontractor, [***]: (1) Contract with [***] that was in effect from [***], (2) amendment of the contract with [***] that was signed on [***], and (3) contract with [***] that is currently in effect, from [***]. As shown in these documents, the contracts cover multiple services, such as inland freight and warehousing.¹⁰⁰

Hyundai Steel did not provide the other contracts with the other (almost) thirty-nine subcontractors, choosing instead one contract to substitute for USDOC's request for "all" contracts. Nonetheless, Hyundai Steel asserted that comparison of its contract with [***] and the one [***] contract with its subcontractor demonstrated that [***] earned a profit from its

⁹⁶ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁹⁷ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁹⁸ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 3 (Exhibit USA-72 (BCI)).

⁹⁹ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questions for Sections B-C (November 24, 2015), p. 9 (Exhibit USA-72 (BCI)).

¹⁰⁰ Hyundai Steel Section B-C Supplemental Response (December 15, 2015), pp. 20-21 (Exhibit KOR-34 (BCI)).

freight services, which in turn, according to Hyundai Steel, “demonstrate{d} that these services were negotiated at arm’s length.”¹⁰¹

51. In response to USDOC’s request for “a price quote from [***] sub-contractor to another customer showing the arm’s-length transaction comparisons between Hyundai Steel and [***], and [***] and its subcontractor”, Hyundai responded, “{b}ecause [***] sub-contractor is not affiliated with [***] or Hyundai Steel, Hyundai Steel is not in a position to compel the sub-contractor to provide its price quotes to another customer.”¹⁰²

52. In response to USDOC’s request for “all international freight contracts between [***] and its unaffiliated customers”, Hyundai Steel responded:

Hyundai Steel confirms that [***] does not have any contracts with unaffiliated customers for shipments to the United States. Moreover, while Hyundai Steel understands that [***] does provide shipping services to unaffiliated customers for shipments to third countries, [***] has declined Hyundai Steel’s request to provide its contracts with unaffiliated third parties citing the proprietary and confidential nature of its transactions with other parties.¹⁰³

53. In the second supplemental Sections B-C questionnaire, USDOC again requested copies of [***] contracts with all unaffiliated parties.¹⁰⁴ In response, Hyundai Steel changed its position and reported that [***] “does not offer similar services to unaffiliated parties.”¹⁰⁵ A third and final request for copies of [***] contracts with unaffiliated parties was made at verification.¹⁰⁶ Again, USDOC asked for the contracts with unaffiliated parties, regardless of the unaffiliated parties’ location.¹⁰⁷ This time, Hyundai Steel did not deny that [***] offered

¹⁰¹ Hyundai Steel Section B-C Supplemental Response (December 15, 2015), p. 8 (Exhibit KOR-34 (BCI)).

¹⁰² Hyundai Steel Section B-C Supplemental Response (December 15, 2015), p. 24 (Exhibit KOR-34 (BCI)).

¹⁰³ Hyundai Steel Section B-C Supplemental Response (December 15, 2015), p. 24 (Exhibit KOR-34 (BCI)).

¹⁰⁴ *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questionnaire for Sections B-C (January 19, 2016) (“Submit copies of all contracts that [***] has with all unaffiliated parties for similar services that covers the {period of investigation}.”) (Exhibit USA-15 (BCI)); *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Supplemental Questionnaire for Sections B-C (January 19, 2016), Question 3(C) (Exhibit USA_15 (BCI)); *see also* Hyundai’s Second Supplemental Sections B-C Questionnaire Response (February 2, 2016), p. 2 (Exhibit KOR-37 (BCI)).

¹⁰⁵ Hyundai’s Second Supplemental Sections B-C Questionnaire Response (February 2, 2016), p. 2 (Exhibit KOR-37 (BCI)).

¹⁰⁶ Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), p. 42 (Exhibit KOR-47 (BCI)).

¹⁰⁷ Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), p. 42 (Exhibit KOR-47 (BCI)).

similar services to unaffiliated parties, but rather that it could not obtain the information because there was no “direct ownership” of [[***]] by Hyundai Steel.¹⁰⁸

54. It was because Hyundai Steel’s responses were inadequate that USDOC continued to seek the contracts between [[***]] and unaffiliated customers to demonstrate that the transactions between Hyundai Steel and [[***]] were at arm’s length. While Hyundai Steel responded that it was unable to provide the contracts, Hyundai’s answers regarding its relationship with [[***]] and its reasons for not being able to obtain the requested information from [[***]] were inconsistent. Moreover, Hyundai’s claim of no “direct ownership” was contradicted by Hyundai Steel’s previous statement that [[***]] and Hyundai Steel were affiliated companies, as [[***]] and by evidence found at verification.¹⁰⁹

55. Specifically, at verification it was discovered that the [[***]] at Hyundai Steel was the majority shareholder in [[***]] and his father, the second largest shareholder in [[***]], was a direct and indirect owner of Hyundai Steel.¹¹⁰ Additionally, USDOC observed that [[***]] “was willing to provide some information, i.e., the contracts with its subcontractor, but was unwilling to provide the additional documentation” regarding the unaffiliated customers.¹¹¹ In other words, Hyundai Steel appeared to be selectively providing documents, and its explanations of what it could and could not provide were undermined by inconsistencies and confirmed inaccuracies.

56. Based on these facts, USDOC found that Hyundai Steel failed to demonstrate the arm’s-length nature of the transactions with [[***]] and accordingly relied on facts available for the transactions with [[***]].¹¹² Moreover, because Hyundai Steel failed to provide the requested information or fully cooperate with USDOC’s request for information, USDOC applied an adverse inference with respect to these transactions.¹¹³

Question 13 (Both Parties)

Does the applicable law or practice for the USDOC’s conduct of such investigations lay down any criteria for determining the arms-length nature of transactions between affiliates?

¹⁰⁸ Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), pp. 42-43 (Exhibit KOR-47 (BCI)).

¹⁰⁹ Hyundai Steel’s Section A Response (October 16, 2015), A-12 (Exhibit KOR-28 (BCI)).

¹¹⁰ Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), pp. 42-43 (Exhibit KOR-47 (BCI)).

¹¹¹ Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), pp. 42-43 (Exhibit KOR-47 (BCI)).

¹¹² CRS I&D Memo, p. 74 (Exhibit KOR-41).

¹¹³ CRS I&D Memo, p. 74 (Exhibit KOR-41).

57. USDOC makes its determinations regarding the arm's-length nature of transactions between affiliates pursuant to provisions of its domestic governing statute at 19 U.S.C. § 1677f(b)(2), which provides:

TRANSACTIONS DISREGARDED.—A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.¹¹⁴

Question 14 (United States)

Please indicate why copies of [[]] international service-related contracts with unaffiliated customers, irrespective of their location, were "necessary" for the purpose of the USDOC's determination with respect to Hyundai Steel. Why would a comparison with contracts between Hyundai Steel and other unaffiliated service providers, for services similar to those provided by [[***]], not have been sufficient to establish the arm's length nature of the transactions between [[***]] and Hyundai Steel?***

58. [[***]] international service-related contracts with unaffiliated customers were necessary for the purpose of USDOC's determination with respect to Hyundai Steel because a review of the contracts would have allowed USDOC to determine whether Hyundai Steel's transactions with [[***]] were at arm's length. Specifically, as [[***]] prices to an unaffiliated party likely represent market prices, such a comparison would have allowed USDOC to confirm that the freight services [[***]] provided to Hyundai Steel were provided at market prices, an indication that the services provided to Hyundai Steel were provided at arm's length.

59. As noted above, in determining whether the transaction between affiliated parties were at arm's length, USDOC sought to compare the prices between the affiliated parties to prices for the same service charged by the affiliated service provider to unaffiliated parties, or to prices for the same service paid by the respondent to unaffiliated parties.¹¹⁵ Hyundai Steel reported that it does not use unaffiliated freight companies for similar services and thus, was unable to provide comparable prices from unaffiliated vendors for comparison.¹¹⁶ Therefore, it was not possible to consider any such contracts in evaluating whether the transactions between Hyundai Steel and

¹¹⁴ 19 U.S.C. § 1677b(f)(2) (Exhibit USA-74).

¹¹⁵ *Certain Oil Country Tubular Goods from the Republic of Korea*, Issues and Decision Memorandum (July 10, 2014), pp. 36-37 (Exhibit USA-73).

¹¹⁶ *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel's Section B Response (November 6, 2015), p. B-30 (Exhibit KOR-36 (BCI)).

[[***]] were at arm's length. Thus, to determine whether the transactions between Hyundai Steel and [[***]] were at arm's length, for purposes of USDOC's determination it was necessary to have [[***]] contracts with unaffiliated customers.

Question 15 (United States/Korea)

a. United States: Could you please respond to Korea's argument in para. 30 of its opening statement, and Panel Exhibit KOR-220, that if [[]] would have provided its third party contracts to Hyundai Steel, it could have been exposed to various liabilities under Korean domestic law.***

60. First, the United States cannot speculate as to which, if any, liabilities [[***]] would have been exposed under Korean domestic law had it provided all of its third-party contracts to Hyundai Steel.

61. Second, however, the United States recalls that Hyundai Steel was able to produce certain of [[***]] contracts with unaffiliated third parties without issue and without raising any concerns regarding liability under Korean domestic law in response to information requests made by USDOC. For example, as explained in the U.S. response to Question 12, Hyundai Steel provided certain of [[***]] third party contracts as a “representative sample” of [[***]] contracts with unaffiliated parties in response to USDOC's November 24, 2015, Supplemental Sections B-C Questionnaire.¹¹⁷

62. The United States also recalls that parties involved in USDOC's investigations submit business proprietary and otherwise confidential information regularly. Pursuant to U.S. law, these submissions are afforded special protection through USDOC's electronic filing and investigation management systems, which severely limit access to such submissions and protect against the exposure of business confidential information. Such protections would have been afforded to [[***]] contracts with unaffiliated third parties, had Hyundai Steel cooperated and provided them.

63. Finally, if exposure to legal liability under Korean law was the impediment to Hyundai Steel being able to access [[***]] contracts with unaffiliated third parties, one would have expected Hyundai to state as much to USDOC. Hyundai Steel made numerous representations about why it supposedly could not gain access to these documents – some of which later proved to be false – but this was not one of them.¹¹⁸ In any event, had it done so, USDOC would have had the opportunity to investigate any such concern.

¹¹⁷ Hyundai Steel Supplemental Sections B-C Questionnaire Response (December 15, 2015), pp. 20-21 (Exhibit KOR-34).

¹¹⁸ See Certain Cold-Rolled Steel Flat Products From the Republic of Korea, Hyundai Steel's Section B Response (November 6, 2015) (Exhibit KOR-36 (BCI)); Hyundai Steel Supplemental Sections B-C Questionnaire Response (December 15, 2015) (Exhibit KOR-34); Hyundai Steel Second Supplemental Sections B-C Questionnaire Response (February 2, 2016) (Exhibit KOR-37 (BCI)). See also Certain Cold-Rolled Steel Flat Products From the

- b. Korea: Did you raise this argument before the USDOC? If yes, please identify with reference to the panel record.**

Question 16 (Both Parties/United States/Korea)

In respect of the alleged CONNUM issue, Korea argues that the cost-related "facts" used by the USDOC had nothing to do with the alleged issue of the correct CONNUM determination (Korea's FWS, paras. 326-328).

- a. Both parties: What was the information that the USDOC found to be "missing"/"misreported" in order to reach its determination?**

64. The missing information was the cost of manufacturing associated with certain products where product specifications were unverified.¹¹⁹ Hyundai Steel failed to provide USDOC with accurate reporting for certain CONNUMs, and further failed to provide satisfactory explanations for why it had failed to provide accurate reporting in the first instance. The Issues and Decision Memorandum explains in detail what information was missing or misreported, and the calculation memorandum for Hyundai expands upon this analysis.¹²⁰

65. Specifically, during Hyundai's verification USDOC discovered inconsistencies in Hyundai's reporting of certain product specifications and the relevant CONNUMs.¹²¹ CONNUM or product specification issues arising at verification included: prime v. non-prime merchandise designations, overruns, and specification designations with respect to certain specific products coded by the USDOC as Spec A, B, C, D, E, F, G, and H, corresponding to the following specifications: [[***]].

66. There were [[***]] affected for Spec D, Spec E, and Spec H product misreporting.¹²² There were [[***]] among the reported U.S. sales affected by the Spec C product misreporting.¹²³

Republic of Korea, Hyundai Steel's Case Brief (June 6, 2016) (Exhibit KOR-48 (BCI)) (no mention of [[***]]); Certain Cold-Rolled Steel Flat Products From the Republic of Korea, Hyundai Steel's Rebuttal Brief (June 13, 2016) (Exhibit KOR-29 (BCI)) (no explanation of confidentiality or Korean domestic law as preventing Hyundai Steel from responding to USDOC's documentation requests).

¹¹⁹ See CRS I&D Memo, pp. 58-63 (Exhibit KOR-41); USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), pp. 5-6 (Exhibit KOR-49 (BCI)).

¹²⁰ See CRS I&D Memo, pp. 58-63 (Exhibit KOR-41); Certain Cold-Rolled Steel Flat Products from the Republic of Korea, Final Determination Sales Calculation Analysis Memorandum for Hyundai Steel Company (20 July 2016), pp. 3-6 (Exhibit KOR-49 (BCI)).

¹²¹ CRS I&D Memo, pp. 58-63 (Exhibit KOR-41).

¹²² USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), p. 5 (Exhibit KOR-49 (BCI)).

¹²³ USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), p. 6 (Exhibit KOR-49 (BCI)).

67. Specifically, USDOC determined that Spec D products were improperly reported as “commercial quality” and should have been reported as “drawing quality,” a higher quality product.¹²⁴ Spec H products were improperly reported as AHSS/UHSS products, as the actual merchandise sold did not have the [[***]] for the AHSS/UHSS classification.¹²⁵ The Spec H products should have been classified as structural quality products.¹²⁶ Spec E products were improperly reported as having a minimum yield strength of “1,” where the actual product sold did not have supporting documentation; USDOC determined that the product therefore would be classified as having a minimum yield strength of “4,” a lower yield strength.¹²⁷ Certain Spec C products were found to have inconsistencies between the [[***]], such that those sales could not be verified.¹²⁸

68. At verification, Hyundai Steel’s officials were able to explain, with sufficient supporting documentation, the issues relating to prime versus non-prime merchandise and overruns. Specifically, Hyundai Steel officials demonstrated that the product coding system does not fully differentiate between overrun merchandise that could be classified as prime merchandise and overrun merchandise that could be classified as non-prime merchandise.¹²⁹ USDOC therefore found there was no basis to use facts available with respect to Hyundai Steel’s overruns or prime/non-prime merchandise, because USDOC was able to successfully verify the information and Hyundai Steel cooperated with USDOC’s requests for explanations.¹³⁰ USDOC therefore determined that the reporting for Spec A, B, F, and G was sufficient or that the reasons given for the misreporting were sufficient and, thus, USDOC did not need to resort to the use of facts

¹²⁴ CRS I&D Memo, p. 60 (Exhibit KOR-41); USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), p. 4 (Exhibit KOR-49 (BCI)), citing *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Sales Verification Report (May 26, 2016), p. 21 (Exhibit KOR-35 (BCI)).

¹²⁵ CRS I&D Memo (July 20, 2016), pp. 60-61 (Exhibit KOR-41); USDOC Final Calculation Memo for Hyundai Steel (20 July 2016), p. 4 (Exhibit KOR-49 (BCI)), citing *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Sales Verification Report (May 26, 2016), p. 21 (Exhibit KOR-35 (BCI)).

¹²⁶ CRS I&D Memo (July 20, 2016), pp. 60-61 (Exhibit KOR-41); USDOC Final Calculation Memo for Hyundai Steel (20 July 2016), p. 4 (Exhibit KOR-49 (BCI)), citing *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Sales Verification Report (May 26, 2016), p. 21 (Exhibit KOR-35 (BCI)).

¹²⁷ CRS I&D Memo (July 20, 2016), p. 61 (Exhibit KOR-41), citing *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Sales Verification Report (May 26, 2016), pp. 17-18, 21-22 (Exhibit KOR-35 (BCI)).

¹²⁸ CRS I&D Memo (July 20, 2016), pp. 61-62 (Exhibit KOR-41), citing Verification of Hyundai Steel Corporation Sales Responses in Cold-Rolled Steel Flat Products from the Republic of Korea (May 26, 2016), pp. 13, 15 (Exhibit KOR-46 (BCI)).

¹²⁹ CRS I&D Memo (July 20, 2016) (Exhibit KOR-41) at 58, citing *Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, Hyundai Steel’s Sales Verification Report (May 26, 2016) (Exhibit KOR-35 (BCI)).

¹³⁰ CRS I&D Memo, p. 58 (Exhibit KOR-41).

available for these product specifications.¹³¹ Instead, it relied on the data reported by Hyundai Steel.

69. However, as outlined in USDOC’s verification reports, for the home market sales verification, Hyundai Steel company officials were unable to explain why, for certain sale observations, the product specifications in the observed database on-site was inconsistent with certain specifications reported to USDOC.¹³² Likewise, for the U.S./CEP sales verification, Hyundai Steel officials were similarly unable to explain or substantiate the inconsistencies with the observed and reported fields titled “QUALITYH/U,” “QUALITYH,” and “QUALITYU”.¹³³

70. USDOC therefore identified specifically the [[***]] and the [[***]] with which it found unsubstantiated and unexplained misreported product characteristics and, thus, CONNUMs, and for which it resorted to using facts available.

71. USDOC reclassified the relevant misreported sales into the correct CONNUMs as a result of the correction of the product characteristic in question for each product type (i.e., for each of Spec C, D, E, and H).¹³⁴ USDOC explained in its calculation memorandum:

The incorrect product characteristics in question were corrected for those sales, and the CONNUMs for those sales revised accordingly. The reported CONNUMs for these home market sale observations were identified, and the incorrect product characteristics for them were corrected. The CONNUMs for those sales were also revised to reflect the change in the product characteristic in question.¹³⁵

b. United States: Please respond to Korea's assertion that the "missing"/"misreported" CONNUM information was "miniscule".

72. Korea’s argument that the missing or misreported CONNUM information is “miniscule” is another attempt to abrogate for itself the right to decide what is important. Neither respondents, nor Korea *post hoc*, is entitled to substitute its judgment for that of the investigating authority. Indeed, Korea’s arguments are fundamentally at odds with the proper standard of review in a WTO proceeding involving a claimed breach of the AD Agreement.¹³⁶ Furthermore,

¹³¹ CRS I&D Memo, pp. 59, 61-62 (Exhibit KOR-41).

¹³² Verification of Hyundai Steel Corporation Sales Responses in Cold-Rolled Steel Flat Products from the Republic of Korea (May 26, 2016), p. 2 (Exhibit KOR-46 (BCI)).

¹³³ Department of Commerce, CEP Verification Report, Hyundai Steel (May 26, 2016), pp. 2, 12-25 (Exhibit KOR-47 (BCI)).

¹³⁴ CRS I&D Memo (July 20, 2016), p. 63 (Exhibit KOR-41).

¹³⁵ USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), p. 5 (Exhibit KOR-49 (BCI)).

¹³⁶ For a full discussion of the standard of review in this proceeding, please *see* Section I of the U.S. first written submission.

Korea's characterization of the magnitude of the erroneously reported information does not bear upon the necessity of the information. And that characterization certainly does not constrain the investigating authority's consideration of what information is necessary. Necessary information includes all information that is "required to complete a determination."¹³⁷

73. USDOC determined that without the properly reported CONNUMs, for which Hyundai provided no plausible explanation, it could not verify the reported information, and therefore did not have verified information on which to rely for its margin calculation on each of those Spec classifications.¹³⁸ Because it could not verify that information, USDOC determined that information necessary to the completion of the determination was missing from the record, and USDOC therefore properly determined to resort to the use of the facts available.

c. Korea: Why did you think that the "missing"/"misreported" CONNUM was too small to be necessary?

d. United States: Please respond to Korea's argument that the "USDOC not only decided to re-classify certain products but also concluded that an adverse inference was warranted" (Korea's first written submission, para. 248). Specifically, what reasons were provided by the USDOC for applying AFA with respect to CONNUMs that Korea alleges were previously confirmed as being accurate and why did the USDOC consider that re-classification of certain products was insufficient?

74. As a threshold matter, Korea's allegation at para. 248 of its first written submission that "the reported CONNUMs for the sales in question plus the CONNUMs into which such sales were reclassified as a result of the correction of the product characteristic in question" were "previously verified as being accurately reported" finds no support in the record.¹³⁹ USDOC did not "verify as being accurately reported" any CONNUMs prior to its verification of Hyundai Steel.

75. Further, upon attempting to verify certain sales under certain CONNUMs at verification (as explained in detail in our responses to Question 16a above), USDOC discovered that those sales had been misreported. Therefore, those CONNUMs were not verifiable. USDOC explained in its calculation memorandum that:

The incorrect product characteristics in question were corrected for those sales, and the CONNUMs for those sales revised accordingly. The reported CONNUMs for these home market sale observations were identified, and the incorrect product characteristics for them were corrected. The CONNUMs for

¹³⁷ See U.S. FWS, para. 166.

¹³⁸ CRS I&D Memo, pp. 58-63 (Exhibit KOR-41).

¹³⁹ Korea's FWS, para. 248.

those sales were also revised to reflect the change in the product characteristic in question.¹⁴⁰

76. Put another way, USDOC considered that the CONNUMs into which the sales in question were reclassified were no longer accurate and required revision.¹⁴¹ As USDOC stated, “{t}hese are problems involving products analyzed during verification, and for which Hyundai Steel had no plausible explanation either at verification or in its case and rebuttal briefs for misidentifying these sales, as discussed above. Accordingly,” USDOC “finds that...Hyundai did not cooperate to the best of its ability with regard to this information and finds it necessary to apply an adverse inference.”¹⁴²

e. United States: What were the "facts available" that the USDOC selected in order to fill this gap and reach its determination? Specifically, please identify where and how the USDOC explained that it was replacing the missing information relating to product characteristics with the highest calculated dumping margin for US sales associated with the Spec C issue, and with the highest reported total cost of manufacturing for Spec D, Spec H, and Spec E home-market sales.

77. As explained by USDOC in its Issues and Decision Memorandum and its calculation memorandum, for the Spec D, E, and H sales:

The highest total cost of manufacturing (AVGTCOM) from amongst the affected CONNUMs (*i.e.*, the reported CONNUMs for the sales in question plus the CONNUMs into which such sales were reclassified as a result of the correction of the product characteristic in question), along with the corresponding variable cost of manufacturing (AVGVCOM) for the CONNUM with the highest reported AVGTCOM, was applied to all of the affected CONNUMs, with one exception, as discussed below.

For one of the miscoded CONNUMs ([***]), the volume of reported sales equaled the volume of sales for that CONNUM across both the home market and U.S. sales databases, and that volume also equaled the volume of production quantity for the CONNUM in question. When the incorrectly reported product characteristic for that CONNUM were corrected, the revised CONNUM ([***]) was one which already exists, and for which no product coding issues were identified. We recalculated the AVGTCOM and AVGVCOM for that revised CONNUM so that they are based on the weight-averaged (by PRODQTY) values

¹⁴⁰ USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), pp. 5-6 (Exhibit KOR-49 (BCI)).

¹⁴¹ CRS I&D Memo, p. 63 (Exhibit KOR-41).

¹⁴² CRS I&D Memo, p. 63 (Exhibit KOR-41).

of the AVGTCOMs and AVGVCOMs of the original and the revised CONNUMs.¹⁴³

78. For the Spec C sales:

With regard to the U.S. market issues, affecting certain U.S. sales for which the reported PRODCOD2U was Spec C ([[***]]), [[***]], or [[***]], we are assigning the highest calculated margin for Hyundai Steel's other U.S. sales. The highest calculated margin for Hyundai Steel's other U.S. sales is [[***]] percent...

We removed these sale observations from the U.S. sales database so they would not be used in the SAS programming. Then, after a final margin was calculated from the SAS programming, we weight-averaged that margin (using the weight of the U.S. sales used to calculate that margin in the SAS programming) with the [[***]] margin (using the weight of the U.S. sales of the aforementioned U.S. sale observations that also happened to have sale dates during the POI, as those listed above were identified without reference to whether or not their sale dates were in the POI). This weight-averaging uses the following:

$SASmargin = 29.69\%$

$SASmarginqty = [[***]] \text{ metric tons}$

$RemovedSalesMargin = [[***]]$

$RemovedSalesMarginQty = [[***]] \text{ metric tons}$

$Final \text{ margin} = 34.33\%¹⁴⁴$

f. Korea: What information, in your view, was a part of the record of the investigation and could have been used by the USDOC to replace the "missing"/"misreported" information in order to arrive at a more "accurate" determination?

1.3 Anti-Dumping Duties on Certain Hot-Rolled Steel Flat Products from the Republic of Korea (USDOC investigation number A-580-883)

¹⁴³ USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), pp. 5-6 (Exhibit KOR-49 (BCI)); *see also*, CRS I&D Memo, p. 63 (Exhibit KOR-41).

¹⁴⁴ USDOC Final Calculation Memo for Hyundai Steel (July 20, 2016), p. 6 (Exhibit KOR-49 (BCI)); *see also* CRS I&D Memo (July 20, 2016), 63 (Exhibit KOR-41).

Question 17 (United States)

You argue that the contract information between Hyundai Steel's affiliated service providers and unaffiliated customers was first requested by the USDOC by way of a supplemental questionnaire, following Hyundai Steel's initial response.

- a. We note that in the Cold-Rolled AD investigation, the USDOC, in its Supplemental Questionnaire dated 19 January 2016 (Panel Exhibit USA-15), asked Hyundai Steel to "[s]ubmit copies of all contracts that [[***]] has with all unaffiliated parties..." (question 3). Could you please indicate where, in its supplemental Section A-C questionnaire, dated 23 December 2015 (Panel Exhibit USA-20 (BCI)), did the USDOC request the same information?***

79. USDOC requested the same information in the December 23, 2015, A-C Supplemental Questionnaire: Question 83 (page 16); Question 87 (page 17); and Question 125 (page 23).¹⁴⁵

- b. Please identify the first instance at which the USDOC asked Hyundai Steel to submit copies of contracts that [[***]] had with all unaffiliated customers.***

80. The first time USDOC asked Hyundai Steel to submit copies of [[***]] contracts with unaffiliated customers was in the December 23, 2015, A-C Supplemental Questionnaire: Question 83 (page 16).¹⁴⁶

- c. Please identify the first instance at which the USDOC asked Hyundai Steel to submit copies of contracts that [[***]] had with all unaffiliated customers.***

81. As Hyundai Steel used affiliates to provide certain movement expenses (domestic inland freight, ocean freight, and marine insurance) it was necessary for USDOC to verify these expenses were provided at arm's length and Hyundai Steel was obligated to demonstrate at verification the arm's-length nature of the transactions. The first instance that USDOC asked Hyundai Steel to submit copies of contracts that [[***]] had with all unaffiliated customers was during verification of Hyundai Steel's Sales Responses in the Republic of Korea from April 18-22, 2016.¹⁴⁷ USDOC noted in its verification report:

For marine insurance, given that [[***]] was also identified as an affiliated party, we requested that Hyundai Steel also demonstrate that such marine insurance services were provided at arm's-length. Specifically, we requested that Hyundai Steel obtain comparative marine insurance rate information between its affiliate, [[***]], and other unaffiliated parties. Hyundai Steel stated that, while the two

¹⁴⁵ *Certain Hot-Rolled Steel Flat Products from Korea*, Section A through C Supplemental Questionnaire (December 23, 2015) (Exhibit USA-20 (BCI)).

¹⁴⁶ *Certain Hot-Rolled Steel Flat Products from Korea*, Section A through C Supplemental Questionnaire (December 23, 2015) (Exhibit USA-20 (BCI)).

¹⁴⁷ *Hot-rolled Steel Flat Products from the Republic of Korea*, Verification of Hyundai Steel Corporation Sales Responses (July 5, 2016), p. 15 (KOR-57 (BCI)).

companies were related via [[***]], it was not within the Hyundai's Steel's capability to obtain such data (*i.e.*, Hyundai Steel could not compel [[***]] to provide it).¹⁴⁸

Question 18 (United States)

Korea argues that no "necessary" information was missing as Hyundai Steel provided specific information indicating that the transactions with its affiliate partners were at arm's length (Korea's FWS, para. 487). The United States responds that the information so provided was "not comprehensive, provided only sample of example contracts ... and were not responsive to the request for the actual contracts between the affiliated service provider and its unaffiliated customers" (United States' FWS, para. 173). Did the USDOC provide these reasons as part of its determination? If yes, please provide appropriate references to the determination and/or the I&D memo where the USDOC provided these specific reasons as the basis for the insufficiency of the information provided by Hyundai Steel.

82. Yes, as explained in the U.S. first written submission, in its final determination USDOC found that Hyundai Steel failed to demonstrate the arm's-length nature of the transactions with its affiliate partners.¹⁴⁹ USDOC made this finding at Comment 8 of its I&D Memo.¹⁵⁰ The reasons for this finding are further elaborated in USDOC's verification report.¹⁵¹ Moreover, in seeking additional information from Hyundai regarding the affiliated transactions, in supplemental questionnaires USDOC identified deficiencies with Hyundai's responses and Hyundai's failure to demonstrate that its transactions with [[***]] were at arm's length.

83. As in the Cold-Rolled Steel investigation, to attempt to demonstrate that Hyundai Steel's transactions with [[***]] were at arm's length, Hyundai Steel provided certain documents, including an excerpt of [[***]] financial statements to show that [[***]] earned a profit during the POI.¹⁵² Again, Hyundai Steel asserted that because [[***]] "earned a profit during the POI, Hyundai Steel believes these transactions reflect arm's length prices."¹⁵³ Additionally, Hyundai Steel provided contracts between Hyundai Steel and [[***]] and between [[***]] and one of

¹⁴⁸ Single brackets in the original verification report have been replaced with bolded double brackets to indicate that the information within should be treated as BCI in this dispute.

¹⁴⁹ U.S. First Written Submission at paras. 149-162 and 171-173.

¹⁵⁰ HRS I&D Memo (August 4, 2016), pp. 17-20 (Exhibit-67).

¹⁵¹ *Hot-rolled Steel Flat Products from the Republic of Korea*, Verification of Hyundai Steel Corporation Sales Responses (July 5, 2016), pp. 2, 14-15 (Exhibit KOR-57 (BCI)).

¹⁵² *Certain Hot-Rolled Steel Flat Product from the Republic of Korea*, Hyundai Steel's Section B-C Response (November 23, 2015), p. 31 (Exhibit KOR-60 (BCI)).

¹⁵³ *Certain Hot-Rolled Steel Flat Product from the Republic of Korea*, Hyundai Steel's Section B-C Response (November 23, 2015), p. 31 (Exhibit KOR-60 (BCI)).

[[***]] subcontractors, which Hyundai Steel claimed also showed that the transactions were at arm's length.¹⁵⁴

84. In its supplemental questionnaire, dated December 23, 2015, USDOC requested that Hyundai "demonstrate that the freight rates charged by affiliate, [[***]] are arm's-length prices," noting that the "net profit information provide for [[***]] does not show that [[***]] earned a profit from its freight services, or from non-operating income."¹⁵⁵ As such, USDOC requested that Hyundai provided "copies of all freight contracts with [[***]] and all unaffiliated freight providers that cover the full POI."¹⁵⁶

85. With respect to international freight, USDOC noted:

Hyundai Steel informed the Department that it has reported international freight that was provided by its affiliate, [[***]]¹²⁸ Hyundai Steel did not demonstrate that the international freight expenses with [[***]] were negotiated on an arm's-length basis. [[***]] describes itself as a "global logistics company." [[***]]. Thus, it appears [[***]] must be negotiating international freight with the providers of the ocean freight services.¹⁵⁷

86. USDOC asked Hyundai to provide copies of contracts between Hyundai Steel and [[***]] and between [[***]] and the provider of the ocean freight services and to demonstrate that [[***]] direct costs, overhead, general, administrative and selling expenses and interest expenses are fully covered by the differential between the two contract values.¹⁵⁸

87. To verify that the freight services provided by [[***]] were provided at arm's length, at verification USDOC requested comparative freight charge information for both ocean and inland freight between Hyundai's affiliate [[***]] and unaffiliated parties.¹⁵⁹ Hyundai Steel officials stated that such information had been requested during the verification for the cold-rolled

¹⁵⁴ *Certain Hot-Rolled Steel Flat Product from the Republic of Korea*, Hyundai Steel's Section B-C Response (November 23, 2015), p. 30 (Exhibit KOR-60 (BCI)).

¹⁵⁵ *Certain Hot-Rolled Steel Flat Products from Korea*, Section A through C Supplemental Questionnaire (December 23, 2015), p. 16 (Exhibit USA-20 (BCI)).

¹⁵⁶ *Certain Hot-Rolled Steel Flat Products from Korea*, Section A through C Supplemental Questionnaire (December 23, 2015), pp. 16, 17, 22, 25 (Exhibit USA-20 (BCI)).

¹⁵⁷ *Certain Hot-Rolled Steel Flat Products from Korea*, Section A through C Supplemental Questionnaire (December 23, 2015), p. 25 (Exhibit USA-20 (BCI)).

¹⁵⁸ *Certain Hot-Rolled Steel Flat Products from Korea*, Section A through C Supplemental Questionnaire (December 23, 2015), p.25 (Exhibit USA-20 (BCI)).

¹⁵⁹ *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Sales Verification Report (July 5, 2016), p. 14 (Exhibit KOR-57).

investigation, and that, as was the case then, Hyundai Steel could not obtain it.¹⁶⁰ USDOC then explained to Hyundai Steel officials that, for inland freight, Hyundai Steel had previously provided, in Exhibit S-38 of its January 19, 2016, supplemental response, the contract between [[***]] and its freight subcontractor [[***]], and further had provided in Exhibit S-56 of the same submission a chart to show that [[***]] had earned a profit on the inland freight amount it charged Hyundai Steel.¹⁶¹

88. For ocean freight, USDOC similarly noted that Hyundai Steel had provided in Exhibit S-59 of its January 19, 2016, supplemental response, the contract between [[***]] and its ocean freight subcontractor [[***]], and further had provided in Exhibit S-60 of the same submission sample invoices from [[***]] to [[***]], and from [[***]] to Hyundai Steel, to show that [[***]] had earned a profit. However, Hyundai Steel was not able to provide the requested comparative freight charge information between [[***]] and unaffiliated parties.

89. In sum, USDOC clearly identified its reasons for determining that Hyundai Steel's responses were not comprehensive; that those responses only provided samples of certain contracts; and thus that Hyundai Steel had not been responsive to USDOC's requests for the actual contracts between the affiliate and its customers.

Question 19 (Korea)

What reasons were provided by the USDOC for resorting to and applying facts available with respect to [[]]? Please provide references to the record of the investigation.***

1.4 Countervailing Duties on Certain Cold-Rolled Steel Flat Products from the Republic of Korea (USDOC investigation number C-580-882)

1.4.1 Cross-owned affiliates input

Question 20 (United States)

Please respond to Korea's argument that the information on the minimal amounts supplied by the four of [[]] cross-owned affiliates of POSCO was not "essential" under "US law and practice" (Korea's FWS para. 393) because information relating to inputs which are not "primarily dedicated" to the production of the downstream product is not relevant for purposes of the investigation and certainly not "necessary" for making a determination (Korea's FWS, para. 352).***

90. As discussed at the first substantive meeting with the parties and in the U.S. first written submission, whether an input is "primarily dedicated" to the production of the downstream product is a determination for USDOC and not for POSCO. As USDOC noted on the record in

¹⁶⁰ *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Sales Verification Report (July 5, 2016), p. 14 (Exhibit KOR-57).

¹⁶¹ *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Sales Verification Report (July 5, 2016), pp. 14-15 (Exhibit KOR-57).

the proceeding: had POSCO not simply responded in the negative, USDOC would have had the opportunity to follow up and verify POSCO's claim that the affiliated companies' production was not primarily dedicated to the production of subject goods.¹⁶²

91. To be clear, aside from POSCO's improper decision to substitute its own judgment for that of the investigating authority as to what was "primarily dedicated," POSCO's questionnaire response was simply not accurate. Specifically, USDOC's questionnaire does *not* ask respondent companies to provide responses for input suppliers for which inputs are primarily dedicated. Rather, USDOC's questionnaire clearly directs respondents that:

You must provide a complete questionnaire response for those affiliates where "cross-ownership" exists, and one of the following situations exists:

- the cross-owned company produces the subject merchandise; or
- the cross-owned company is a holding company or a parent company (with its own operations) of your company; or
- ***the cross-owned company supplies an input product to you for production of the downstream product produced by the respondent;*** or
- the cross-owned company has received a subsidy and transferred it to your company.¹⁶³

In response, POSCO falsely replied: "There were no cross-owned companies located in Korea that provided inputs to POSCO's production of subject merchandise."

92. Moreover, as POSCO decided not to provide responses "for cross-owned input suppliers, as required under 19 CFR 351.525(b)(6), the Department was not provided the opportunity to carefully examine the full extent to which POSCO and all of its cross-owned entities ... benefitted from subsidies that are attributed to POSCO within the meaning of 19 CFR 351.525(b)(6)."

93. POSCO's decision to render legal decisions itself is inherently improper; that is the role of the investigating authority. But an additional reason this is improper is because respondents do not have the expertise to administer U.S. domestic countervailing duty law. This case proves the point, as POSCO's apparent understanding of "U.S. law and practice," as put forth in Korea's argument before the Panel, is wrong.

¹⁶² *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (July 20, 2016), p. 64 ("CRS I&D Memo (CVD)") (Exhibit KOR-77).

¹⁶³ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Affiliated Companies Response, POSCO/Daewoo (September 30, 2015), pp. 4-5 (emphasis added) (Exhibit KOR-73 (BCI)); *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Countervailing Duty Questionnaire (September 16, 2015), Section III, Subsection C "Affiliated Companies" (emphasis added) (Exhibit USA-52).

94. Specifically, Korea’s assertion that USDOC uses a 30 percent bright line for determining “primarily dedicated” is inaccurate.¹⁶⁴ USDOC has never established a bright line threshold for primary dedication; USDOC makes such a determination after evaluating the record, including the information provided by the respondent companies, on a case-by-case basis. Korea cites USDOC’s countervailing duty administrative review of certain softwood lumber products from Canada, a 1992 administrative review, for the proposition that USDOC previously established a 30 percent threshold for purposes of considering “primary dedication.”¹⁶⁵ USDOC’s findings in a proceeding conducted over 25 years ago – involving different facts and circumstances – bears no relevance to the issues in POSCO’s administrative proceedings.

95. Moreover, Korea conflates a respondent party’s argument in that proceeding with USDOC’s actual findings.¹⁶⁶ While the respondent in the softwood lumber administrative review “asserted” that only 30 percent of the affiliated input supplier’s timber sales were made to the respondent, USDOC never adopted 30 percent as a standard.¹⁶⁷ Rather, all USDOC stated in its determination is that “as the verification report indicates, we found that Anticosti’s log production was not primarily dedicated to Bois Daquaam softwood lumber production.”¹⁶⁸

96. The United States also would note that in the softwood lumber administrative review, USDOC conducted the primarily dedicated analysis, not the Canadian respondents. Similarly, in the more recent investigation of *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, which Korea cites, USDOC reached its final determination with respect to primary dedication of inputs from cross-owned affiliated input suppliers *after* the respondent provided the underlying information to USDOC.¹⁶⁹ These cases reflect the appropriate roles; the

¹⁶⁴ Korea FWS, para. 352.

¹⁶⁵ Korea First Written Submission, para. 352 n.296 (citing *Final Results and Partial Rescission of Countervailing Duty Expedited Reviews, Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 67,388 (Department of Commerce Nov. 5, 2002), and accompanying Issues and Decision Memorandum at Comment 1, p.23 (Exhibit KOR-82).

¹⁶⁶ Korea First Written Submission, para. 352 n.296 (citing *Final Results and Partial Rescission of Countervailing Duty Expedited Reviews, Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 67,388 (Department of Commerce Nov. 5, 2002), and accompanying Issues and Decision Memorandum at Comment 1, p.23 (Exhibit KOR-82).

¹⁶⁷ *Final Results and Partial Rescission of Countervailing Duty Expedited Reviews, Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 67,388 (Department of Commerce Nov. 5, 2002), and accompanying Issues and Decision Memorandum at Comment 1, p. 23 (Exhibit KOR-82).

¹⁶⁸ *Final Results and Partial Rescission of Countervailing Duty Expedited Reviews, Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 67,388 (Department of Commerce Nov. 5, 2002), and accompanying Issues and Decision Memorandum at Comment 1, p. 23 (Exhibit KOR-82).

¹⁶⁹ See, *Countervailing Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, Issues and Decision Memorandum, (March 16, 2012), p. 3 (Exhibit KOR-79); cf Korea First Written Submission, para. 352 (citing *Bottom Mount Combination Refrigerators from the Republic of Korea*, (March 16, 2012), p. 3 (Exhibit KOR-79).

respondents respond accurately to the investigating authority's requests, and the investigating authority renders legal determinations. They also reinforce that USDOC does so on a case-by-case basis, not based on some bright-line rule asserted by Korea.

97. In summary, the conceptual basis for Korea's assertion that POSCO reasonably declined to provide USDOC with accurate answers is untenable. In effect, Korea's argument is that respondents should decide what is "essential". As USDOC explained in the investigation, "respondents cannot unilaterally decide to withhold information from the Department that may require further analysis. Otherwise the Department would be unable to conduct an accurate and complete investigation."¹⁷⁰

Question 21 (Korea)

The United States submits that whether an input product is primarily dedicated to the production of a downstream product is a decision that can only be made by the USDOC (United States' FWS, para. 399).

- a. Even if it is your position that the inputs were not primarily dedicated to the production of Cold-Rolled Steel, were you still under the obligation to report them, so that the USDOC could have determined whether they were primarily dedicated or not? In other words, who calculates whether an input is "primarily dedicated" to the production of the downstream product, the interested party or the USDOC?***
- b. On what basis do you believe that not reporting such information in the first instance is a standard practice?***

Question 22 (United States)

Please respond to Korea's argument that the value of POSCO's transactions with the four cross-owned affiliates and the value of the transactions in relation to the cross-owned affiliates' sales were part of POSCO's financial statements, which were on the record from its earliest responses, and thus the USDOC could have "easily confirmed" from these responses that only trace amounts were provided by these affiliates (Korea's FWS, paras. 394-395). Specifically, please indicate whether and how the USDOC examined the extent to which POSCO's initial responses concerning its affiliates, as well as its financial statements, could be used to determine the value of transactions in relation to the cross-owned affiliates' sales and, by extension, whether the inputs were "primarily dedicated" to the production of CR steel.

98. Korea's financial statements argument, which epitomizes the misguided nature of its WTO case, is baffling. It is clear from the administrative record that POSCO answered USDOC's question falsely. In response to a request for a complete questionnaire for any cross-owned affiliate that supplies an input for the production of subject merchandise, POSCO opted not to submit a questionnaire response for the affiliate in question and responded: "There were no cross-owned companies located in Korea that provided inputs to POSCO's production of

¹⁷⁰ CRS I&D Memo (CVD), p. 64 (Exhibit KOR-77).

subject merchandise.”¹⁷¹ Korea argues, as discussed in the preceding questions, that USDOC was wrong to fault POSCO for this inaccurate statement and withholding the information requested because POSCO itself administered the (incorrect) legal test and decided that Commerce therefore did not need the data to conduct that legal test.

99. Then, in the financial statements argument probed by this question, Korea asserts that USDOC should have known that POSCO’s questionnaire response was false because POSCO also submitted different evidence (*i.e.*, financial statements) that proves as much. In other words, at the same time, Korea is arguing both that Commerce did not even need to conduct a “primarily dedicated” inquiry (because POSCO did it itself, which justified withholding the information directly on point), and that Commerce was required to conduct a sophisticated “primarily dedicated” inquiry based on deductions from evidence submitted for other purposes. To put it mildly, Korea’s argument finds no support in the text of the SCM Agreement.

100. Not only is there no basis in the SCM Agreement to find that USDOC was required to deduce propositions from POSCO’s financial statements that contradict POSCO’s own statements, but the deductions Korea would have the Panel believe are so simple (and apparently obligatory) are neither simple, nor logical. POSCO’s consolidated financial statements, which USDOC examined in full, contain general information pertaining to cross-owned affiliates.¹⁷² These financial statements do not provide any information on whether or to what extent such cross-owned affiliates provided inputs that POSCO used in the production of subject merchandise.¹⁷³ In fact, the information provided by POSCO in its consolidated financial statements contains several columns entitled: sales, others, total, purchase of material, purchase of fixed assets, outsourced processing cost, others, and total. None of these provide any indication that the listed subsidiaries provided inputs used in production of subject merchandise.¹⁷⁴ Rather, the only information USDOC had with respect to cross-owned affiliated input suppliers is POSCO’s narrative response in which it affirmatively stated that that “{t}here

¹⁷¹ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Affiliated Companies Response, POSCO/Daewoo (September 30, 2015), pp. 4-5 (Exhibit KOR-73 (BCI)); *see also* *Countervailing Duty Questionnaire, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Case No. C-580-882, (September 16, 2015), Section III, Subsection C “Affiliated Companies” (Exhibit USA-52); *Certain Cold-Rolled Steel Flat Products from Korea*, Affiliated Companies Response, POSCO/Daewoo (September 30, 2015), pp. 4-5 (Exhibit KOR-73 (BCI)).

¹⁷² CRS I&D Memo (CVD), p. 15 (Exhibit KOR-77).

¹⁷³ *See Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Questionnaire Response (October 23, 2015), pp. 660-61, Exhibit 20, n. 38 (Exhibit KOR-70 (BCI)); *see also* *Countervailing Duty Investigation, Certain Hot-Rolled Steel Flat Products from Korea*, Initial Questionnaire Response (November 2, 2015), pp. 661, Exhibit 17, n. 38 (Exhibit KOR-90 (BCI)).

¹⁷⁴ *See Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Questionnaire Response (October 23, 2015), pp. 660-61, Exhibit 20, n. 38 (Exhibit KOR-70 (BCI)).

were no cross-owned companies located in Korea that provided inputs to POSCO's production of subject merchandise."¹⁷⁵

101. Accordingly, contrary to Korea's contention, USDOC was not able to rely on POSCO's financial statements to: (1) determine whether the cross-owned companies provided any inputs used in the production of subject merchandise; (2) identify the nature of the transactions between cross-owned companies and POSCO; or (3) the value of any inputs provided by cross-owned companies to POSCO. Moreover, it is extraordinary to contend, as Korea does, that USDOC was required to work backwards and deduce conclusions from POSCO's financial statements, while at the same time arguing that USDOC should have skipped the inquiry altogether and been satisfied that POSCO, without telling USDOC, had already conducted the inquiry itself.

Question 23 (United States)

Please respond to Korea's argument that, in at least 39 out of the 45 subsidy programs, the AFA rate applied to POSCO was derived from a previous investigation entirely unrelated to POSCO and was thus based on "unwarranted speculation" (Korea's FWS, para. 428). Specifically, please identify where and how the USDOC examined and explained the reliability and relevance of such rates as part of its analysis.

102. USDOC did not engage in "unwarranted speculation," and it did not use rates from investigations "entirely unrelated to POSCO."

103. To the extent USDOC was forced to "speculate," not only was it not unwarranted, it was unavoidable *because POSCO chose not to provide necessary information*.

104. POSCO failed to provide information on subsidies received by its cross-owned input suppliers, depriving the record of this necessary information. POSCO filed responses on behalf of itself, DWI, Samsung C&T, and SK Networks.¹⁷⁶ Thus, the record lacked any information regarding the cross-owned input suppliers. Accordingly, it was not known what subsidies, or the amount of subsidies, that the input suppliers received. If USDOC's attempts to fill those gaps amounts to "speculation," it was forced by POSCO's non-cooperation.

105. Moreover, USDOC did not use subsidization rates from investigations entirely unrelated to POSCO. For such programs as Electricity for LTAR, VAT Exemption for Purchase of Anthracite Coal, and K-SURE Short-Term Export Credit Insurance, USDOC did not apply facts available to POSCO, because the factual record showed that these programs were not countervailable, and thus, these programs could not possibly confer a benefit upon POSCO.

¹⁷⁵ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Affiliated Companies Response, POSCO/Daewoo (September 30, 2015), pp. 4-5 (Exhibit KOR-73 (BCI)).

¹⁷⁶ *See Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Questionnaire Response (October 23, 2015), p. 1 (Exhibit KOR-70 (BCI)).

106. For each program that was countervailable, USDOC first examined the factual record and evaluated the responses of the other respondent, Hyundai. For programs used by Hyundai and for which USDOC calculated a rate based on accurate and verified responses by Hyundai, USDOC applied those rates to POSCO.¹⁷⁷ Those rates represent subsidization behavior of the Government of Korea for the same program for a company in the same industry.

107. Second, USDOC looked to see if a rate had been calculated for the identical program in a prior investigation involving Korea.¹⁷⁸ This step sought information based on the amount of subsidies that the Government of Korea had provided in the past under the identical investigated program. Only if this too did not yield a usable rate did USDOC look to apply the highest non-*de minimis* rate calculated for a cooperating respondent in another countervailing duty proceeding for a similar program administered by the Government of Korea.¹⁷⁹ Finally, for any program where an analogous program and corresponding rate still could not be identified, USDOC applied the highest rate calculated for a cooperating respondent from any non-company-specific program that the industry subject to the investigation could have used for the production or exportation of subject merchandise.¹⁸⁰

108. This order of analysis attempted to find, for each countervailable program, a calculated rate that shared as many of the same key features as possible. None is “entirely unrelated to POSCO.” The available options for calculated rates get increasingly less related, but that is a function of what information is available, and it is why they are prioritized in that order. Under Article 12.7 of the SCM Agreement, when necessary information is not available on the record in a countervailing duty proceeding, an authority must fill gaps using facts available as a proxy for the missing information. In the challenged determination, USDOC did what it must when non-cooperation deprived it of necessary information. Facts available are, by definition, imperfect. Ironically, POSCO was the only entity that could have obviated the need to use imperfect proxies instead of the actual data.

1.4.2 POSCO facility in FEZ

Question 24 (Both Parties)

Does the "F" in FEZ stand for foreign or free? In answering, please cite to a relevant authority.

¹⁷⁷ CRS I&D Memo (CVD), p. 12 (Exhibit KOR-77).

¹⁷⁸ CRS I&D Memo (CVD), p. 12 (Exhibit KOR-77).

¹⁷⁹ CRS I&D Memo (CVD), p. 12 (Exhibit KOR-77).

¹⁸⁰ CRS I&D Memo (CVD), p. 12 (Exhibit KOR-77).

109. The record before USDOC reflects that the “F” in FEZ stands for “free,” as explained below. As an initial matter, USDOC initiated its countervailing investigation into and examined certain programs in free economic zones:

J. SUBSIDIES TO COMPANIES LOCATED IN CERTAIN ECONOMIC ZONES

1. Tax Reductions and Exemptions in Free Economic Zones
2. Exemptions and Reductions of Lease Fees in Free Economic Zones
3. Grants and Financial Support in Free Economic Zones¹⁸¹

110. POSCO’s responses also identified that USDOC was examining programs in “free economic zones.”¹⁸² In fact, POSCO affirmatively stated that “POSCO has no facilities located in a free economic zone (‘FEZ’).”¹⁸³

111. Later, when USDOC issued its verification agenda outline, it specified that it would examine the accuracy and completeness of POSCO’s responses with respect to certain programs in free economic zones, such as *Tax Reductions and Exemptions in Free Economic Zones*, *Exemptions and Reductions of Lease Fees in Free Economic Zones*, and *Grants and Financial Support in Free Economic Zones*.¹⁸⁴

112. Finally, the United States notes that USDOC, in its final determination, inadvertently referred to FEZs as foreign economic zones.¹⁸⁵ Given that the term was used correctly and consistently by USDOC throughout the proceeding, this minor error had no impact on the conduct of the proceeding.

Question 25 (Korea)

- a. ***The United States in para. 382 of its FWS refers to the Incheon FEZ, whereas Korea refers to the Songdo FEZ (Korea’s FWS para. 366). Are these the same? Which is the correct name? In answering, please cite to a relevant authority.***
- b. ***Do you acknowledge that the POSCO R&D facility is located in the FEZ?***

¹⁸¹ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Questionnaire (September 16, 2015), p. 71 (Exhibit USA-52).

¹⁸² *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Questionnaire Response (October 23, 2015), pp. 52-53 (Exhibit KOR-70 (BCI)).

¹⁸³ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from Korea*, Initial Questionnaire Response (October 23, 2015), p. 52 (Exhibit KOR-70 (BCI)).

¹⁸⁴ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*; Verification Agenda Outline for POSCO and Cross-Owned Affiliates’ (March 7, 2016), p. 12 (Exhibit USA-53 (BCI)).

¹⁸⁵ See, e.g., CRS I&D Memo (CVD), p. 1 (Exhibit KOR-77).

Question 26 (United States)

Korea submits that the necessary information of any benefits related to the FEZ was already on the record and that the government of Korea stated in its questionnaire response that "during the investigation period, none of the respondents received tax reductions or exemptions, lease-fee reductions or exemptions, or grants or financial support due to their location in an FEZ" (Korea's FWS para. 370 (quoting GOK Initial Questionnaire (Panel Exhibit KOR-84 (BCI), p. 108)). Did the USDOC, at any stage of this investigation, attempt to verify the information submitted by the government of Korea and did it ever request the government of Korea to clarify and explain the reference to the "investigation period" in the government of Korea's response? Please indicate where the USDOC decided and explained that this information was not relevant as "facts available".

113. As hinted at by the question, the Government of Korea's statement is ambiguous because it is not clear what Korea means by the "period of investigation." On the one hand, as provided in U.S. regulations, the period of investigation or "POI" in a countervailing duty investigation is normally the most recently completed fiscal year for the government and exporters or producers in question, subject to certain exceptions.¹⁸⁶ On the other hand, non-recurring subsidies may be allocated over the average useful life ("AUL") of the subsidized product. In that situation, a portion of a subsidy received several years before the period of investigation would be allocated to the 12-month period of investigation for purposes of calculating a CVD rate. In that situation, although the POI remains the same, the receipt of subsidies prior to the POI will affect the POI CVD rate.

114. USDOC did not attempt to verify free economic zone benefits, including what Korea meant by "period of investigation" in the relevant statement, with the Government of Korea because both POSCO and Hyundai Steel affirmatively stated in their responses to USDOC's questionnaire that they had no facilities in an economic zone. Had either respondent disclosed that they, or their cross-owned companies, had facilities located in free economic zones, USDOC would have had a reason to more closely investigate the intended meaning and the accuracy of the Government of Korea's statement. As the Panel may recall, USDOC only suspected that this was inaccurate with respect to POSCO at verification. And even then, POSCO maintained that it was indeed accurate. (Of course, Korea has now admitted the opposite in this proceeding).

115. USDOC explained its inability to rely on the Government of Korea's statement as facts available in the I&D Memo:

With regard to POSCO's claim that record evidence demonstrates that POSCO did not receive any benefits due to its location in an FEZ, we disagree. As discussed in Comment 8 below, the response submitted by the GOK states that "during the investigation period, none of the respondents received tax reductions or exemptions, lease-fee reductions or exemptions, or grants or financial support

¹⁸⁶ See 19 C.F.R. § 351.204(b)(2) (Exhibit USA-75).

due to their location in an FEZ.” However, the GOK’s response does not clarify if the “investigation period” it refers to is the POI or the entire 15-year AUL. Therefore, we are unable to use the GOK’s response to fill this “gap” in the record. As such, we cannot determine that POSCO did not receive any benefits from this program. Due to this discrepancy in the GOK’s response, we do not agree with POSCO’s claim that there is not contradicting information on the record.¹⁸⁷

Question 27 (Both Parties)

Please identify the information on the record of the investigation, as well any analysis by the USDOC, in respect of the purpose and operations of the R&D facility, which Korea alleges to be unrelated to subject merchandise.

116. USDOC was unable to verify the purpose and operations of the facility. USDOC explained that:

When verifying POSCO’s October 23, 2015 response that “POSCO has no facilities located in a free economic zone (FEZ),” we found that a company named POSCO Global Research and Development is listed on the official Incheon FEZ government website as being located in the Incheon Free Economic Zone-Songdo International City.¹⁸⁸

After discovering the existence of the facility in the FEZ, USDOC attempted to verify the nature of the facility. USDOC’s verification report notes:

At POSCO, company officials presented a map of the Korean Free Economic Zones. From here, officials confirmed that the Pohang and Gwangyang plants are not located in any FEZ. At DWI headquarters, located in Songdo, Korea, we noted that Songdo is located within an FEZ. We requested that DWI officials provide documentation demonstrating that they were not located in Songdo during the POI. Company officials presented utility bill payment receipts online for facilities located in Seoul through December 2014 to confirm that they relocated to Songdo outside of the POI.

While verifying that DWI was not located in the Songdo International City Zone, we found that a POSCO facility was listed on the official Incheon FEZ government website as being located in the Incheon FEZ. This facility is titled POSCO Global R&D Center on the Korean government website that depicts

¹⁸⁷ See CRS I&D Memo (CVD), pp. 73-74 (Exhibit KOR-77).

¹⁸⁸ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and Daewoo International Corporation (April 29, 2016), p. 2 (Exhibit KOR-75 (BCI)).

major projects within the Incheon FEZ. We noted that the website stated that it was last updated in 2014. At this point, we asked POSCO officials for information regarding the purpose and location of the R&D center. POSCO officials stated that they were unaware of the facility, and unsure of the function and exact location of the facility, but officials stated that they would try to provide further information.

Approximately two hours later, POSCO officials stated that they were unable to gather information on the facility's operations and location. POSCO's local counsel proffered a printout from "Neighborhood," which they explained was equivalent to Google Maps and which they claimed demonstrated that the POSCO Global R&D center was outside of the FEZ. We reviewed the printout and noted that counsel had drawn boundaries around an area of the map that it said represented the FEZ. We noted that the boundary was very small, did not conform to the map on the GOK FEZ website, and only included few apartment buildings. Given that the "Neighborhood" map of the FEZ did not include any office buildings and did not conform to the information on the GOK FEZ website, we declined to accept this as proof that the POSCO Global R&D Center was not in an FEZ.

At this time, we suggested that they could walk or taxi to the POSCO Global R&D Center location as depicted on the map provided on the government website. We suggested that there may be staff to speak with at the POSCO Global R&D Center, signage, or other information that could help clarify their inquiry. However, POSCO officials declined this suggestion and stated that at this point, the verification was concluded.¹⁸⁹

117. In sum, the record does not contain information pertaining to the nature of the facility because POSCO submitted inaccurate information (and then doubled down when the inaccuracy was called to its attention).

1.4.3 DWI loan data

Question 28 (Korea/United States)

a. Korea: Do you agree with the United States that DWI initially reported having received [[]] loans under the KORES and KNOC programs (Panel Exhibit KOR-***

¹⁸⁹ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and Daewoo International Corporation (April 29, 2016), pp. 38-39 (Exhibit KOR-75 (BCI)).

75, p. 2)? If yes, are these counted and reported in the same manner as the [[*]] loans reported by DWI as minor corrections?**

b. United States: Did you verify the [[*]] loans initially reported by DWI and confirm that there were tied to non-subject merchandise and unrelated to DWI's exports to the United States of cold-rolled steel produced by POSCO (Korea's FWS, para. 377)?**

118. USDOC did verify the [[***]] loans initially reported by DWI. Korea is mistaken in its claim that all [[***]] loans were tied to non-subject merchandise.

119. The [[***]] loans initially reported by DWI consisted of loans to POSCO from KORES and loans to POSCO from KNOC. In the preliminary determination, USDOC found that sufficient information demonstrates that the KNOC loans were tied to non-subject merchandise, but noted that it intended to verify this information.¹⁹⁰ The KORES loans were not found to be tied to non-subject merchandise and USDOC preliminarily calculated a subsidy rate under this program.¹⁹¹

120. USDOC conducted verification with respect to all of the timely submitted DWI loans. USDOC explained that:

For the KORES loans, we began by examining the loan values submitted in Exhibit F-12 of the 2SQR. DWI presented a trial balance summary which showed the total amounts of loans received under this program. We then tied the trial balance summary to financial statement. Next, we tied selected individual project loans to the trial balance summary, confirmed receipt, and verified principal and interest payment made against the loans on select loans in the [[***]] system. We selected additional loan agreements and payments to confirm the completeness of the response. We found no discrepancies with regard to the loans reported in the PQR and 2QR. We did not verify additional loans presented as minor corrections at verification.¹⁹²

Using the same steps, USDOC also verified the KNOC loans and found no discrepancies.

¹⁹⁰ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Decision Memorandum for the Preliminary Negative Determination (December 15, 2015), p. 23 (Exhibit USA-56).

¹⁹¹ *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Decision Memorandum for the Preliminary Negative Determination (December 15, 2015), pp. 23-24 (Exhibit USA-56).

¹⁹² *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and Daewoo International Corporation (April 29, 2016), p. 26 (Exhibit KOR-75 (BCI)).

- c. Korea: In para. 409 of its FWS, the United States refers to the KORES and the KNOC programs. Please explain the difference between the two programs and the relevance of the KNOC loans to the investigation at issue.**

1.5 Countervailing Duties on Certain Hot-Rolled Steel Flat Products from the Republic of Korea (USDOC investigation number C-580-884)

Question 29 (Both Parties)

Korea submits that it provided the requested information with respect to the cross-owned affiliate inputs; POSCO's R&D facility; and DWI loan data, well before verification by the USDOC in the investigation at issue. Why did the USDOC decide not to accept this information?

121. USDOC did not accept this data because it was submitted nearly four months after the deadline for new factual information. Under USDOC's regulations, there is a deadline by which all parties must submit factual information.¹⁹³ The deadline by which factual information was required to be submitted in the hot-rolled steel investigation was December 15, 2015.¹⁹⁴ POSCO submitted the data on April 14, 2016 and May 3, 2016.¹⁹⁵ There are limited exceptions to the factual deadlines in USDOC's regulations, but POSCO's submission did not fall under any of these exceptions.¹⁹⁶

122. Accordingly, USDOC adhered to its regulations, which apply even-handedly to all interested parties, and rejected POSCO's delinquent submission. Thus, as USDOC explained in the underlying investigation, "due to untimely presentation of the data and the large amount of analysis required to verify the data, we did not verify the validity of the input amounts as presented by POSCO."¹⁹⁷

123. It is unclear why Korea considers that, as long as it views the time between a delinquent submission and verification as sufficient, POSCO is not bound by the regulations that apply to all of the other parties in the proceeding. Article 12.12 clearly recognizes the legitimate interest

¹⁹³ 19 C.F.R. § 351.301(c)(5) (Exhibit USA-76).

¹⁹⁴ See Letter from Department of Commerce Rejecting POSCO's Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93), Letter from Department of Commerce Rejecting POSCO's Submission of New Factual Information (May 3, 2016) (Exhibit KOR-95).

¹⁹⁵ See Letter from Department of Commerce Rejecting POSCO's Submission of New Factual Information (April 14, 2016) (Exhibit KOR-93), Letter from Department of Commerce Rejecting POSCO's Submission of New Factual Information (May 3, 2016) (Exhibit KOR-95).

¹⁹⁶ USDOC's regulations contain four exceptions, including: (1) factual information submitted in response to questionnaires; (2) factual information submitted in support of allegations; (3) factual information to value factors under § 351.408(c) or to measure the adequacy of remuneration under § 351.511(a)(2); and (4) factual information placed on the record of the proceeding by USDOC. See 19 C.F.R. § 351.301(c)(1-4) (Exhibit USA-76).

¹⁹⁷ *Final Determination in the Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Issues and Decision Memorandum (August 4, 2016), p. 64 (Exhibit KOR-98).

investigating authorities have in proceeding expeditiously to reach a final determination. Moreover, paragraph 1 of Annex II of the AD Agreement acknowledges that administering authorities may, and therefore can, resort to facts available if information is not submitted in a timely manner.¹⁹⁸ It merely requires that the investigating authority notify parties in this respect. USDOC has done so as clearly as possible by publishing a regulation. The AD Agreement requires nothing more, and to the extent this provides context for the SCM Agreement, neither does that agreement.

Question 30 (Both Parties)

Are there any circumstances under which information that is submitted after a deadline can still be considered to be submitted within a reasonable period of time?

124. Yes, there are circumstances in which USDOC may accept new factual information submitted after the factual deadline. USDOC's regulations contain four specific exceptions to the general rule: (1) factual information submitted in response to questionnaires; (2) factual information submitted in support of allegations (*e.g.* allegations of market viability, sales below cost of production, and purchases of major inputs from an affiliated party at prices below the affiliated party's cost of production); (3) factual information to value factors of production under 19 C.F.R. § 351.408(c)¹⁹⁹ or to measure the adequacy of remuneration under 19 C.F.R. § 351.511(a)(2); and (4) factual information placed on the record of the proceeding by USDOC.²⁰⁰

125. Moreover, USDOC's regulations provide it with discretion to consider extraordinary circumstances. Specifically, under USDOC's regulations, "{a}n untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists...An extraordinary circumstance is an unexpected event that: (i) Could not have been prevented if reasonable measures had been taken, and (ii) precludes a party or its representative from timely filing an extension request through all reasonable means."²⁰¹ If such circumstances occur, USDOC typically discusses the situation with interested parties at length to ensure that information can be submitted within a reasonable period and does not cause unnecessary delay to the proceeding.

126. POSCO's delinquent submission did not meet any of these exceptions. A respondent having the impression that USDOC would have had sufficient time to prepare for verification, of course, is not one of the exceptions. Private parties are not at liberty to assess USDOC's

¹⁹⁸ See also Anti-Dumping Agreement, Annex II, para. 3 (also reflecting the legitimate interest in timeliness of submissions).

¹⁹⁹ This relates to the factors of production used to calculate normal value in a non-market economy using producers' factors of production in a market economy country.

²⁰⁰ See 19 C.F.R. § 351.301(c)(1-4) (Exhibit USA-76).

²⁰¹ 19 C.F.R. § 351.302(c) (Exhibit USA-77).

workload and decide accordingly that they can submit factual information after the deadline for doing so. Indeed, the very judgment that USDOC could have added consideration of this information to the other work it must do to prepare for verification and an eventual final determination presupposes that all of the other interested parties will comply with the factual deadline, leaving USDOC with only one delinquent factual filing to add to its workload. This is yet another example of POSCO abrogating to itself the authority that actually resides with the aptly-named investigating authority.

Question 31 (Both Parties)

- a. With respect to cross-owned affiliates issue, are the cross-owned affiliates and the relevant inputs in the Hot-Rolled Steel CVD investigation exactly the same as in the Cold-Rolled Steel CVD investigation?**

127. Yes, the cross-owned affiliates and the relevant inputs in the *Hot-Rolled Steel CVD* investigation are exactly the same as in the *Cold-Rolled Steel CVD* investigation.²⁰²

- b. Is the DWI loan data at issue in the Hot-Rolled Steel CVD investigation exactly as it was in the Cold-Rolled Steel CVD investigation?**

128. Yes, the DWI loan data at issue in the *Hot-Rolled Steel CVD* investigation is exactly the same as in the *Cold Rolled Steel CVD* investigation.²⁰³

1.6 Anti-Dumping Duties on Large Power Transformers from the Republic of Korea (USDOC investigation number A-580-867)

Question 32 (Korea)

With respect to the 2nd administrative review, do you only challenge the redetermination results of 9 February 2018?

Question 33 (Korea)

- a. With respect to the 3rd administrative review, in which the USCIT has made a remand decision, do you continue to challenge the final results of 13 March 2017 (Panel Exhibit KOR-120)? Do you challenge in these panel proceedings the redetermination results of 13 December 2018 (Panel Exhibit KOR-143)? If yes, on what basis?**

²⁰² See *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and Daewoo International Corporation (April 29, 2016), pp. 10-17 (Exhibit KOR-75(BCI)); see also *Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and DWI (June 30, 2016), pp. 5-17 (Exhibit KOR-96(BCI)).

²⁰³ See *Countervailing Duty Investigation, Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and Daewoo International Corporation (April 29, 2016), pp. 2-3 (Exhibit KOR-75(BCI)); See also *Countervailing Duty Investigation Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, Verification Report, POSCO and DWI (June 30, 2016), p. 3 (Exhibit KOR-96(BCI)).

b. Are you challenging the preliminary results of the 5th administrative review?

c. Are you challenging the Expedited First Sunset Review?

Question 34 (United States)

Why did the USDOC not issue a supplemental questionnaire seeking HHI's comments after its voluntary remand of the POR2 Final Results regarding the issue of service-related revenues? (Korea's FWS, para. 679)

129. Following the voluntary remand from the court, USDOC issued a draft redetermination to interested parties, including HHI (or “Hyundai”), that provided HHI with an opportunity to comment on the draft redetermination.²⁰⁴ HHI submitted comments, and USDOC considered and addressed HHI’s comments in issuing a final redetermination that it submitted to the court for review.²⁰⁵

130. With respect to the question of seeking additional information through the issuance of another supplemental questionnaire to Hyundai, as discussed below in the U.S. answer to Question 35, USDOC requested that the court grant the agency a voluntary remand (*i.e.*, a remand to examine a particular issue, without admitting error as to that issue), with the aim of examining whether it had “applied its revenue capping methodology consistently for both Hyundai and Hyosung.”²⁰⁶ As such, there was no re-opening of the factual record. In other words, USDOC had a complete record on remand and the only question was whether USDOC had applied the statute and regulations consistently to the factual record in that administrative review.

Question 35 (Both Parties)

Where in the record can the Panel find the “old” and “new” practices regarding the assessment of “service-related revenues”? Assuming that there was an alteration in the practice regarding this term during the proceedings (between POR3 preliminary and final results, and between the POR2 final results and remand determination), under what conditions can an investigating authority change its practice in the course of the same investigation?

131. As an initial matter, USDOC does not have an “old” and “new” practice regarding the assessment of “service-related revenues.” Rather, “{t}o prevent U.S. price from being overstated, the statute and regulations *require* service-related revenues that exceed the associated

²⁰⁴ Department of Commerce Draft Results of Redetermination Pursuant to Court Remand (January 9, 2018), 24 (inviting interested parties to comment on the draft redetermination) (Exhibit USA-27 (BCI)).

²⁰⁵ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), pp. 15-25 (Exhibit USA-29 (BCI)).

²⁰⁶ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 5 (Exhibit USA-29 (BCI)).

expenses be capped by the amount of those service-related expenses, and thus deducted from the reported U.S. gross unit price.”²⁰⁷

132. Under the statute (19 U.S.C. § 1677a(c)), USDOC is required to increase the price used to establish export price and CEP (*i.e.* U.S. price) in only three instances – none of which include an adjustment for any profit made on the provision of a service when the provision of that service is part of the transaction for the sale of the subject merchandise.²⁰⁸ Additionally, U.S. regulations direct USDOC to use a price that is net of any price adjustment, as defined in 19 CFR § 351.102(b), that is reasonably attributable to the subject merchandise. The term “price adjustment” is defined under 19 CFR § 351.102(b)(38) as “any change in the price charged for subject merchandise.”²⁰⁹ Thus, as HHI’s service-related revenues are related to the movement of subject merchandise, and attributed to the sale of movement services, not to the subject merchandise, pursuant to the relevant statute and regulations, it is appropriate for USDOC to cap service-related revenue by the corresponding expense. In effect, this ensures that profit from services does not inflate the price of a good.

133. USDOC consistently applied the statute and regulations, treating service-related revenues at all points during POR2 and POR3, as it is required to do. In fact, it is beyond dispute that USDOC’s aim throughout these proceedings was to cap service-related revenue by the amount of the expense pertaining to such service. Therefore, there was no “old” and “new” practice. What changed is USDOC’s understanding of HHI’s transactions and accounting. Once USDOC understood this better, although it applied the same statute and regulations, it determined that HHI’s previous reporting was inaccurate and that HHI had failed to cooperate to the best of its ability.

134. Prior to USDOC’s remand in POR2 and final determination in POR3, USDOC accepted HHI’s reporting of revenues and expenses based on USDOC’s understanding of Hyundai’s reporting at that time. In its final determination in POR2, USDOC recalled that it had previously concluded that HHI “invoices on a lump-sum, project basis and that it does not separately invoice customers for services.”²¹⁰ Thus, based on this reporting, USDOC determined that “Hyundai was not obligated to report separate expenses and revenues for reimbursed services related to its U.S. sales and that its reported gross unit price for each sale is the appropriate basis

²⁰⁷ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 6 (emphasis added) (Exhibit USA-29 (BCI)).

²⁰⁸ See 19 U.S.C. § 1677a(c) (Exhibit USA-78).

²⁰⁹ See 19 CFR 351.102(b)(38) (Exhibit USA-79).

²¹⁰ *Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea*; 2013-2014, Second Review, Issues and Decision Memorandum (March 8, 2016) (“LPT I&D Memo (March 8, 2016)”), p. 40 (Exhibit KOR-110), citing *Large Power Transformers from the Republic of Korea* (July 2, 2012), Issues and Decision Memorandum, Comments 4, p. 29 (Exhibit USA-80).

for the calculation of CEP for its final dumping margin.”²¹¹ Furthermore, in response to petitioners’ claim that USDOC should have capped Hyundai’s service-related revenue, USDOC responded that it was not relevant as “Hyundai has not reported revenues from reimbursements and the record does not suggest it should have done so.”²¹² In conclusion, USDOC noted:

In general, reimbursed expenses only arise when the expenses are listed as separate line items on a sales invoice and there is a clear distinction between the line-item price of a product and its invoice price (*i.e.*, including the price of the product and additional expenses). Further, it is incumbent upon a respondent company to report such expenses and corresponding revenues in separate data fields from the field for gross unit price in its sales listing as instructed in our antidumping duty questionnaire. In the current review, Hyundai did not report any of these expenses or revenues and based its reported gross unit price for U.S. sale on the invoice price....{and a} review of sales documentation on the record, including the sales traces reviewed at verification, show no indication that Hyundai improperly reported its sales data.²¹³

135. By contrast, USDOC capped the sales-related revenues of Hyosung, the other respondent reviewed in POR2.²¹⁴ USDOC noted that Hyosung’s request that USDOC not cap Hyosung sales-related revenue “contradicts the Department’s own policies and statutes.”²¹⁵ USDOC continued that it “has consistently stated that the statute and its regulations do not permit the Department to raise U.S. prices for revenues in excess of the related expense.”²¹⁶ Thus, in POR2, both companies received the same questionnaires²¹⁷ and the same instructions, but based on whether the company properly reported the requested information, USDOC was able to remove service revenue in excess of service expenses, as required. Thus, although USDOC’s approach was the same, the results were different due to HHI’s decision not to report the

²¹¹ Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea, 2014-2015 (March 8, 2016), p. 40 (Exhibit KOR-110).

²¹² LPT I&D Memo (March 8, 2016), p. 40 (Exhibit KOR-110).

²¹³ LPT I&D Memo (March 8, 2016), pp. 39-40 (Exhibit KOR-110).

²¹⁴ LPT I&D Memo (March 8, 2016), p. 23 (Exhibit KOR-110).

²¹⁵ LPT I&D Memo (March 8, 2016), p. 23 (Exhibit KOR-110).

²¹⁶ LPT I&D Memo (March 8, 2016), p. 23 (Exhibit KOR-110).

²¹⁷ USDOC’s questionnaire required respondents to “{r}eport the information requested concerning the quantity sold and the price per unit paid in each sale transaction. All **price adjustments** granted, including **discounts** and **rebates**, should be reported in these fields. The gross unit price less price adjustments should equal the net amount of revenue received from the sale. If the invoice to your customer includes separate charges for other services directly related to the sale, such as a charge for shipping, create a separate field for reporting each additional charge.” See Department of Commerce Large Power Transformers Initial Antidumping Questionnaire (December 1, 2014), p. C-18 (emphasis original) (Exhibit USA-23).

requested information, ignoring USDOC’s specific request for such information, the statute, and the agency’s regulations.

136. Following USDOC’s final results in POR2, both petitioners and respondents appealed to the U.S. Court of International Trade, challenging various aspects of USDOC’s determination.²¹⁸ After briefing was complete, USDOC requested that the court grant the agency a voluntary remand (*i.e.*, a remand to examine a particular issue, without admitting error as to that issue). USDOC’s aim was to “examine whether Commerce applied its revenue capping methodology consistently for both Hyundai and Hyosung.”²¹⁹ In granting the voluntary remand to USDOC, the court stated it “agrees that in articulating a desire for consistent treatment with respect to both respondents, Commerce has identified a concern that is substantial and legitimate.”²²⁰ On remand, USDOC found that the evidence collected at verification and on the record, showed that, contrary to Hyundai’s reporting, Hyundai obtained revenues on sales-related services, which should have been capped, but were not due to Hyundai’s failure to separately report the services, as requested.²²¹

137. Contrary to Hyundai’s claim, it was not previously required to report service-related revenue *only* if it was required to provide a service under the terms of sale.²²² As USDOC explained, “Commerce’s capping methodology is not dependent upon whether a respondent must provide the service under the terms of sale as Hyundai contends, but whether such service were provided and whether the revenue amounts collected for the provision of such services exceed the cost of those services.”²²³ USDOC continued, “[i]f a respondent collects, as a portion of the final price to customer, a portion of revenue which is dedicated to covering a service-related expense, and that service-related expense is less than the revenue set aside to cover the expense, then this is service related revenue which is part of material terms of sale and must be capped.”²²⁴

138. Similar to USDOC’s reexamination of the record on remand in POR2, following the preliminary determination in POR3, USDOC re-evaluated the evidence on the record.

²¹⁸ *ABB Inc. v. United States*, Slip Op. 17-138, (October 10, 2017) (Exhibit KOR-206).

²¹⁹ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 5 (Exhibit USA-29 (BCI)).

²²⁰ *ABB Inc. v. United States*, Slip Op. 17-138, (October 10, 2017), p. 8 (Exhibit KOR-206).

²²¹ Department of Commerce Final Results of Redetermination Pursuant to Court Remand, (Exhibit USA-29 (BCI)), p. 20 (Exhibit KOR-208).

²²² Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 19 (emphasis added) (Exhibit USA-29 (BCI)).

²²³ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 21 (Exhibit USA-29 (BCI)).

²²⁴ Department of Commerce Final Results of Redetermination Pursuant to Court Remand (February 8, 2018), p. 22 (Exhibit USA-29 (BCI)).

Specifically, in a supplemental questionnaire received after the preliminary results, USDOC found that “certain documents identified separate service line items with a corresponding price/revenue listed” and “noted that the prices/revenues for these services were higher than the expenses reported by Hyundai in its sales database for this sale, which indicated that Hyundai was improperly overstating gross unit price.”²²⁵ USDOC continued, “{t}his finding affirmed our concerns regarding the methodology Hyundai used to report gross unit price.”²²⁶ USDOC concluded, “given the record evidence, we find that service-related revenue for the sale of subject merchandise should not be considered as a component of the gross unit price.”²²⁷

139. In sum, the record shows that USDOC consistently applied the statute and regulations requiring revenues for services provided with the sale in excess of the related expenses to be removed from a respondent’s reported U.S. price. Moreover, USDOC consistently required that respondents report revenue in excess of related expenses. Indeed the only change was that USDOC initially accepted HHI’s reporting and did not understand that HHI had provided inaccurate reporting. As USDOC noted in its final determination in POR2, “it is incumbent upon a respondent company to report such expenses and corresponding revenues in separate data fields from the field for gross unit price in its sales listing as instructed in our antidumping duty questionnaire.”²²⁸ Hyundai failed to do just that. Eventually, it became evident to USDOC that HHI was misreporting service revenue and should have reported the expenses and revenues separately. USDOC 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.”²²⁹

Question 36 (Both Parties)

With respect to the issue of the separate reporting of accessories under POR3, Korea asserts that “the USDOC resorted to the use of available facts to replace information that it never clearly requested, or where the request was ambiguous or unclear. An authority cannot claim that resort to facts available is justified if it has not first indicated in a detailed and unambiguous manner the information that is required.” (Korea’s FWS, para. 787)

- a. Please explain whether in your view, it was the burden of the USDOC to provide a definition of “accessories”, or it was for HHI to determine the meaning of this term.***

²²⁵ *Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea, 2014-2015*, Issues and Decision Memorandum (March 6, 2017) (“LPT I&D Memo (March 6, 2017)”), p. 20 (Exhibit KOR-121).

²²⁶ LPT I&D Memo (March 6, 2017), p. 20 (Exhibit KOR-121).

²²⁷ LPT I&D Memo (March 6, 2017), p. 21 (Exhibit KOR-121).

²²⁸ LPT I&D Memo (March 6, 2017), p. 39 (Exhibit KOR-121).

²²⁹ LPT I&D Memo (March 6, 2017), p. 22 (Exhibit KOR-121).

Please include in your answer the relevance of the use of the term "accessories" by HHI internally and when negotiating with customers.

140. In POR3, USDOC resorted to facts available to make its AD determination with respect to HHI based upon finding HHI's response deficient in several areas to such an extent that the response became unreliable for purposes of its determination. As part of that determination, USDOC determined that HHI failed to separately report the price and cost of "accessories." USDOC determined that HHI was responsible for determining what constituted an accessory based upon the company's use of that term in its dealings with its customers. In particular, USDOC stated that "Hyundai is aware of what constitutes an accessory, because sales documentation provided by Hyundai indicates the industry uses such term and that term is referred to in certain documents provided by Hyundai."²³⁰

141. It would be highly unusual for a company to sell a product that included accessories and use such term in its documents, but not be able to determine what it sold and what the term used in its own documents means. Just as USDOC did not define the term "spare parts" in these proceedings, but requested separate reporting on such parts, HHI provided such information because it knows what it sells as a spare part. Similarly, USDOC did not define the term "accessories" because it is eminently reasonable for USDOC to expect that HHI knows what it sells. Notably, the same request was made to the other respondent in POR3, Hyosung, also without the term being defined by USDOC, and the company provided the requested information.²³¹

Question 37 (United States)

With respect to POR3, the USDOC found that while the specific issues raised may not, "on their own, warrant the application of adverse facts available, these specific examples demonstrate that Hyundai has been selective in its reporting to the Department, thereby demonstrating that Hyundai has engaged in a pattern of behavior that leaves the Department with a response that, taken as whole, is incomplete and unreliable. We find that this pattern of behavior has impeded the review and negated our ability to satisfy ourselves that the data provided are accurate and reliable, and to develop and issue deficiency questionnaires as needed". (Panel Exhibit KOR-121, p. 27)

a. Can you provide other examples, if any, of arguments made by respondents in WTO jurisprudence where a "collective failure"-type argument has been made?

142. As an initial matter, we do not believe that USDOC's determination in POR3 is a case of "collective failure." Specifically, it is not the case that USDOC found that Hyundai failed with respect to specific issues that, "on their own" may not warrant facts available with an adverse

²³⁰ LPT I&D Memo (March 6, 2017), p. 27 (Exhibit KOR-121), citing HHI's November 10, 2016 Supplemental Questionnaire Response, p. Attachment 3S-35 (Exhibit KOR-119 (BCI)).

²³¹ LPT I&D Memo (March 6, 2017), p. 48 (Relying on Hyosung's Section B-D response, USDOC stated "consistent with the Department's instructions, Hyosung reported four separate price fields pertaining to its U.S. LPT sales." One of which was "[t]he revenue associated with accessories.") (Exhibit KOR-121).

inference, but “taken as a whole,” do. Rather, the record shows that USDOC found that Hyundai “(1) systematically overstated U.S. prices; and (2) systematically understated home market prices. Further, Hyundai failed to provide the Department with cost information, which prevented the Department from determining whether costs could be distorted by incomplete reporting.”²³² Due to these deficiencies, USDOC found that Hyundai’s U.S. sales database, home market database, and cost database were deficient.²³³ Indeed, USDOC spends more than ten pages of its final determination detailing Hyundai’s failures regarding these issues and reasons for rejecting Hyundai’s databases.

143. Only after discussing the issues above and rejecting Hyundai’s three databases, did USDOC turn to the additional findings from the quoted language above, which addresses Hyundai’s “Selective Reporting and Other Discrepancies.”²³⁴ Noting a handful of specific instances, USDOC went on to find that “Hyundai has been systematically selective in providing various documents to the Department, thereby impeding the course of the review.”²³⁵ Moreover, “[r]ather than providing the requested information, Hyundai selectively reported what it considered ‘necessary’ and ‘sufficient,’ thereby stripping the Department of its ability to determine what is, in fact, necessary and sufficient to calculate an accurate margin.”²³⁶ Regarding the instances of Hyundai’s selective reporting, USDOC noted that:

While these items may not, on their own, warrant the application of adverse facts available, these specific examples demonstrate that Hyundai has been selective in its reporting to the Department, thereby demonstrating that Hyundai has engaged in a pattern of behavior that leaves the Department with a response that, taken as whole, is incomplete and unreliable. We find that this pattern of behavior has impeded the review and negated our ability to satisfy ourselves that the data provided are accurate and reliable, and to develop and issue deficiency questionnaires as needed.²³⁷

144. In other words, in addition to the unreliability of Hyundai’s databases, the selective reporting in Hyundai’s responses further impeded the investigation by leaving inconsistencies and further undermining the completeness and reliability of Hyundai’s responses. Thus, the “selective reporting” referred to in the quoted language from the question did not result in a

²³² LPT I&D Memo (March 6, 2017), p. 17 (Exhibit KOR-121).

²³³ LPT I&D Memo (March 6, 2017), pp. 17-27 (Exhibit KOR-121).

²³⁴ LPT I&D Memo (March 6, 2017), p. 27 (Exhibit KOR-121).

²³⁵ LPT I&D Memo (March 6, 2017), p. 27 (Exhibit KOR-121).

²³⁶ LPT I&D Memo (March 6, 2017), p. 28 (Exhibit KOR-121).

²³⁷ LPT I&D Memo (March 6, 2017), p. 27 (Exhibit KOR-121).

finding of “collective failure.” Rather, the “selective reporting” only added to Hyundai’s failures.

Question 38 (Both Parties)

a. Please explain whether it is the date of shipment, rather than the date of the invoice, that has been considered as the “date of sale” in this proceeding, and why. (Korea’s FWS, para. 758)

145. The date of sale plays a key role in an antidumping duty determination. The date of sale reflects the date on which the exporter or foreign producer establishes the material terms of sale and provides the basis for establishing which sales are to be reported and the information pertaining to such sales that also needs to be reported. As USDOC explained in its initial questionnaire to Hyosung for POR4 (review covering 2015-2016): “The **date of sale** for your sales to the United States and the foreign market is important to the Department’s analysis. It will determine which sales records are reported in response to sections B and C of this questionnaire and the exchange rate used to convert normal value into U.S. dollars.”²³⁸

146. The date of sale for POR4 was determined to be the date of shipment, as demonstrated below. In its preliminary determination for POR4, citing Hyosung’s Section A response at A-30,²³⁹ USDOC stated that “Hyosung agrees that the date of sale should be the date of shipment, as the material terms of sale may change after the purchase order date.”²⁴⁰ On that basis, USDOC determined that “the price negotiations with the customers at the time of the purchase order are not controlling if the material terms of sale change after the purchase order date (and can change up to the date of shipment) and necessitate the use of the shipment date as the date of sale.”²⁴¹

b. Did the USDOC specify in detail what exactly the “certain discounts and adjustments” should be?

147. Yes. In its initial questionnaire for POR4, USDOC requested of Hyosung: “All price adjustments granted, including discounts and rebates, should be reported in these fields. The gross unit price less price adjustments should equal the net amount of revenue received from the sale.”²⁴² In particular, USDOC specified in detail, the following reporting requirements:

²³⁸ Department of Commerce Initial AD Questionnaire (January 5, 2017) A-4 (emphasis original) (Exhibit USA-46).

²³⁹ Hyosung Section A Questionnaire Response (February 3, 2017), p. A-30 (Exhibit KOR-152).

²⁴⁰ *Large Power Transformers from the Republic of Korea*, Memorandum for Preliminary Results (August 31, 2017), p. 11 (Exhibit KOR-140).

²⁴¹ *Large Power Transformers from the Republic of Korea*, Memorandum for Preliminary Results (August 31, 2017), p. 11 (Exhibit KOR-140).

²⁴² Department of Commerce Initial AD Questionnaire (January 5, 2017), p. 18 (Exhibit USA-46).

- **Billing Adjustments:** “Report *any price adjustments* made for reasons other than discounts or rebates.” USDOC also requested that the company “{d}escribe the nature of each type of billing adjustment that is recognized in your sales records.”²⁴³
- **Early Payment Discount:** “Report the *unit value of any discount granted* to the customer for early payment.” USDOC also requested that the company “{e}xplain your policy and practice for granting early payment discounts. Describe the basis for eligibility for such discount. If discounts vary by channel of distribution (field 8) or by customer category (field 7), provide an explanation of the discounts given to each channel or category. Explain how you calculated the per-unit discount.”²⁴⁴
- **Quantity Discount:** “Report the unit value of *each type of discount granted* to the customer due to the quantity of the purchase.” USDOC also requested that Hyosung “{e}xplain your policy and practice for granting quantity discounts. Describe the basis for eligibility for such discounts. If discounts vary by channel of distribution (field 8) or by customer category (field 7), provide an explanation of the discount given to each channel and category. Explain how you calculated the per-unit discount. Provide your quantity discount schedule or other documentation establishing the discount program.”²⁴⁵
- **Other Discounts:** “Report the unit value of *other discounts granted* to the customer. Create a separate field for reporting each discount granted.” “Explain your policy and practice for granting each additional discount. Describe each type of discount granted and the basis for eligibility for such discount. If discounts vary by channel of distribution (field 8) or by customer category (field 7), provide an explanation of the discounts given to each category. Explain how you calculated each additional per-unit discount.”²⁴⁶
- **Rebates:** “Report the unit value of *each rebate given* to the customer. Create a separate field for reporting each rebate granted. Rebates should be reported with the sales to which they apply.” In addition, USDOC requested that Hyosung “{e}xplain your policy and practice for granting rebates. Describe the terms and conditions of each rebate program and when the terms and conditions are established in the sales process. If rebates vary by customer category (field 7) or channel of distribution (field 8), provide an explanation of the rebates given to each. For rebates that have not yet been paid, describe how you

²⁴³ Department of Commerce Initial AD Questionnaire (January 5, 2017), p. 18 (emphasis added) (Exhibit USA-46).

²⁴⁴ Department of Commerce Initial AD Questionnaire (January 5, 2017), p. 18 (emphasis added) (Exhibit USA-46).

²⁴⁵ Department of Commerce Initial AD Questionnaire (January 5, 2017), p. 18 (emphasis added) (Exhibit USA-46).

²⁴⁶ Department of Commerce Initial AD Questionnaire (January 5, 2017), p. 18 (emphasis added) (Exhibit USA-46).

computed the amount to be rebated. Include your worksheets as an attachment to the response.”²⁴⁷

148. As is clear from the narrative contained in the initial questionnaire to Hyosung, USDOC spelled out certain price adjustments, and it expressly requested that Hyosung separately report all price adjustments granted by the company to its various customers.

Question 39 (Korea)

With respect to the 4th administrative review, the USDOC relied on the analysis made in POR3 to corroborate the use of the petition margin as AFA. According to the United States, "[t]here is no obligation in Annex II of the Anti-Dumping Agreement or anywhere else in the text of the Agreement to corroborate an already-used rate for a second time if that rate is used again in a later segment". (United States' FWS, para. 350)

a. What is your view on this statement of the United States?

2. "AS SUCH" CLAIMS AGAINST THE UNITED STATES' USE OF ADVERSE FACTS AVAILABLE

Question 40 (Korea)

a. Does the list provided in Panel Exhibit KOR-216 represent an exhaustive and definitive list of the cases confirming the existence of the unwritten measure?

b. Is it your position that in all 319 cases identified by you, there was a lack of necessary information or significant impediment in the investigations that would justify the use of AFA?

c. When did the alleged unwritten measure come into existence?

Question 41 (United States)

Are there any instances, since 6 August 2015, that the USDOC has applied facts available without drawing adverse inferences?

149. Yes, there are numerous instances, since August 5, 2015, in which Commerce has applied facts available without drawing adverse inferences.

150. For example, in *Olives from Spain*, the respondent failed to report plantilla fixed price adjustments accurately.²⁴⁸ Instead, for the home market, the respondent allocated 12 months of expenses over 15 months of sales.²⁴⁹ This, of course, was distortive. For U.S. export price, the

²⁴⁷ Department of Commerce Initial AD Questionnaire (January 5, 2017), p. 18 (emphasis added) (Exhibit USA-46).

²⁴⁸ *Ripe Olives from Spain*, Issues and Decision Memorandum (June 11, 2018), Comment 9 (Exhibit USA-81).

²⁴⁹ *Ripe Olives from Spain*, Issues and Decision Memorandum (June 11, 2018), p. 21 (Exhibit USA-81).

respondent allocated the 2016 expenses over all 2016 export price sales, but the 2017 expenses over just the first half of 2017 sales.²⁵⁰ Thus, the 2017 allocation too was distortive.

151. There was no non-distortive allocation on the record. For the home market, as facts available, Commerce multiplied the reported discounts by 1.25 (ratio of 15 months/12 months) to derive the replacement information.²⁵¹ For the U.S. export price, Commerce applied the 2016 reported per kg discount to all transactions, including those in 2017.²⁵² The selection of this replacement information did not involve the adoption of adverse inferences.

152. As another example, in a recent administrative review in *Steel Concrete Reinforcing Bar from Mexico*, in the preliminary determination Commerce adopted adverse inferences with respect to the home market downstream sales prices of a respondent's affiliate. However, in the final determination, Commerce determined not to adopt an adverse inference and, as facts available, simply disregarded the respondent's home market sales to the relevant affiliate in calculating the respondent's margin.²⁵³

153. To be clear, these are not the only such examples.²⁵⁴ However, they are more than sufficient to establish the accuracy of the United States' affirmative answer to the Panel's question—that Commerce has applied facts available without adopting adverse inferences since August 6, 2015.

Question 42 (United States)

What are the conditions in which the highest margin is not selected in AFA cases?

154. The United States understands that, by the term "AFA cases," the question is referring to situations in which USDOC has applied facts available and, in so doing, has adopted adverse inferences based on the non-cooperation of a party. In such cases, the selection of replacement information to fill the gap left by the missing necessary information depends on the specific facts and circumstances of each particular case. Accordingly, to the extent this question asks about "the conditions" for reaching a certain result, there is no single set of conditions that can be identified *a priori* as resulting in a certain outcome.

155. In any event, it is certainly not the case that Commerce has always selected the highest margin on the record in situations of non-cooperation. We describe below some examples where

²⁵⁰ *Ripe Olives from Spain*, Issues and Decision Memorandum (June 11, 2018), p. 21 (Exhibit USA-81).

²⁵¹ *Ripe Olives from Spain*, Issues and Decision Memorandum (June 11, 2018), p. 21 (Exhibit USA-81).

²⁵² *Ripe Olives from Spain*, Issues and Decision Memorandum (June 11, 2018), p. 21 (Exhibit USA-81).

²⁵³ See *Steel Concrete Reinforcing Bar from Mexico*, Issues and Decision Memorandum (July 16, 2019), pp. 4, 9 (Exhibit USA-82).

²⁵⁴ See, e.g., *Silicon Metal from Norway*, Issues and Decision Memorandum (February 27, 2018), Comment 6 (Exhibit USA-83).

Commerce, based on an examination of all relevant facts and circumstances, determined less than the highest margin on the record.

156. In *Certain Lined Paper Products from India*, Commerce determined that two respondents were non-responsive despite repeated requests for critical cost data, and therefore failed to cooperate.²⁵⁵ The highest margin on the record was the petition margin of 215.93 percent. The second highest margin – which was the highest calculated margin – was 110.43 percent. Commerce declined to use either. With respect to the highest calculated margin of 110.43 percent, Commerce found that it lacked probative value because it was from a single sale with a quantity that was less than two percent the size of the average sales quantity.²⁵⁶ Commerce instead selected a rate of 23.17 percent that it considered had probative value, including because it was within the mainstream of the cooperating respondent's transactions, and related to sales of notebooks, which accounted for the majority of the reported sales.²⁵⁷ In other words, Commerce selected a margin that was about one-tenth of the highest margin from the petition, and less than one-fourth of the highest calculated margin, because record evidence demonstrated that such margin had more probative value than the higher margins.

157. In *Certain Cold-Rolled Flat Steel Products from the Russian Federation*, a respondent failed to report the amount of subsidies received for a program under investigation. Thus, Commerce had no way to calculate that respondent's actual rate of subsidization for that program. In selecting replacement information, Commerce calculated a rate for the identical program for another cooperating respondent. Accordingly, as the replacement information for the non-cooperative respondent, Commerce selected a rate of just 0.03 percent.²⁵⁸

158. These examples show some of the facts and circumstances that Commerce has considered important in the past in selecting replacement information. However, as stated above, ultimately the replacement information that Commerce selects will depend on the facts and circumstances of a particular case.²⁵⁹

²⁵⁵ *Certain Lined Paper Products from India*, Issues and Decision Memorandum (August 8, 2006), p. 37 (Exhibit USA-84).

²⁵⁶ *Certain Lined Paper Products from India*, Issues and Decision Memorandum (August 8, 2006), p. 37 (Exhibit USA-84).

²⁵⁷ See *Certain Lined Paper Products from India*, Issues and Decision Memorandum (August 8, 2006), p. 38 (Exhibit USA-84).

²⁵⁸ *Certain Cold-Rolled Flat Steel Products from the Russian Federation*, Issues and Decision Memorandum (July 20, 2016), Comment 21 (Exhibit USA-85).

²⁵⁹ See *Certain Hot-Rolled Steel Flat Products from Korea*, Issues and Decision Memorandum (August 4, 2016), pp. 62-63 (declining to use certain calculated rates urged by the petitioners in that investigation because those rates were rates calculated for company-specific debt restructuring programs, the respondent could not have used that company-specific program, and Commerce was not investigating any debt restructuring program applicable to the relevant respondent) (Exhibit KOR-98).

Question 43 (Korea)

Does the alleged unwritten measure include the conditions of resort to facts available, or only the USDOC's application or selection of facts available?

Question 44 (Both Parties)

Is there a difference between drawing "adverse inferences" and a "result which is less favourable to the party" as referred to in paragraph 7 of Annex II ADA?

159. “Adverse inferences” is not a term that appears in the covered agreements. The use of adverse inferences, pursuant to U.S. domestic law, is a fact-intensive, case-specific concept that relies on discretion afforded to USDOC. Under U.S. law, inferences cannot be drawn that contradict verified facts on the record or that aim to punish an uncooperative party.²⁶⁰ Where necessary information is missing, USDOC applies what it considers the most relevant or reliable information that is available on the record in making its determinations based upon facts available. In so doing, USDOC can and does consider a respondent’s non-cooperation when determining what information should be used to replace missing necessary information.

160. Paragraph 7 of Annex II of the Anti-Dumping Agreement indicates that a non-cooperating party may experience a “less favourable” – that is, worse – result than if the party had cooperated. In any given case, when relying on facts available, there is no way to know whether the result actually is worse because there is no way to know what the result would have been had the party cooperated. In other words, “non-cooperation creates a situation in which a less favourable result becomes possible due to the selection of a replacement for an unknown fact.”²⁶¹

161. Drawing of adverse inferences under U.S. law is entirely consistent with this provision in paragraph 7. Where USDOC draws adverse inferences in selecting among facts available, there still is no way to know what the result would have been had the party cooperated. Therefore, in no case does USDOC intentionally engineer a result it knows to be “less favourable” than the result would have been had the party cooperated. But again, given the uncertainty created by the non-cooperation, it is possible that in some cases a non-cooperative party may experience a “less favourable” result than if it had cooperated. The Members, through paragraph 7 of Annex II, have acknowledged as much.

²⁶⁰ See *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 punitive) (Exhibit USA-61); *De Cecco Di Filippo Fara. S. Martino v. United States*, p.6 (holding that the AFA provision of the U.S. statute prohibits Commerce from imposing punitive margins) (Exhibit KOR-176).

²⁶¹ *US – Carbon Steel (AB)*, para. 4.426.

Question 45 (Korea)

You indicate that 13 cases out of the 319 that you identify (Panel Exhibit KOR-216) did not include the standard language "failure to cooperate" used by the USDOC. Do these cases support the existence of the alleged unwritten measure? How many of the 319 cases use the term "practice" when referring to the use of AFA?

Question 46 (United States)

Please explain the meaning of a "segment" in an anti-dumping proceeding. What does the first segment comprise of?

162. An antidumping proceeding consists of one or more segments. Commerce's regulations define a segment of a proceeding as "a portion of the proceeding that is reviewable under section 516A of the Act" (*i.e.*, judicially reviewable).²⁶² For example, each of the following constitutes a segment of a proceeding: (1) an antidumping investigation; (2) an administrative review of an antidumping order; (3) a sunset review of an antidumping order; and (4) a product scope inquiry.²⁶³

163. The first segment of a proceeding in an antidumping proceeding is an antidumping investigation. An investigation begins on the date of the filing of a petition or the publication of a notice of self-initiation and ends with a final determination by Commerce with respect to such investigation. Final determinations include: (1) dismissal of a petition; (2) rescission of initiation; (3) termination of investigation; (4) a negative determination that has effect of terminating the proceeding; and (5) an affirmative determination that results in issuance of an antidumping duty order. To be clear, various events that occur during an antidumping investigation (such as evaluation of the sufficiency of the petition, initiation of the investigation, issuance of questionnaires, issuance of preliminary determination, verification, etc.) are not segments of a proceeding.

164. The first administrative review, assuming one was requested, would then be a separate segment from the investigation. A second administrative review would be yet another separate segment, and so on.

Question 47 (Korea)

Are there any exhibits or other facts on the panel record that you rely upon only in support of your "ongoing conduct" claim, and not in support of your "rule or norm" claim?

²⁶² 19 C.F.R. §351.102(b) (Exhibit USA-79). Section 516A of the Act provides for judicial review of certain determinations by Commerce such as investigations, administrative reviews, *etc.*

²⁶³ See 19 C.F.R. §351.102(b) (Exhibit USA-79).

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